Attorney General v Mohamed & another (Civil Appeal E113 of 2022) [2023] KEHC 24303 (KLR) (24 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24303 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E113 OF 2022

DKN MAGARE, J

OCTOBER 24, 2023

BETWEEN

THE HON ATTORNEY GENERAL .... APPELLANT

AND

ALI MUHUMED MOHAMED .... 1ST RESPONDENT

SAID ABDALLA MBARAK .... 2ND RESPONDENT

JUDGMENT

1. The matter is an appeal from the Judgment of the Honurable E. Muchoki given in Mombasa CMCC 964 of 2019, delivered on 7/7/2022. THIS was a claim for malicious prosecution. The Respondent had prayed for exemplary, aggravated and general damages for wrongful arrest, defamation and malicious prosecution. They also prayed for special damages of Ksh 400,000/= per plaintiff.
2. The Appellant raised the following grounds of Appeal: -
    1. That the Learned Trial Magistrate erred in law and in fact in finding that the plaintiff had proved their case on a balance of probability.
    2. That the Trial Court erred in law and in fact in failing to consider the Appellants pleadings and submissions.
    3. That the learned trial magistrate erred in law and in fact in finding that the plaintiff had proved his claim of malicious prosecution against the Defendant yet the defendant is not the prosecutor.
    4. That the trial magistrate erred in law and in fact in failing to find that the police and the office of the president are not charged with the duty to prosecute which duty is conferred on the Director of public prosecution under Article 157 of *the constitution* of Kenya.

5. That the trial magistrate erred in law and in fact in entering judgment for the plaintiff against the defendant yet the suit was filed contrary to Section 3 of the Public Authority Limitation Act.

6. That the trial court erred in law and in fact in failing to hold it lacked jurisdiction to extend time for filing suit on the basis of mistake of counsel.

The pleadings

3. The plaintiffs filed suit on 28/6/2019 claiming that they were arrested and charged in Mariakani CMCC 205 of 2016 and arraigned on 18/3/2016 for stealing by servant a 3,328.32 litres of petrol, valued at 1,108,189, property of David Onguka, though in the plaintiff it is indicated as property of Ainushamsi Energy Ltd. The offence is said to have occurred at Mariakani, Ainushamsi energy petrol station in Kaloleni sub county of Kilifi county. They went through trial and were acquitted since the Kenya police service failed to proof allegations against them.

4. They claim they lost their jobs. They sated that they incurred expenses to the terms of Kshs. 400,000/=. It was their case that they were granted leave on 9/1/2019 in Chief Magistrate's Court in CMCC Misc. No. 422 of 2018 to Extend time within which to file suit which had expired on 4/6/2019.

5. The limitation period is said to have passed on 21/6/2018.

6. The defendant filed defence dated 21/2/2020. They denied the allegation and denied that the plaintiffs were acquitted for lack of evidence. They denied particulars of mental anguish. They denied the amounts of 400,000/= as loss stated that the suit is time barred by virtue of Section 3 of the limitations of Actions Act. Their view was that the court lacks jurisdiction to entertain the claim.

7. Though they indicated that they were the 2nd Defendants they were the only defendants. They denied loss of jobs.

Proceedings

8. The proceedings were not attached to the record of Appeal. I had to use the original record.

Decision

9. The Court found the Defendant liable and averred a sum of Kshs. 8,400,000/= cost and interest thereon.

Submissions in the lower court

10. The appellant filed submission stating that the nature arose from Mark Gichuru a CPA testified on a value of 1,100,000/= yet Kshs. 8,189 was not accounted for.

11. The Appellant testified that the suit was time barred. Secondly that the Attorney General is sued on the office of the president. It is their view that the case was not established against the defendant.

Duty of the first Appellate court

12. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

13. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

> "…that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

14. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123, where the law looks in their usual gusto, held by as follows;-

> ".. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court … is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

15. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

16. In the case of Peters vs Sunday Post Limited [1958] EA 424, court therein rendered itself as follows:-

> "It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"

17. In Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others (2019) eKLR, Justice D.S Majanja held as doth:

> "General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same."

18. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial Court.

19. The foregoing was settled in the cases of Butter Vs Butter Civil Appeal No. 43 of 1983 (1984) KLR where the Court of Appealed held as follows as paragraph 8.

> "In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of ……is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies…should be taken into consideration."

20. Finally, in deciding whether to disturb quantum given by the Lower Court, the Court should be aware of its limits. Being exercise of discretion the exercise should be done Judiciously conclusively are circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.

21. Therefore, for me to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

22. So my duty as the appellate court is threefold regarding quantum of damages: -

    a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.

    b. To ascertain whether the award is too high as to amount to an erroneously assessment of damages.

    c. The award is simply not justified from evidence.

23. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.

24. Similarly, in the duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows: -

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

25. The foregoing statement had been ably elucidated by Sir Kenneth O'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is, Nance vs British Columbia Electric Co Ltd, in the decision of Henry Hilanga vs Manyoka 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages: -

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

26. For the appellate court, to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

Analysis

27. A case is malicious prosecution is technical in its nature. There must be proof that: -

a. There was no probable case for the arrest.

b. The matter was brought maliciously

c. The was must, that is patent or can be described from the proceedings.

28. In this matter two issues arose:-

a. Whether the prosecution was malicious

b. Whether there was proof the case against the Attorney General.

c. Whether the suit was time barred.

