

UGANDA / JUDGMENT

Oketch v Attorney General & Anor (Civil Suit No. 0007 of 2012) [2017] UGHCCRD 412 (10 August 2017) [2017] UGHCCRD 412

COURT

HC: Criminal Division (Uganda)

BEFORE

Stephen Mubiru, J

CASE / FILE NUMBER

Civil Suit No. 0007 of 2012

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CIVIL SUIT No. 0007 OF 2012

OKETCH OLOYA PETER PLAINTIFF

VERSUS

1. ATTORNEY GENERAL }

2. NEBBI DISTRICT LOCAL ADMINISTRATION }..... DEFENDANTS

JUDGMENT

The plaintiff sued the defendants jointly and severally for malicious prosecution. The plaintiff's claim was that the defendants had negligently made allegations of financial impropriety against him as a result of which he was prosecuted, which prosecution culminated in his favour when the charges were dismissed. His claim was that during or around the year 2006, he was the Sub-county Chief of Wadwelai sub-county, in the employment of the second defendant. On or about 27th June 2006, without any justifiable reason, he was arrested and prosecuted by the Inspectorate of Government for the offences of abuse of office and causing financial loss. The allegation was that he had knowingly or having reason to believe, included in payment to a contractor, the cost of roofing a primary school yet the works had been executed by a different contractor who had been paid earlier thereby causing the second defendant financial loss of shs. 9630,000/= . The charges were on 2nd September 2011 dismissed by the trial Chief Magistrate of Nebbi, hence the suit.

In the written statement of the first defendant, the plaintiff's claim was denied. In the written statement filed by the second defendant, it denied having made any allegations against the plaintiff but contended that the investigation and prosecution was entirely an initiative of the office of Inspector General of Government. In the alternative, they contended that the second defendant's Public Accounts Committee discovered that a sum of shs. 9,630,000/= had been included in the bills of quantities as the cost of roofing Paten Primary School classroom block yet the same had been roofed earlier and paid for by another contractor. The second defendants technocrats involved were directed to recover the money from the contractor which they did and the District let the matters lie. By the time of that discovery, the plaintiff was already in retirement and recovery was made as against his terminal benefits.

The facts as they emerged from the evidence of witnesses for the plaintiff and the second defendant were that the plaintiff was at all time material to this suit before his retirement, the Sub-county Chief of Wadwelai sub-county, having been appointed to that position on 3rd September 1997. During or around 1997, a non Governmental Organisation by the name Community Action Programme (CAP) was contracted by the second defendant to undertake the construction of two classroom blocks at Paten Primary School. According to D. W.4 Mr. Jacan Geoffrey the Parish Chief for Ragem Upper and lower, roofing of both blocks was executed by that organisation, which fact is contested by the plaintiff.

It is common ground though that CAP left unfinished work on both classroom blocks and it became necessary to engage another construction company to complete the buildings. The second defendant then engaged a firm by the name "Abunia and Sons." When the bills of quantities for the completion of the works were prepared, they included an item for roofing one of the blocks, which according to the second defendant's version, was work which had already been properly executed by CAP, but which according to the plaintiff was work required to be re-done by Abunia and Sons. Upon completion of the works, the plaintiff, in his capacity as the immediate supervisor of the construction on behalf of the second defendant, recommended payment which was then approved by the District Engineer and eventually authorised by the Chief Administrative Officer. During a subsequent sitting of the District Public Accounts Committee, the payment to "Abunia and Sons" was queried on account of having included a component for the roofing of the classroom block, which according to that Committee was work which was not executed by "Abunia and Sons" but by PAC. It was resolved that the sum of money, shs. 9,630,000/=, paid under those circumstances be recovered from the four District Officials involved in processing that payment who included the plaintiff.

By that time the plaintiff had retired from service and deductions were made from his retirement benefits in a bid to recover part of the said sum. The four District officials were as well subsequently arrested and prosecuted by the Inspectorate of Government on charges of abuse of office and causing financial loss which charges were on 2nd September 2011 dismissed by the trial Chief Magistrate at Nebb, having found at the close of the prosecution case that there was no case to answer made out against any of the four accused. The plaintiff now contends that the prosecution was done maliciously.

