



Kimanthi v DHL Global Forwarding (K) Limited & another (Civil Appeal E289 of 2021) [2023] KEHC 18749 (KLR) (Civ) (24 February 2023) (Judgment)

Neutral citation: [2023] KEHC 18749 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E289 OF 2021

DO CHEPKWONY, J

FEBRUARY 24, 2023

BETWEEN

ERASTUS MUTUSYA KIMANTHI APPELLANT

AND

DHL GLOBAL FORWARDING (K) LIMITED 1ST RESPONDENT

THE HON. ATTORNEY GENERAL 2ND RESPONDENT

(Being an Appeal from the Judgment and decree of Hon. E. Wanjala (PM) delivered on 26th November, 2021 in CMCC No.4199 of 2019)

JUDGMENT

Background

1. By a Plaint filed in Court on 12th June, 2019, the Appellant sought for the following prayers against the Respondents jointly and severally:-
 - a. General damages for malicious prosecution.
 - b. Kenya shillings one million five hundred thousand (Kshs.1,500,000/=) on account of legal fees.
 - c. Kenya Shillings two hundred (Kshs.200,000/=) only on account of professional fees for handwriting expert.
 - d. Costs of this suit.
 - e. Interest on (a), (b) and (c) above at court rates from the date of filing the suit until payment in full.
 - f. Any other relief the court deems fit and proper to grant.



2. The basis of the claim before the trial court as pleaded by the Appellant is that sometimes in September, 2009, he was employed by the 1st Respondent as a Financial Controller. He stated that there arose allegations of theft of money and fraud at the 1st Appellant Company and the Appellant was placed in custody whereby on 29th October, 2009, he was charged with the offences of conspiracy to defraud, forgery and stealing in Milimani Criminal Case No.1946 of 2009. He was later tried, found not guilty and acquitted under Section 215 of the Criminal Procedure Code. According to the Appellant, the 1st Respondent maliciously made a complaint against him without any probable cause.
3. The 1st Respondent filed its defence before the trial court on 15th July, 2019 in which he admitted that the Appellant was their employee, whereby he was working as a Financial Controller on contract terms. The 1st Respondent also admitted that there was theft of money in the Company but denied that the prosecution of the Appellant was engineered by them out of malice.
4. The Appellant called Peter Mwangela, the Chief Finance Officer who testified as PW-1 and he adopted his witness statement recorded on 11th June, 2019 as his evidence in-chief. He had filed a further witness statement dated 20th December, 2020 which he equally adopted as such. The Appellant also produced and adopted a bundle of documents dated 6th October, 2020 which were admitted as PEx-1-7. He had also filed a supplementary list of documents dated 2nd December, 2020 which he produced and adopted as PEx-8. In his testimony to court, the Appellant's witness PW1 reiterated the averments of the Plaintiff and witness statement.
5. On cross examination by the counsel for 1st Respondent, PW1 stated that he is aware of the allegation of fraud at the 1st Respondent's Company which had come up and led to his arrest and prosecution. He was not aware of any investigations that were done at the 1st Respondent Company before his arrest as he was not privy of to them. He stated that he was implicated for forgery when referred to an investigation report filed by the 1st Respondent in which he allegedly admitted he findings that he had forged a cheque No.xxxx but stated that he was not aware of the charges dated 15th September, 2009 for Kshs.4,246,200/= were posted on the Sony System of the 1st Respondent. He further stated that as per the report, it was implicated that he was to be charged. A report was made to the police and charges were preferred against him. He said that the charge sheet is from Kenya Police and not from the 1st Respondent.
6. On further cross-examination, PW1 averred that he was taken to court and during the hearing, he saw a report from the Document Examiner. He also had a Document Examiner who testified in support of his case, although he was put on defence.
7. When cross examined by the 2nd Respondent, PW1 stated that the 1st Defendant's complaint to the police had led to his arrest. He was suspected and the work of the police was to arrest the suspects, though it ought to be after thorough investigations. He stated that he was arrested and taken to the police station where he recorded a statement and his sample signatures were taken. That witnesses testified and the 4th Defendant was found guilty in the criminal case after due process was followed.
8. After hearing the matter, the trial Court delivered its Judgment on 26th November, 2021 dismissing the appellant's claim which Judgment is now the subject of the appeal herein.

