



Kibos Sugar & Allied Industries Ltd v Njera & another (Civil Appeal E081 of 2021) [2023] KEHC 1744 (KLR) (28 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1744 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E081 OF 2021
JN KAMAU, J
FEBRUARY 28, 2023**

BETWEEN

KIBOS SUGAR & ALLIED INDUSTRIES LTD APPELLANT

AND

WILSON OYOMO NJERA 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon S. N. Telewa (SRM) delivered at Kisumu in Chief Magistrate's Court Case No 551 of 2018 on 16th June 2021.)

JUDGMENT

Introduction

1. In her decision of 16th June 2021, the Learned Trial Magistrate, Hon S. N. Telewa (SRM), entered Judgment in favour of the 1st Respondent therein against the Appellant and the 2nd Respondent jointly and severally as follows:-

General damages Kshs 350,000/=

Plus costs and interest of the suit
2. Being aggrieved by the said decision, on 25th June 2021, the Appellant filed a Memorandum of Appeal dated 18th June 2021. He relied on eleven (11) grounds of appeal.
3. Its Written Submissions were dated 28th June 2022 and filed on 29th June 2022. The 1st Respondent's Written Submissions were dated 3rd October 2022 and were filed on 4th October 2022 while those of the 2nd Respondent were dated 30th September 2022 and filed on 4th October 2022. The Judgment herein is based on the said Written Submissions which the parties relied upon in their entirety.



Legal Analysis

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
5. This was aptly stated in the case of *Selle & Another vs. Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
6. Having looked at the Grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the only issue for determination was whether the ingredients of the elements of malicious prosecution were proved as required by the law. All the Grounds of Appeal were related and intertwined, this court therefore dealt with the said issues altogether.
7. The Appellant invoked Section 107 and 108 of the *Evidence Act* Cap 80 (Laws of Kenya) and submitted that the burden of proof lay on he who asserted and that where no evidence was given, the burden to prove the existence of a fact lay on the person who would fail if no evidence were given on either side respectively.
8. It cited the case of *Murunga vs The Attorney General* (1976-1980) KLR 1251 where it was held that for an offence of malicious prosecution to be proven, the plaintiff had to demonstrate the four (4) elements namely:-
 1. that the prosecution was instituted by the defendant or by someone for whose acts he was responsible;
 2. that it terminated in the plaintiff's favour;
 3. that the prosecution was instituted without reasonable and/or probable cause and
 4. that it was actuated by malice.
9. It asserted that in the case of *Attorney General vs Peter Kirimi Mbogo & Another* [2021] eKLR, it was held that all the elements applied conjunctively and all had to be proven in order to successfully claim for damages for malicious prosecution.
10. It argued that the 1st Respondent did not testify as to who the Complainant was in the criminal case. It was emphatic that he did not tender any documentary evidence pointing to it as the Complainant and/or that he was charged as its servant or at all. It was its case that the 1st Respondent failed to prove that it was the one who complained, caused his arrest, charged him and prosecuted him. It submitted that the 1st Respondent thus failed to prove that the first element of the offence of malicious prosecution.
11. It conceded that the second element of the offence of malicious prosecution was not disputed as the 1st Respondent was acquitted in *Kisumu Criminal Case No 1214 of 2014*.
12. In respect of the third element of the offence of malicious prosecution, it submitted that the reasonable man's standard applied. It placed reliance on the case of *Hicks vs Faulkner* (1878) 8 Q.B.D 167 at 171 where it was held that a reasonable and probable cause was 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.
13. It averred that the test for whether or not a case was instituted with a reasonable and probable cause was discussed in the case of *Kagane & Others vs The Attorney General & Another* (1969) EA 643 where it was also held that it was when a reasonable and prudent man could honestly believe that the information must be reasonably credible to afford a reasonably strong basis for the prosecution.
 14. It also relied on the case of *John Nderitu vs The Attorney General* [2010] eKLR where it was held that the court had judicial notice that before a person was arraigned in court in a criminal case, the police recorded statements and first analysed the facts to see if they disclosed an offence.
 15. It argued that the 1st Respondent was charged with the offence of theft. It pointed out that he was the guard on duty on that night when the items were stolen but he failed to explain his whereabouts. It added that the eye witnesses placed him at the scene and testified that he did not raise any alarm when the stolen items were being ferried on a motor bike. It contended that the 2nd Respondent conducted interviews and investigations and decided to charge the him at that time with the belief of a reasonable, prudent and cautious man that he was liable for prosecution. It therefore argued that the he had failed to prove the third element of the offence of malicious prosecution.
 16. In respect of the fourth element of the offence of malicious prosecution, it submitted that it was a limited liability company which was a legal person incapable of being malicious as it had no mental element. It argued that the 1st Respondent did not mention any of its employees, agents and/or mental capacity to actually institute malicious prosecution against him.
 17. It referred this court to the definition of malice in the *Black's Law Dictionary*, 8th Edition which defines it as "The intent, without justification, or excuse to commit a wrongful act, reckless disregard of the law or of a person's legal rights and ill will, wickedness of heart."
 18. It also relied on the case of *Nzoia Sugar Company vs Fungututi* [1988] eKLR where the court held that it was trite law that acquittal, per se, in a criminal case was not sufficient basis to ground a suit for malicious prosecution and that spite or ill will against the prosecutor had to be proved.
 19. It submitted that the 1st Respondent failed to prove all the elements of the tort of malicious prosecution. It referred to the case of *Silvia Kambura vs George Kathurimaa Japhet & 2 Others* [2021] eKLR where the appellate court set aside the trial court's judgment and dismissed the suit as the respondent therein failed to prove all the elements of malicious prosecution.
 20. It was therefore its submission that this court ought to set aside the Trial Court's judgment, dismiss the suit and award it costs as the 1st Respondent had failed to prove his case on a balance of probabilities.
 21. The 2nd Respondent argued that an appellate court will only disturb a finding of fact if it was not based on evidence or there was a misapprehension of the evidence, that the judge was shown to have acted on wrong principles in reaching the finding that he did as was held in the case of *Mwanasokoni vs Kenya Bus Service Limited* CA No 35of 1988 (eKLR citation not given).
 22. He supported the Appellant's position and asserted that the Trial Court totally disregarded the principals that were set out by law with regard to matters of malicious prosecution.
 23. He submitted that the Trial Court's decision was not based on any evidence and it acted on wrong principles in reaching the finding that it did because the 1st Respondent did not demonstrate that he