In order to succeed in a suit for malicious prosecution, the plaintiff must prove that; the defendant instituted or was instrumental in instituting criminal proceedings against the plaintiff, the defendant acted without reasonable or probable cause, the defendant acted maliciously, the criminal proceedings must have terminated in plaintiff's favour and the plaintiff suffered loss as result of the prosecution (see *Alaudin Rahamtulla v. Uganda Bookshop Ltd and another [1972] HCB 90*; *Kateregga Constantino v. Attorney General [1972] 224*; *Edirisa Ssemakula v. Attorney General [1976] HCB 171*; *Attorney General v. Adam Farajala [1977] HCB 29* and *Pike v. Waldrum (1952) 11 Lloyd's Rep. 431*). Proof of acquittal is not enough. The claim will succeed only when it is proved that the prosecution was initiated without reasonable cause and was actuated by malice. The plaintiff is enjoined to prove that the prosecution not only lacked reasonable or probable cause, but also that it was done out of malice or bad faith, ill will or improper motive (see *Bukenya Issa v. Attorney General [1986] HCB 67* and *Kiwanuka Safati v. Kamuli District Administration [1994-95] HCB 74*).

There are two issues to be decided in this suit;

1. Whether any of the defendants maliciously prosecuted the defendant.
2. Whether the plaintiff is entitled to any remedy.

First Issue: Whether any of the defendants maliciously prosecuted the defendant.

In the first place, the plaintiff has proved on the balance of probabilities that he was one of the accused persons in Nebbi Chief Magistrate's Court Criminal Case No. 169 of 2006. He was the third accused in that case. A copy of the charge sheet was received in evidence and marked as exhibit P. Ex. 1 while a copy of the record proceedings was tendered in evidence and marked as exhibit P. Ex. 2. That record indicates that the case was terminated in the plaintiff's favour on 2nd September 2011 when the trial magistrate dismissed having found at the close of the prosecution case that there was no case to answer made out against any of the four accused.

In paragraph 7 of his witness statement, the plaintiff contended that it is the second defendant's officials who complained to the office of the Inspector General of Government thereby initiating the process that culminated in his being arrested, charged and prosecuted. In paragraph 4 of its written statement of defence, the second defendant denied having initiated that processes. It contended instead that its role ended with the resolution of its Public Accounts Committee for recovery of the lost funds. That fact having been disputed by the second defendant, the burden was on the plaintiff to adduce evidence specifying which officials of the second defendant reported the case. Being a corporate entity, the second defendant could only incur liability upon proof of that act having been performed by its agent employee or person authorised by it, acting within the scope of his or her duty and course of employment. In the instant case, since the plaintiff did not adduce such evidence, the plaintiff failed to establish vicarious liability against the second defendant.

The only fact established by exhibit P. Ex. 2 is that some of the prosecution witnesses were employees of the second defendant. There however was no evidence that it was any of them who reported the case to the Inspectorate of Government. In any event, where prosecution is instituted by the police or other investigative or prosecutorial agency after investigations, the person giving information is not liable for malicious prosecution unless the information was given with malice (see *Kindi Eria, Zizinga Albert v. Makerere University Kampala [1977] HCB 180*). Where an individual falsely and maliciously gives a police officer information indicating that some person is guilty of a criminal offence and states that he is willing to give evidence in court of the matter in question; it is properly to be inferred that he desires and intends that the person he names should be prosecuted. Such an individual is deemed to be actively instrumental in setting the law in motion (see *Mahon and another v. Rahn and another (No.2) [2004] 4 All ER 41 at 242*). However in the instant suit, there is no proof that any of the second defendant's employees falsely and maliciously gave information to the Inspectorate of Government. That cannot be inferred from the mere fact that some of the second defendant's employees testified in the case.

As regards the first defendant, exhibit P. Ex. 2 shows that the prosecution was undertaken by the office of the Inspector General of Government. Thus in light of section 10 of *The Government Proceedings Act*, the first defendant would be vicariously liable for any wrongdoing on the part of the Inspectorate of Government once established by the plaintiff. The plaintiff had the added requirement of proving that in commencing the proceedings against him, the first defendant acted without reasonable or probable cause and maliciously. To prove that malice, the plaintiff had to show that the prosecution was not based on reasonable or probable cause that the plaintiff had committed the offence with which he was prosecuted.

