



**Bedrock Holdings Ltd v Otieno & another (Civil Appeal
E14 of 2021) [2023] KEHC 2894 (KLR) (31 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2894 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E14 OF 2021
PJO OTIENO, J
MARCH 31, 2023**

BETWEEN

BEDROCK HOLDINGS LTD APPELLANT

AND

MATHEWS OUMA OTIENO 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

*(Being an appeal from the judgment of Hon. B. Ochieng
CM in Kakamega CM Civil Suit No. 107 of 2017)*

JUDGMENT

Background Of The Appeal

1. The 1st respondent, by way of a plaint dated 16th March, 2017, sued the Appellant and the 2nd Respondent at the Chief Magistrate Court in Kakamega for General for wrongful arrest, detention and malicious prosecution together with Special damages, being legal fees of Kshs 60,000/-, interest and costs of the suit. The foundation of the suit was pleaded to be that on 9th April, 2014, the appellant maliciously made a false report at the Kakamega Police Station that he had on diverse dates between 1st January, 2014 and 28th February, 2014 stolen a sum of Kshs 29,000/- from the appellant which money came into his possession in his capacity as an employee. The 1st respondent was prosecuted at the Kakamega Chief Magistrate Court vide case No CMCCR No 937 of 2014 for stealing by servant contrary to section 281 of the Penal Code and thereafter acquitted under section 210 of the Criminal Procedure Code.
2. The appellant resisted the claim by a statement of defence dated 10th April, 2017, and asserted that the report made to the police was true and correct, was never activated and/or actuated by malice and that the decision to charge was solely at the discretion of the police on whom the appellant exercises no



control. The particulars of malice and the allegations that the 1st respondent had suffered loss, damage or any expense were denied seriatim and strict proof invited.

3. By a statement of defence dated 16th June, 2017, the 2nd defendants pleaded that the 1st respondent was arrested, charged and prosecuted after a genuine report was made to the police and that the 1st respondent was acquitted on technicalities and not on the basis that the case was unfounded.
4. In a judgment delivered by the trial court on 15/8/2020, the court found for the 1st respondent against both appellant and the 2nd respondent and awarded was awarded general damages in the sum of Kshs 800,000/- Kshs 60,000/- as special damages together with costs and interest.
5. Aggrieved by this Judgment, the appellant filed a Memorandum of Appeal dated 12/3/2021 premised on the grounds that; the learned trial Magistrate erred in law and in fact by; misapprehending the evidence on record and hence arriving at the wrong conclusion and judgment; failed to appreciate the tests and principles of law applicable in a case of malicious arrest and prosecution; failed to appreciate that there was reasonable cause and justification in the appellant's agent making a complaint to the police, failed to appreciate that the appellant could not be malicious given that it is a legal person as opposed to a natural person; failed to appreciate that the appellant could not and did not arrest, detain and/or prosecute the 1st respondent and hence cannot be held liable for actions, omissions and/or commissions of another person; the judgment, finding and award is against the weight of the evidence for being excessive and not based on any factors/principles.
6. The appeal was directed to be canvassed by way of written submissions. Parties filed respective submissions, which submissions, the proceedings and judgement of the trial court have been fully reexamined and reappraised, this being a fast appeal proceeding by way of a rehearing, towards discharging on its legal mandate. Even though the grounds are quite a number, all fault the trial court for failure to properly analyse the evidence and failing to apply the law to such evidence and therefore committed errors of principle leading it to an erroneous decision when it found the appellant liable to the 1st respondent in damages. There would then arise, after a determination on whether liability was properly determined, the question whether the damages assessed and awarded were commensurate.

Analysis

7. In a suit for malicious prosecution, the plaintiff must show; that the prosecution was instituted by the Defendant, or by someone for whose acts he is responsible; that the prosecution terminated in his favour; that the prosecution was instituted without reasonable and or probable cause; and was actuated by malice¹.
8. It is not in dispute, but common ground, that it was an agent, a manager, of the appellant that set the prosecution of the 1st respondent in motion by lodging a complaint at the Kakamega Police Station that the 1st respondent had stolen money from the appellant.
9. It is also not disputed that the 1st respondent was charged and prosecuted at Kakamega Chief Magistrate Court vide case No CMCCR No 937 of 2014 for stealing by servant contrary to section 281 of the penal code and subsequently acquitted under section 210 of the criminal procedure code. On the basis of those common positions, the question as to who initiated the prosecution by a report and the outcome of such prosecution are answered in favour of the 1st respondent as the plaintiff at the trial.
10. That leaves the court with the task to establish the third and fourth element of the tort, whether the prosecution was instituted without reasonable and probable cause and if propelled by malice.

¹ Cotran, J in *Murunga v Attorney General* (1979) KLR, 138



11. To this court where one drags another to court without reasonable or probable cause, the person initiating the process cannot escape the perception of being actuated by malice. A reasonable and probable cause is adjudged on the objective test whether on the materials available to court, a honest and discerning person would conclude that an offence could have been committed. To this court, where there is lack such discernment and a report is all the same made and prosecution initiated and pursued by one with no justification to believe that a cognizable offence has been committed, the pursuit is not for the benefit of the administration of criminal justice but for ulterior purposes. It is the ulterior application of criminal law that is sought to be discouraged by the tort of malicious prosecution.
12. What amounts to reasonable and probable cause was well explained by the court in *Kagame & others v AG & another* [1969] EA 643 where it was held as follows: -

“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...