- was charged falsely, that he was arrested and other offenders left out, that his mother died, that his land was sold and that his reputation was damaged.
24. He argued that the fact that he and the Appellant did not call any witnesses did not mean that the 1st Respondent would escape the burden of proof. In this respect, he relied on the case of *Gitobu Imanyara & 2 Others vs Attorney General* (eKLR citation not given) where the court held that the trial court had a duty to satisfy itself that a claim in a formal proof or where the defendant has not appeared, had been proven because the standard of proof in a civil case which was on a balance of probabilities, did not change even in the absence of a rebuttal by the other side.
 25. He averred that it was wrong for the Trial Court to have concluded that the 1st Respondent's evidence remained unchallenged and uncontroverted and proved on a balance of probability just because he and the Appellant did not call a witness despite the 1st Respondent having been cross-examined and found not to have met the threshold laid and/or met the four (4) aforementioned elements for the offence of malicious prosecution.
 26. He relied on Section 107 of the *Evidence Act* Cap 80 (Laws of Kenya) and argued that although the first and second elements for the offence of malicious prosecution were undisputed, the Trial Court misapprehended the facts as there was nothing that was presented before it to show that the prosecution was done with malice or without probable cause, a facet that must be proven to establish the tort of malicious prosecution. It was its case that no evidence was brought forth at trial to prove malice or demonstrate that the prosecution was done without probable cause.
 27. He added that despite testifying that he was charged with a defective charge sheet and that his arrest was couched to make him lose his job and ruin his reputation, the 1st Respondent did not produce any evidence to prove the same.
 28. He was emphatic that the 1st Respondent's claim was unsustainable and that that the fact that one was acquitted did not denote malice. He therefore urged this court to allow the Appellant's appeal, set aside the Trial Court's Judgment and dismiss the suit before the trial court.
 29. On his part, the 1st Respondent relied on the case of *Peter M. Kariuki vs Attorney General* [2014] eKLR which espoused the role of the appellate court of re-evaluating, re-assessing and re-analysing the conclusions of the trial court to reach its own independent conclusion based on the evidence on record.
 30. He submitted that the tort of malicious prosecution was established where a person caused the arrest and prosecution of another person without reasonable or probable cause. In that respect, he relied on the case of *George Masinde Murungu vs Attorney General* (Supra).
 31. He contended that it was not in dispute that he was tried in the criminal case and that the same terminated in his favour. He asserted that in civil cases the standard of proof was on a balance of probabilities and the onus was on the who alleged. It was his case that he proved his case at the Trial Court on a balance of probabilities and relied on the proceedings of the criminal case and the Investigation Report that formed part of the Prosecution's evidence, which clearly stated that he was not responsible for the theft but that the Appellant went ahead to prefer charges against him in essence setting the law against him and leaving the 2nd Respondent to charge him.
 32. To support the Appellant's mental element, he relied on the case of *Nzoia Sugar Company Limited vs Fungutuli* (sic) (Supra) where it was held that although the mental element could not be found in an artificial person, there had to be evidence of spite in one of the servants that could be attributed to the company.



