

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
CIVIL SUIT No. 0073 of 2020**

**RA/160287 CPL KAKURU EMMY ::::::::::::::::::::::::::::::::::: PLAINTIFF
VERSUS**

- 1. ATTORNEY GENERAL**
- 2. GUWATUDDE CHRISTINE ::::::::::::::::::::::::::::::::::: DEFENDANTS**

BEFORE HON: JUSTICE SSEKAANA MUSA

JUDGMENT

The facts of the plaintiff's case are that is a regular soldier of the Uganda Peoples Defence Forces (UPDF) who was attached to the office of Prime Minister in 2013 as an intelligence officer in charge of special assignment/intelligence operations. That during the said attachment/deployment he alleges that he incurred operational expenses to a tune of UGX 47,000,000/= which amount was outstanding during the tenure of Pius Bigirimana as the Permanent Secretary in the Office of the Prime Minister (OPM).

When the 2nd defendant took over from Pius Bigirimana, the plaintiff claimed the alleged outstanding operational expenses which she decline to approve its payment.

The 2nd defendant having established that there was no administrative mechanism to continue engaging the plaintiff under the Office of the Prime Minister and wrote to the Ministry of Defence to take back the plaintiff for redeployment but she continued seeing the plaintiff at Office of the Prime Minister and also allegedly instigate the arrest of the plaintiff who was later charged, prosecuted and acquitted by the General Court Martial.

The 2nd defendant declined to pay the claim of 47,000,000/= or any part thereof since the claims were dated as far back as 11th September 2013 and

according to the 2nd defendant they were exorbitant, sham, bogus, and baseless.

The decision to prosecute the plaintiff was made by the prosecutor of General Court Martial of the UPDF and not the 2nd respondent.

Joint Scheduling Memorandum

The parties filed a joint scheduling memorandum filed in this court on the 11th day of December 2020, the following are the agreed facts, issues and documents for trial;

Agreed Facts

1. The plaintiff RA/160287 CPL KAKURU EMMY is in an active service UPDF Non-commissioned officer.
2. The plaintiff was attached by UPDF to the office of Prime Minister in year 2013.
3. The plaintiff was arrested in July 2017 and prosecuted by the UPDF General Court Martial in criminal case No. UPDF/GCM/018/2017 for the offences of 'other fraudulent offences c/s 176 of the UPDF Act' and discharged by the said Court on a no case to answer on 03RD day of September 2018.
4. At the time of the plaintiff's arrest, the 2nd defendant was and still is the acting Permanent Secretary of the Office of Prime Minister.

Agreed Issues

1. *Whether the plaint discloses a cause of action against the 2nd Defendant.*
2. *Whether the arrest and imprisonment of the plaintiff were unlawful and without reasonable cause.*
3. *Whether the plaintiff's prosecution was malicious.*
4. *What remedies are available to the parties?*

Parties filed their witness statements and led evidence to prove their respective cases and other evidence was documentary as exhibited on court record.

The plaintiff led evidence of two witnesses while the 2nd defendant led evidence in support of both defendants

ISSUE 1.

Whether the plaint discloses a cause of action against the 2nd Defendant

Counsel for the 2nd defendant submitted on issue 1 & 2 concurrently, however I will resolve the issues separately.

Counsel submitted that in determining whether a suit discloses a cause of action the court ordinarily looks at the plaint only and annexures thereto and assume allegations contained therein are true. Counsel relied on **S.C.C.A NO.1 of 1997 Attorney General vs Tinyefunza** counsel submitted that the plaintiff sued the 2nd defendant for among others false imprisonment, the plaintiff alleges that he was arrested on 17th day of July 2017 and detained at UPDF Chieftaincy of Military Intelligence later charged before the court martial and remanded to Makindye Military Detention Facility until 25th September, 2017.

Counsel further submitted that the plaint does not indicate that the 2nd defendant participated in his arrest and subsequent detention. The plaintiff was arrested and detained by the Military the 2nd defendant has no actual or ostensible authority to execute the action complained of, only recorded a statement with UPDF and whatever was done thereafter was within its legitimate province. Counsel concluded that the plaint does not disclose a cause of action against the 2nd defendant.