The Appeal

9. The appellant being dissatisfied with the Judgment and decree of the trial court preferred an appeal before this court vide a Memorandum of Appeal dated 26th November, 2021 in which he set forth the following grounds of appeal:-



- a. That the Learned Magistrate erred in law and in fact by dismissing the Appellant's suit whilst there was overwhelming evidence that the Appellant had proved all elements of malicious prosecution
- b. That the Learned Magistrate erred in law and in fact in finding that the appellant failed to prove his case against the Respondents to the required standards.
- c. That the Learned Magistrate erred in law and in fact by failing to appreciate that there was no evidence negating the evidence of the Appellant that he was maliciously prosecuted.
- d. That the Learned Magistrate erred in law and in fact in finding that there was reasonable and probable cause for prosecution of the Appellant.
- e. That the Learned Magistrate erred in law and in fact in finding that the Respondents did not act maliciously.
- f. That the Learned Magistrate erred in law and fact in failing to consider the Appellant's submissions on failure to call witnesses.
- g. That the Learned Magistrate erred in law and fact in failing to take into account the Appellant's submissions and case laws.
- h. That the Learned Magistrate erred in law and fact by arriving at a conclusion that was not supported by the evidence on record.
- i. That the Learned Magistrate wrongly interpreted the facts and law, misconstrued the decisions cited to her and arrived at a wrong decision.
- j. That the Learned Magistrate erred in law and fact and disregarded the evidence tendered by the Appellant that he was maliciously prosecuted.

Reasons wherefore, the Appellant prays:-

- a. That the appeal be allowed.
 - b. That the Judgment and decree of Honourable E. Wanjala, Principal Magistrate delivered on 26th November, 2021 be set aside.
10. On 13th May, 2022, this court issued directions that the appeal be disposed of by way of written submissions. The Appellant complied with the directions and in support of this appeal, filed his written submissions dated 22nd September, 2022. There are no submissions on record for the Respondents at the time of writing this Judgment.

Analysis and Determination

11. Having considered the grounds of appeal and the written submissions by counsel for the Appellant, the only issues arising for determination in this appeal are:-
 - a. Whether the Appellant's appeal has merit; and if so,
 - b. Whether he deserves the orders being sought.
12. It is trite law that this being the first appellate court, it has a duty to re-evaluate, re-analyze and re-assess the evidence before the trial court afresh before drawing its own conclusions. This position was held



in the case of *Selle & Another –vs- Associated Motor Boat Co. Ltd. & Others* [1968] EA 123 where the court held as follows:-

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

13. As this court re-evaluates and re-assesses the material evidence submitted before the trial court, it is important to note that in a claim of malicious prosecution, the Plaintiff is required to prove the following ingredients in order to succeed:-
 - a. That the prosecution was instituted by the Defendant or by someone for whose acts he is responsible.
 - b. That the prosecution was instituted without reasonable and probable cause.
 - c. That the prosecution was actuated by malice.
 - d. That the prosecution was terminated in the Plaintiff’s favour.
14. The tort of malicious prosecution is committed where a party causes the arrest and prosecution of another party without reasonable or probable cause and the instituted proceedings terminate in favour of the party so arrested and prosecuted. The essential ingredients of malicious prosecution aforementioned were also echoed in the case of *Stephen Gachau Gitthaiga & Another v Attorney General* [2015] eKLR, where Mativo J (as he then was) held that;
 - a. Malicious prosecution is an intentional tort designed to provide redress for losses flowing from an unjustified prosecution. Under the first element of the test of malicious prosecution, the Plaintiff must prove that the prosecution at issue was initiated by the Defendant.
 - b. This element identifies the proper target of the suit, as it is only those who were actively instrumental in setting the law in motion that may be held accountable for any damage that results.
 - c. The second element of the tort demands evidence that the prosecution terminated in the Plaintiff’s favour. This requirement precludes a collateral attack on a conviction properly rendered by a criminal court, and thus avoids conflict between civil and criminal justice. The favourable termination requirement may be satisfied no matter the route by which the proceedings conclude in the Plaintiff’s favour, whether it be an acquittal, a discharge at a preliminary hearing, a withdrawal, or a stay.
 - d. The third element which must be proven by a Plaintiff – absence of reasonable and probable cause to commence or continue the prosecution – further delineates the scope of potential Plaintiffs. As a matter of policy, if reasonable and probable cause existed at the time the prosecutor commenced or continued the criminal proceeding in question, the proceeding must be taken to have been properly instituted, regardless of the fact that it ultimately terminated in favour of the accused.