33. He asserted that the Investigation Report was done by the security company that he worked for and which the Appellant had hired but the Appellant did not consider the contents therein as all it wanted, was a man to crucify. He was emphatic that he had clearly demonstrated that the Appellant's actions were actuated by malice from the onset and that the its report was without reasonable and probable cause.
34. He pointed out that he was the only one who testified at the Trial Court as the Appellant and the 2nd Respondent did not call any witness to advance their cases and therefore the Trial Court arrived at a decision on the basis of his evidence which was not contradicted. It was his case that he indeed proved his case on a balance of probability and the damages awarded were justified thus the same ought not to be disturbed. He urged the court to dismiss the appeal with costs and uphold the Trial Court's judgment.
35. As can be seen herein, the elements for the offence of malicious prosecution were as were set out in the cases of *George Masinde Murunga vs The Attorney General (1979) KLR 138* and *Kagane vs Attorney General (Supra)*.
36. It was not disputed that the 1st Respondent was charged in a criminal case and acquitted. There was therefore no need to analyse whether or not he had demonstrated two (2) of the four (4) elements of the offence of malicious prosecution namely, that the prosecution was instituted against him and that the criminal proceedings were terminated in his favour as the same was undisputed.
37. Be that as it may, this court re-assessed, re-evaluated and re-analysed the evidence that he adduced to satisfy itself whether or not he had shown that the proceedings at Nyando Law Courts were instituted without any probable or sufficient cause and that the same were actuated by malice. Notably, the Appellant and the 2nd Respondent closed their defence cases without calling any witnesses.
38. A perusal of the proceedings showed that the 1st Respondent produced in evidence copies of the criminal proceedings and the Investigations Report by his employer, JRS, which were marked as Plaintiff's Exhibits 1 and 2 respectively. His testimony was that his services were terminated, his land sold and he lost his mother. It was not clear from his evidence whether or not these events occurred as a result of the criminal proceedings, a fact that the 2nd Respondent ably pointed out in his Written Submissions.
39. He complained that the police refused to record statements from a teacher at Awasi and boda boda (sic) who were eye witnesses of what transpired on the material date of 22nd November 2020. He asserted that one Kiburi wanted to have the criminal proceedings withdrawn but that the Prosecution refused.
40. When he was cross-examined, he asserted that he had never been an employee of the Appellant yet he was charged with the offence of stealing by servant. His evidence, however, appeared inconsistent. At one point, he stated that it was not correct that he was on duty on the said day and then admitted that he was on duty on that night. He then confirmed that he was a night guard and that he was in charge when the theft occurred. He then went on to say on say that the theft happened during the day.
41. That notwithstanding, this court noted from Plaintiff's Exhibit 2 that the theft was on 22nd November 2015 between 6.00 am- 7.00 am. According to the said Investigation Report, the main suspect was one Justine Onyango who was a day guard. He was said to have disappeared and never went for his November salary. In his statement, No 44509 PC Kiriaru Kosge of Awasi Police Station stated that the "suspect" saw a motor cycle carrying the same (sic). It was not clear who suspect this was and what "same" referred to.