If it is shown to the satisfaction of the judge that a reasonable prudent and cautious man would not have been satisfied that there was a proper case to put before the court, then absence of reasonable and probable cause has been established.”
13. Applying that test to evidence on the events leading up to 1st respondent being charged in criminal case No 937 of 2014, it behoves the Court to determine whether there was honest belief that the 1st respondent had stolen from his employer. it was the testimony of PW1, Oscar Ingosi Mabya, that he handed over cash of Kshs 2000/- on 8/1/2014 and another Kshs 3,000/- on 7/2/2014 to the 1st respondent which he had received from clients and which cash the 1st respondent failed to remit to the appellant company. On cross examination, he stated that the appellant company had a cashier called Janet who was responsible for cash collections at day time. Even Pw4 said she collected money and handed over to the accused. The 1st respondent did not get a chance to give his side of the story but his counsel dismissed any receipt of money from Oscar Ingosi, urging that no evidence was produced that the money was handed over to him. To this court, being not a criminal court on appeal, its task is not to establish who between the 1st respondent and the prosecutions witnesses told the truth. Rather, it task is to review the evidence led and to establish if that material could lead a honest, reasonable and discerning person, put in the position of the appellant, to believe that a criminal offence could have been committed. In my assessment, the evidence by PW1 and 4 were that both gave money to the 1s respondent at different times and the money was allegedly not banked or handed over to the appellant. Both witnesses were junior to the 1st respondent who Pw3 said had the mandate and duty to do banking. It is therefore the finding of the court that one a citizen is in a position to believe that a crime has been committed, it becomes a civic duty to make a report to the police who have the obligation to investigate and recommend prosecution to the directorate of prosecutions. That the police recommended prosecution and same was pursued by the directorate, an independent body not subject to directions by the police or the appellant, the court infers that the police carried own investigation which convinced the prosecution that there was a genuine prosecution to be pursued. No malice was alleged nor proved against the police but more important the driver of prosecution was never sued.
14. The court thus finds that a reasonable prudent and cautious man, put in the accuser’s position, would have been satisfied that there was an offence committed and thus proper case to put before the court.



15. On that finding the court equally finds that no spite or ill will was proved by the 1st Respondent against the appellant or the 2nd Respondent yet it was a foundational element. Malicious prosecution as the name states is an intentional tort it is key that malice be proved to strike the balance between the due administration of justice and to compensate those injured by wrongful invocation of the law as those who wrongfully invoke the law get penalized in damages. In *Nzoia Sugar Company Ltd v Fungututi*[1988] eKLR the court of appeal underscored the place of malice in the tort of malicious prosecution in the following fashion: -

“...the case of malicious prosecution must founder on the absence of proof of malice or ill-will. The only reason why the respondent claimed he was maliciously prosecuted, was because the prosecution terminated in his acquittal...

It is trite learning 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 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.”

16. In its determination and after citing the law on burden of proof to be upon the 1st respondent, the trial court delivered itself as follows: -

‘It is not in dispute that upon the plaintiff tendering resignation from the company the same accepted without raising any issues and the only presumption to be drawn is that it was accepted on the basis that the 1st defendant company had no issues with the plaintiff and indeed the company failed to adduce any evidence documentary or otherwise to demonstrate that they did raise the issue of theft by servant with the plaintiff who failed to give a satisfactory explanation thereby prompting them to report the matter to the police. This raises doubt whether some money got lost in the hands of the plaintiffs as alleged and there is a probability that the criminal case was fabricated against the plaintiff to settle scores after he resigned from the 1st defendant’s employment.’

17. In the entire body of the judgment, there is no finding of malice but an inference akin to the standards in criminal prosecution about reasonable doubt as to loss of the money then proceeded to find a probability that the case could have been fabricated on the basis that he had left employment of the appellant. The judgment is silent on what part was played by the appellant as opposed to that by the 2nd respondent but goes the erroneous route that acquittal was sufficient evidence of lack of reasonable and probable cause. In *Robert Okeri Ombeka v Central Bank of Kenya* (2015) eKLR the court of appeal reiterated the position of the law thus:-

“Comparative judicial experience in other jurisdictions also shows an emerging legal principle that an acquittal or discharge in a criminal prosecution should not necessarily lead to a cause of action in malicious prosecution law suits. A malicious prosecution plaintiff cannot establish lack of probable cause based on having obtained in an earlier action an acquittal based on insufficiency of the evidence. Successfully defending a prosecution or a law suit does not establish that the suit was brought without probable cause.”

18. The court therefore finds that the trial court fell into error when it found that what the appellant was alleging could not convince a reasonable man to believe that the 1st respondent had committed an offence. That error was occasion by misapprehension of the evidence and law applicable and it entitles this court on appeal to interfere with the decision reached at trial.



19. . The foregoing holding renders the propriety of the quantum of damages awarded moot but it is worth observing that assessment of damages lies in the discretion of the trial court and that it takes a strong and obvious case of erroneous application of the law and principles or an outright demonstration of overreach for an appellate court to interfere.² Here, nothing shows that the trial magistrate applied the wrong principles in awarding the sum of Kshs 800,000/- as general damages. For that reason, even if the appeal had failed, I would still not disturb the award of damages.
20. Accordingly, for the reasons set out above, this court finds that the appeal is merit and allows the same with costs to the appellant.

DATED, DELIVERED AND SIGNED AT KAKAMEGA THIS 31ST DAY OF MARCH 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Mr. Onsango for the Appellant

No appearance for the 1st Respondent

No appearance for the 2nd Respondent

Court Assistant: Polycap

² See *Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenya) vs Kiarie Shore Stores Limited* [2015] eKLR