- e. Finally, the initiation of criminal proceedings in the absence of reasonable and probable grounds does not itself suffice to ground a Plaintiff's case for malicious prosecution, regardless of whether the Defendant is a private or public actor. Malicious prosecution, as the label implies, is an intentional tort that requires proof that the Defendant's conduct in setting the criminal process in motion was fueled by malice. The malice requirement is the key to striking the balance that the tort was designed to maintain: between society's interest in the effective administration of criminal justice and the need to compensate individuals who have been wrongly prosecuted for a primary purpose other than that of carrying the law into effect."
15. On the first ingredient, the complaint regarding the theft of money was made by the 1st Respondent who was the Appellant's employer. The 1st Respondent made a complaint but the decision to prefer charges against the Appellant lay solely on the state through the Director of Public Prosecutions. A complaint having been raised, it was the duty of the Prosecution to investigate and prefer a charge and or charges depending on the outcome of the investigations.
16. On the second ingredient that the prosecution be terminated in favour of the Plaintiff, in the instant case, the Appellant was acquitted of all the charges on 20th August, 2018. The Appellant therefore urges that this element was fulfilled in regard to the requirements for malicious prosecution.
17. It is now well settled that the acquittal of a person on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. In the case of *Nzoia Sugar Company Ltd -vs- Fungututi* [1988]eKLR, the Court stated that:-
- "It is trite learning that an 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 ill-will 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. The Respondent gave no evidence from which it can be reasonably inferred that the Security Officer made this report to the police on account of hatred or spite that he had for him."
18. And on whether the prosecution was instituted without reasonable and probable cause, in this case, the Appellant was charged with the offence of Conspiracy to defraud contrary to Section 393 of the *Penal Code* Act, which provides;
- "Any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Kenya would be a felony, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a felony and is liable, if no other punishment is provided, to imprisonment for seven years, or, if the greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years, then to that lesser punishment."
19. On the second count, alongside others, he was charged with the offence of Forgery contrary to Section 349 of the *Penal Code* Act, which provides;
- "Any person who forges any document or electronic record is guilty of an offence which, unless otherwise stated, is a felony and he is liable, unless owing to the circumstances of the forgery or the nature of the thing forged some other punishment is provided, to imprisonment for three years."



20. The Appellant alongside others were charged with offences provided for within the law (i.e the [Penal Code](#), Cap 63 Laws of Kenya) and there was basis for the charges preferred against them by the prosecution. It is this Court's considered view that the charges were instituted after a report/complaint was made to the police and proper investigations having been carried out by the Investigation Officer before the Director of Public Prosecution preferred the charges against the accused persons before the trial court.
21. It is un rebutted evidence that the 1st Respondent noted loss or theft of money and made a complaint before the National Police Service which is mandated to carry out investigations and report to the Prosecution who are then mandated to prefer charges depending on the available evidence. The basis of the Appellant's acquittal before the trial criminal court was said to have been due to the discrepancies of the two reports by the Document Examiners being one produced by the Appellant and the other produced by the prosecution.
22. In view of the evidence adduced before the Criminal court which placed the accused (now Appellant) on his defence, it cannot be said that there was no reasonable and probable cause for preferring the charges against the Appellant. It is therefore this Court's finding that there was reasonable and probable cause that the alleged offences had been committed and the 1st Respondent was entitled to raise a complaint against the Appellant alongside the others who were charged before the criminal court for trial.
23. On the last issue of malice, it should be noted that in a claim of malicious prosecution, the Plaintiff must prove that the prosecution was actuated by malice on the part of the complainant.
24. Having appreciated the circumstances of this case, the investigations were conducted by the Police and the prosecution was carried out by the Director of Public Prosecution. It was upon the Appellant to lead evidence to prove malice on the part of the Respondent, which in this Court's view is lacking before the trial court.
25. I have also had the opportunity to peruse the Judgment by the criminal court and note that there were two reports from the two different Document Examiners which are contradicting, produced as evidence before the court. As a result of this contradiction, the trial court found in favour of the Appellant in the criminal trial before it.
26. Upon re-evaluating the evidence adduced before the trial court, this Court comes to the conclusion that the Appellant failed to prove his claim for the tort of malicious damage, on a balance of probability, hence finds no reason to interfere with the said finding. The court therefore proceeds to dismiss this appeal for lack of merit, however, no orders as to costs issue.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 24TH DAY OF FEBRUARY , 2023.

D. O. CHEPKWONY

JUDGE