42. This court looked at the criminal proceedings with a view to establishing whether or not there was probable or reasonable cause for the Office of Director of Public Prosecutions (ODPP) to have charged the 1st Respondent herein. According to the Investigating Officer No 39864 Sgt David Katila (hereinafter referred to as “PW 3”), he stated that the 1st Respondent was brought from the Appellant’s offices on accusations that he had stolen one (1) metal bar at its compound which he was guarding. His testimony was that although the 1st Respondent had handed over with the metal bar, he could not explain the whereabouts of the same. His further evidence that he was not aware of any other investigations and no one had ever gone to withdraw the case.
43. The Trial Court was not satisfied that the Prosecution therein had established a prima facie case and hence acquitted the 1st Respondent under Section 210 of the Criminal Procedure Code Cap 75 (Laws of Kenya).
44. This court could not rely on the Appellant’s letter dated 21st August 2017 purporting to withdraw the criminal proceedings against the 1st Respondent herein as the same was never tendered in evidence during the criminal proceedings. It was marked as “MFI-P”.
45. It was evident that there was a loss at the Appellant’s premises on the material date. The 1st Respondent was on duty on the date the alleged theft was said to have occurred. The Appellant’s security officers handed him over to the police for interrogation. The matter was then moved to the ODPP who charged him in the criminal proceedings. It was one thing to make a complaint and another to prefer charges and institute a criminal prosecution. Once the Appellant lodged a complaint with the police, the matter moved from its hands.
46. Normally, investigations and the decision to charge is undertaken by the Republic through the Kenya Police. After a complainant is made, it is the mandate of ODPP to decide whether it will prosecute or not. The ODPP is not under the control or direction of any person or authority.
47. Indeed, Article 158 (10) of *the Constitution* of Kenya, 2010 provides that:-
- “The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.”
48. In his pleadings in the Trial Court, the 1st Respondent did not state that the ODPP acted without any reasonable and probable cause. The Particulars of malice that he set out were as follows:-⁶
- i. Charging the Plaintiff of an offence maliciously.
 - ii. Charging the Plaintiff with intention to cause him to be of bad reputation from the right thinking members of the society.
 - iii. Charging the Plaintiff with a defective Charge.
 - iv. Preferring charges against the Plaintiff with an aim to cause him to lose a job.
 - v. Intentionally charging the Plaintiff without justifiable cause
49. In his Witness Statement that he adopted in the Trial Court, the 1st Respondent indicated that he was charged with the offence of stealing by servant contrary to Section 275 of the Penal Code Cap 63 (Laws of Kenya) in Cr Case No 1214 of 2015 Nyando Law Courts (hereinafter referred to as “the criminal proceedings”). He did not tender in evidence a copy of the Charge Sheet, a fact that was picked up by the 2nd Respondent herein in its Written Submission in the Trial Court from which the Appeal



herein emanated from. This court could not therefore ascertain whether or not the said Charge Sheet was defective to support his argument that this satisfied the element that the charge against him was actuated by malice.

50. As preferring charges was the mandate of the ODPP, the 1st Respondent failed to demonstrate how the ODPP instituted proceedings against him without reasonable or probable cause. He seemed to assume that his acquittal was enough to prove his claim in malicious prosecution.
51. In addition, he was required to prove that the prosecution was actuated by malice. As stated above, the prosecution was carried out by the ODPP. He ought to have led evidence to prove malice on the part of the Appellant and the police. However, he did not do so.
52. Malice cannot automatically be transferred to the prosecutor unless it is proved that there was collusion between the complainant and the prosecutor prosecuting the matter as was held in the case of Music Copyright Society of Kenya vs Tom Odhiambo Ogowl [2014] eKLR. The 1st Respondent did not demonstrate that there was any malice on the part of the police and/or the prosecutor. If there was, he did not demonstrate and/or prove the same.
53. This court thus came to the firm conclusion that Trial Court fell into error in its judgment when it made a finding that just because the 1st Respondent's evidence was unchallenged, he had proven his case on a balance of probabilities. It misdirected itself when it determined that the trial court hearing the criminal proceedings acquitted the 1st Respondent and ended up stating that he was charged falsely when no such averments were stated therein.
54. This court carefully looked at the Ruling of the trial court in the criminal proceedings and noted that he stated as follows:-

“I have looked at the evidence on records (sic) and I am satisfied that the prosecution has failed to establish a prima facie case against the accused person. There is no direct evidence to link the accused person with the offence of theft. He was just a guard. He was not arrested with anything. I therefore find that there is no evidence to warrant putting the accused on his defence. I find him not guilty and I hereby acquit him under section 210 of the CPC.”

55. Accordingly, having carefully considered the Written Submissions by the respective parties, this court found and held that the 1st Respondent failed to prove his case to the required standard, which in civil cases is proof on a balance of probabilities.

Disposition

56. For the foregoing reasons, the upshot of this court's decision was that the Appellant's appeal lodged on 25th June 2021 was merited and the same be and is hereby allowed. The effect of this Judgment is that the Trial Court's Judgment that was delivered by Hon. S. N. Telewa on 16th June 2021 in Kisumu Chief Magistrate's Court Case No 551 of 2018 be and is hereby set aside and/or vacated. The same be and is hereby substituted with an order that the 1st Respondent's suit be and is hereby dismissed with costs to the Appellant herein.
57. As the 1st Respondent has lost the Appeal and is not of the same financial might as the Appellant herein, this court will deviate from the general principle that costs will follow the event and direct that each party bear its own costs of this Appeal.
58. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF FEBRUARY 2023



J. KAMAU
JUDGE