Counsel for the 1st defendant in his submissions rephrased issue No. 1, to be whether the plaint discloses a cause of action against the 1st defendant. Nonetheless it is akin to issue proposed in the joint scheduling memorandum. Counsel cited the cases; ***Auto Garage vs Motokov [1971] E.A 514, Tororo cement vs Frokina International Ltd Civil Appeal No. 2 of 2001, Kapeeka Coffee Works Ltd vs NPART CACA No. 3 of 2000 and O.7 r 11 (a) CPR*** to support his argument of what amount to a cause of action against the 1st defendant. Counsel largely submitted on the claim of UGX 47,000,000/= that the plaintiff is a civil servant serving with UPDF and that a public officer shall not hold two jobs at any point in time according to Code of Conduct and Ethics

for the Uganda Public service Appendix F-5 of the Public Service Standing orders. Therefore he could not draw salary from UPDF and OPM.

Counsel submitted that during cross examination the plaintiff affirmed that the 47,000,000/= was for operational expenses incurred during his official work however did not adduce evidence on how he arrived to that figure. Counsel further submitted that the 2nd defendant during cross examination affirmed that the plaintiff was paid 5,000,000/= as per diem in accordance with standing orders after verification and that the plaintiff has no cause of action against the 1st defendant and in any case the plaintiff's claim for balance of 42,000,000/= is time barred as it is caught by S.3(1)(a) of the Civil Procedure and Limitation (Miscellaneous Provisions) Act. Counsel relied on the case of *Picfare Industries Ltd vs Attorney General & Another M.C NO. 258/2013* to amplify his argument of statutory limitation since the case was 7 (seven) year later when the balance was due.

Counsel for the plaintiff made general submission on the plaintiff's case, however at this stage this court will consider submission relevant to resolve issue No.1. Counsel quoted *Auto Garage vs Motokov (supra)* which establishes the elements of cause of action and submitted that if the elements are in answered in affirmative, then *locus standi* of the plaintiff to bring a suit would be established. Counsel submitted that PW1 the plaintiff told court he did not claim salary from OPM but payment for operational expenses incurred in the investigations. PW1 also testified that the 2nd defendant paid 5,000,000/= and advised him to seek for former PS approval of his claim which was given but still refused to pay. Counsel further submitted that the 2nd defendant fabricated criminal charges against the plaintiff basing on legal demand notice for payment of his money spent while carrying out his assigned duties.

Analysis

It is undisputed that the plaintiff was arrested and detained at UPDF Military Chieftaincy Intelligence headquarters and later remanded to Makindye Military Detention Facility. Counsel for the plaintiff made general submission that the defendants are liable and did not substantiate which defendant is

liable and for what claim. The 2nd defendant denied liability or involvement in arrest of the plaintiff, that she only recorded a statement with UPDF. The UPDF did not take directive from the 2nd defendant. The UPDF were responsible for their actions and decision to prosecute the plaintiff since they were not agents of the 2nd defendant as counsel for the plaintiff want this court to believe.

In the circumstances its the 1st defendant the Attorney General who is liable for the acts of the UPDF. In the circumstance therefore I find that the plaint does not disclose a cause of action against the 2nd defendant.

In further resolution of issue 1, Counsel for 1st defendant also contended that the plaint does not disclose a cause of action and largely submitted on the claim of 42,000,000/=. Counsel submitted that the plaintiff's claim was verified by the 2nd defendant and was paid 5,000,000/= which was verified as transport and field per diem in accordance with Public Standing Orders, in alternative counsel submitted that the balance of 42,000,000/= is time barred.

This court has considered the evidence led by the plaintiff to prove his claim of the balance. The plaintiff's claim raises a very peculiar case for determination. From the evidence adduced by the plaintiff he was firm that his claim is not for salary arrears but operational expenses incurred. The plaintiff proved his attachment to the OPM from PE-1, PE-2 & PE-3 however all exhibits speak only to attachment and silent as to terms of engagement which the plaintiff confirmed during cross examination. It can be inferred that the OPM was to meet the operational expenses for duties to be carried out by the plaintiff.