Reasonable and probable cause has been defined as 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 any ordinarily 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 (see *Attorney General v. Adam Farajala [1977] HCB 29*). When facts exist which would cause a reasonable person to suspect that an offence may have been committed which then would require an investigation, a person who causes such matters to be investigated cannot be said to have done so either by spite or ill will towards the suspect or by indirect or improper motives or uncharitable feelings towards the suspect, simply because it turns out later that he or she was wrong in the first place. It is sufficient to constitute reasonable and probable cause if the prosecutor proceeds on such information as a prudent and cautious man may reasonably accept in the ordinary affairs of life (see *Kagane v. Attorney General [1969] EA 643*).

Once the defendant proves reasonable and probable cause for initiating the prosecution, then the suit must fail. For example in *Kiwanuka George v. Attorney General H. C. Civil Suit No. 562 of 2005*, a former Deputy Headmaster of Mengo Senior Secondary School sued the Attorney General for malicious prosecution. The school had two non teaching staff sharing the name

Musoke, who were on the retrenchment list and destined to receive their retrenchment package. The plaintiff was responsible for issuing them with identity cards. Whereas Musoke Arthur was the Farm Manager while Musoke Samuel was an Assistant Farm Manager, the IDs he issued to both read "Farm Manager." the Ministry had processed and prepared only one cheque for a Musoke and it was meant to be for Musoke, the farm manager. When both Musoke's tendered in their IDs at the Ministry, the Ministry officials suspected forgery. The Commissioner then wrote to the CID to carry out investigations to arrest and prosecute the plaintiff because the IDs were endorsed by him, and this culminated into the plaintiff's arrest and eventual prosecution.

The defence was that the plaintiff was arrested and detained basing on a reasonable and probable apprehension that he had facilitated the uttering of false documents with the object of obtaining money meant for another person. The court decided that in the circumstances, it was evident that there was a probable cause for the investigation and prosecution of the suspects since the identity cards in issue bore similar names and similar titles (farm Manager) yet one would have been the assistant farm manager. When the Ministry received the said IDs in the same names of Musoke as a farm Manager, they thought there was a forgery that needed to be investigated. It was not altogether a hopeless case. The suit was dismissed.

There must be sufficient ground for thinking that the plaintiff was probably guilty of the crime imputed. This does not mean that the prosecution has to believe in the probability of conviction. The prosecution has not got to test the full strength of the defence; he is concerned only with the question of whether there is a case fit to be tried. The prosecution must believe that the probability of the accused's guilt is such that upon general grounds of justice, a charge against him it warranted (see **Glinski v. Mciver* [1962] AC 726 at 767*). The question then is whether a reasonably prudent man believing that district officials had facilitated a double payment in the circumstances as the ones before court would have caused the arrest and prosecution of the plaintiff.

In the instant case, the second defendant's Public Accounts Committee had inquired into the matter and established facts on basis of which they had reason to believe that the four district officials, the plaintiff inclusive, had caused it financial loss as a result of which it resolved that the money is recovered from the. Steps were indeed taken to recover that money from them. In his own testimony, the plaintiff admitted that he signed the certificate of completion on basis of which the questioned payment was made. As such although the prosecution terminated in his favour, I am not convinced that the first defendant was either spiteful or malicious in having the plaintiff arrested, having in mind that the first defendant neither knew the plaintiff nor had seen him before the query by the second defendant's Public Accounts Committee. Besides the arrest, detention and eventual prosecution of the respondent was done after an investigation conducted by the first defendant. Liability for the tort of malicious prosecution arises only where the defendant knowingly makes false report to an investigative authority and court. It does not arise where the defendant is justified in reporting and making its own investigations (see **Rukambuza Eryeza v. Onesefere Nyakoojo* [1975] HCB 287*).

Considering the fact that by the time the first defendant initiated its investigations and subsequent prosecution of the plaintiff the second defendants' Public Accounts Committee had inquired into the matter and established facts on basis of which they had reason to believe that the four district officials, the plaintiff inclusive, had caused it financial loss, the first defendant acted on an honest belief in the guilt of the plaintiff 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 any ordinarily prudent and cautious person, placed in the position of the first defendant, to the conclusion that the plaintiff was probably guilty of the crime imputed. Therefore, the plaintiff has failed to prove that any of the defendants lacked reasonable or probable cause, or that any of them acted out of malice or bad faith, ill will or improper motive. Consequently the claim against them fails and it therefore is unnecessary to consider the last issue. In the final result, the suit is dismissed with costs to the defendants.

Dated at Arua this 10th of August 2017.

Stephen Mubiru

Judge

10th August 2017

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