Therefore the OPM having received the plaintiff started funding the operations carried out by the plaintiff. In determining whether the plaintiff's claim should succeed, this court has to be guided by the Public Standing Orders and relevant regulations related to acquisition of funds/operational intended for public works in this case the special intelligence duties assigned to the plaintiff. PW2 Mr. Pius Bigirimana testified during cross examination that the approval of funds are made when there is requisition made and that the plaintiff was supposed to be paid an assignment is given to him and often

he paid him without requisitioning while other time he would pay upon requisitioning. The plaintiff also testified during cross examination that he did not make requisition for allowances and does not have receipts to prove the expenses incurred

I have considered the pleadings and evidence led by the parties and satisfied that the plaintiff's claim is not founded on tort as counsel for the 1st defendant put it before this court, it is a stand-alone claim from other causes of action pleaded by the plaintiff. It could be classified as an employment claim it remains a civil claim which this court has jurisdiction to adjudicate upon and I will consider it as such in light of submissions by both counsel.

The plaintiff did not adduce evidence to show how he arrived to the figure of 47,000,000/= to guide this court. The testimony of PW2 as to previous conduct and relations between him and the plaintiff does not prove that the plaintiff incurred the expenses and cannot form a basis for this court to draw inference that the plaintiff indeed incurred the expenses more so when there are known procedures of acquisition of funds intended for public expenditure which the plaintiff knew and never followed.

The evidence of PW1 & PW2 that there was no budget for such special investigation and was paid as and when was given assignment does not necessarily prove that the plaintiff incurred expenses claimed. It was also their evidence that there was no requisition for funds for the investigation that was carried out by the plaintiff as per the requirement for approval payments.

The said a claim arose out of work not clearly provided for which in my view required special permission to be executed with specialized funding. The claim was for a period worked which was after such a long period of time would cause audit queries and such claims were questionable. In public service funds are appropriated and allocated through budget should be spent in accordingly save where the law permits. The 2nd defendant was justified in approving what the plaintiff was able to defend as proper expenditure of 5,000,000/=.

In the final result I find that the plaintiff's claim for 42,000,000/= against the 1st defendant fails and the 2nd defendant is justified for having declined to approve such payment in her discretion which was not proved or lacked cogent evidence.

Therefore I will proceed to determine the case as between the plaintiff and the 1st defendant on the rest of the issues contained in the joint scheduling memorandum.

Counsel for the plaintiff submitted on issue 2 & 3 separately while counsel for the 1st defendant submitted on 1 & 2 concurrently. I will determine the issues jointly.

ISSUE 2 & 3.

Counsel for the plaintiff submitted that although there is nothing of the plaintiff's arrest whether lawful or unlawful but what is clear is that the imprisonment arose from a demand notice which the plaintiff served on the 2nd defendant. Counsel relied on the case of *Mugwanya Patric vs Attorney General H.C.C.S No. 154 of 2009 where Justice Stephen Musota (as he then was) stated that 'where an arrest is made on a valid warrant it is not false imprisonment; but where the warrant or imprisonment is prove to have been effected in bad faith then it is false imprisonment'*.

Counsel for the 1st defendant submitted largely on the issue of malicious prosecution his submission. The arrest and detention of the plaintiff from the 17th day of July 2017 until the 25th day of July without being produced before court was beyond the 48 hours and hence a violation of his constitutional right and amounted to wrongful imprisonment by the 1st defendant agents (UPDF).

Counsel for the plaintiff submitted that the plaintiff's arrest and imprisonment were initiated by the 2nd defendant following the plaintiff demand notice for 47,000,000/= as operation expenses incurred.

What remains to be determined on the above issue is whether there was a probable cause and whether the plaintiff was malicious prosecuted. Counsel

for the plaintiff submitted that the agents of the 1st defendant prosecuted the plaintiff in the General Court Martial, the proceedings were terminated in favor of the plaintiff on 3rd day September 2018 and they acted maliciously without probable cause. Counsel relied on the case of ***Mugabi vs Attorney General H.C.C.S No. 133 of 2002.***

Counsel for the plaintiff submitted that the prosecution sanctioned the file without sufficient evidence/probable cause and that is why the 2nd defendant failed to appear in court as a witness. Counsel relied the case of ***Glinsk vs Mciver [1962] AC 726*** to define what amounts to probable cause.

Counsel for the 1st defendant submitted that the two essential elements of malicious prosecution of institution of criminal proceedings and being terminated in favor of the plaintiff were proved. However counsel contended that there was probable cause. He relied on the case of ***Dr. Willy Kaberuka vs Attorney General C.S No. 160 of 1993 [1994] II KARL 64 Byamugisha J(RIP)*** stated that *'The general question as to whether there was a reasonable and probable 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.*

Counsel submitted that the charge show that there were complaints and the case was closed after the principal witness failed to honour summons and there was no malice demonstrated by the plaintiff.

Analysis

The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. See ***Olango Steven v AG & KCCA HCCS No. 681 of 2016***

This court in resolving the above issue is guided by the principles in the ***East African Court of Appeal of Mbowe vs East Mengo Administration [1972]***

*E.A 352, the court stated the plaintiff in order to succeed has to prove the four essential or requirements of malicious prosecution as reproduced in **Mugabi vs Attorney General H.C.C.S No. 133 of 2002** where Justice Bashaija K Andrew stated the elements of Malicious Prosecution to include;*

- 1. The proceedings must have been instituted by the defendant.*
- 2. The defendant must have acted without probable cause.*
- 3. The defendant must have acted maliciously.*
- 4. The proceedings must have been terminated in favor of the plaintiff*

These have to be satisfied and that the plaintiff has suffered damages in other words, the four units must unite in order to create or establish a cause of action. If the plaintiff does not prove them he would fail in his action.

In the instant case the two elements have been admitted by the 1st defendant as proved and the court is also satisfied with their proof. What is in contention is the existence of probable cause and malice. I have considered the submission, authorities cited by both counsel and evidence led by parties regarding the probable cause in this case. The 1st defendant instituted a case basing on the complaint made by the 2nd defendant contained in PE-21. It appears that the prosecutor of the General Court Martial did not adequately investigate the complaint. The complaint was based on the notice of intention to sue served on the 2nd defendant and expenses of 47,000,000/=. The prosecutor believed the words of the 2nd defendant in preferring the charges.

The 2nd defendant having written to the Minister of Defence returning the plaintiff for redeployment and continued to see him at the OPM the 2nd defendant wanted to prove authority and show power over the plaintiff to have him out of the OPM. There was no justification for prosecuting the plaintiff in reliance to the 2nd defendant statement/complaint against the plaintiff basing the claim of 47,000,000/= and the demand notice. The prosecutor acted recklessly and unjustifiably in preferring charges against the plaintiff based on the unchallenged evidence before this court. It is not believable that the complainant had genuine belief in the guilt of the plaintiff and that the proceedings initiated were justified. That explains her absence as a witness in the proceedings.

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.

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.”

The plaintiff as proved the essential elements of malicious prosecution on balance of probabilities since there was justification of preferring charges in the General Court Martial without consulting the law and appreciating the facts of the complaint against the plaintiff and in the final result the issues are resolved in affirmative.

What remedies are available?

The plaintiff prayed for an award of general damages; general damages are awarded at the discretion of court to compensate the aggrieved part for the inconvenience as a result of the defendant’s actions. The plaintiff was inconvenienced by being maliciously prosecuted by the 1st defendant but no to such exorbitant amount claimed in the plaint of 500,000,000/=. I will allow his prayer for general damages and award 50,000,000/=.

The plaintiff also prayed for special damages of 30 million which he specifically pleaded but were not proved. This court therefore declines to allow the prayer for award of special damages.

The plaintiff's prayers for punitive and exemplary damages are also disallowed for plaintiff's failure to prove and or demonstrated circumstance which would entitle him to the award of the same.

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

The plaintiff also prayed for costs, it is a cardinal principle that costs are discretionary and that they follow the event unless the court has some good reasons to order otherwise see; S.27 CPA. The plaintiff is awarded costs of this suit against the 1st defendant.

In the final result the suit is dismissed against the 2nd defendant with no order as to costs and judgment is entered in favor of plaintiff in the above terms.

It is so ordered.

Ssekaana Musa

Judge

27th.07.2022