29. I will address the issues seriation.

Limitation

30. A case against government or public authority must be brought within 1 year. Section 3 of the Pubic Authority *Limitation of Actions Act* provides as doth: -

> " 3. Limitation of proceedings
>
> (1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.
>
> (2) No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued.
>
> (3) Where the defence to any proceedings is that the defendant was at the material time acting in the course of his employment by the Government or a local authority and the proceedings were brought after the end of—
>
> (a) twelve months, in the case of proceedings founded on tort; or.."

31. The prosecution occurred on 18/3/2016. The acquittal cured on 20/6/2018. This suit was filed on 28/6//2018. It was outside 1 year limitation. The suit was therefore time barred. Under order 2 Rule 4, it is required that limitation be pleaded so as not to catch the other side by surprise. The same provides as follows: -

> " Matters which must be specifically pleaded
>
> (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—
>
> (a) which he alleges makes any claim or defence of the opposite party not maintainable;
>
> (b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading.

(2) Without prejudice to sub rule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient."

32. The net effect is that unless raised by the plaintiff the defendants ought to raise the issue of limitation. In this case it was already pleaded by the plaintiff that the suit was time bared by 21/6/2018 and they got leave to file suit out of time on 9/1/2018 vide Mombasa CMCC Misc. 422 of 2018.

33. The next question in this Imbroglio is whether: -

a. The court could rightly extent time to file suit against government.

b. Whether leave was properly issued

c. When is the right time to challenge leave granted.

34. It is now settled that leave to file suit out of time is given exparte. In this, therefore the only chance the defendant has to question the leave granted is at the time of hearing.

35. I agree with the holding in the case of John Gachanja Mundia v Francis Muriira & Another [2017] eKLR, where the Court, A. MABEYA stated as doth: -

"25. It was submitted for the 1st respondent that once the leave was granted, the burden of proof shifted to the Appellant to prove that it had not been properly granted. The long thread of cases on this subject from Cozens v. North Devon Hospital Management Committee and Anor [1966] 2 ALL ER 799 to Yunes K. Oruta v. Samuel Mose Nyamato [1988] KLR 490 establish that, an objection regarding the granting of leave to file suit out of time can only be raised at the hearing of the suit. That objection was raised by the appellant and the incidence of proof shifted to the 1st respondent to show that he was deserving the leave he had been granted."

26. The view this Court takes is that, a Defendant can only challenge the leave at the trial by way of cross-examination on the circumstances of late filing of the case. It is only after he successfully mounts such a challenge that the incidence of proof shifts back to the Plaintiff to defend the leave obtained exparte. This happened in the present case but the 1st respondent failed to discharge that burden. Ground number 1 succeeds.

36. The leave was challenged properly at the trial. The Respondent did not defend the leave. More fundamentally, the question is whether the court can grant leave to file suit out of time against government. In other words, did the court have jurisdiction to grant leave to file suit out of time.

37. The limitation against government like contract is cast in stone. There can be no extension of time for matters against government. This is for good measure. Usually in tort, the parties may not know the tort feasor. However, suits under contract and against government the tort feasor is known. The applicant cannot and did not fulfil the requirement for extension of time.

38. The application is based on the fact that the firm of Gikandi overlooked pleadings that they were given. This was an admission that the parties were aware of the time limits and the facts surrounding the suit. There was no ground for extension of time. The same was thus improperly extended. The suit ought to have been struck out for being filed out of time.

39. The other aspect is whether, there was no probable cause. From the proceedings it is clear that the Respondent were acquitted under Section 215 of the Criminal Procedure Code. The proceedings are incomplete but the Respondents were found with a case to answer. The acquittal was due to a mathematical impression between a sum of 1,100,000/= that was lost and Kshs. 1,108,189 was on the charge sheet. They were thus acquitted on a technicality.

40. This appeal must fail. The claim for malicious prosecution must be made against parties who did the prosecution. Secondly there must be no probable cause for instituting the case. In this case, the Court found, under Section 210 of the Criminal Procedure Code that the Defendants had a case to answer.

41. A prima facie case in civil terms was defined in the case of Mrao Ltd v First American Bank of Kenya Ltd& 2 others [2003] eKLR as doth: -

> " 4. A prima facie case in a civil application includes but is not confined to a "genuine and arguable case." It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

42. It means, upon the Court finding there is a case to answer, there is a probable cause. The Complainants are not trained to determine whether there is a probable case. They report for people who took 6 years learning where to find the law, to make decision on a probable cause and a decision to charge. A Complainant has no control over that.

43. In the case of Okiya Omtatah Okoiti v Director of Public Prosecutions; Inspector General of National Police Service & another (Interested Parties) International Commission of Jurists (Kenya Section) (Amicus Curiae) [2022] eKLR, Justice W. Korir, stated as doth: -

> " 202. That the DPP has discretion on the decision to charge was indeed affirmed by the Court of Appeal in Diamond Hasham Lalji & another v Attorney General & 4 others [2018] eKLR when it stated at Paragraph 30 that:
>
> > "...The DPP has formulated "The National Prosecution Policy" 2015 which repealed the 2007 prosecution policy. The policy, amongst other things, stipulates the factors to be taken into account before a decision to prosecute or not to prosecute is taken including the application of evidential test and public interest test and also the factors to be considered before a review of the decision to prosecute or not to prosecute is made."
>
> 203. I agree with the findings in the cited decisions that the investigating officer cannot under whatever circumstances usurp the role of the prosecutor."

44. This means neither the Complainant nor the Investigator are responsible for prosecution. Once the Appellant was placed on his defence, his goose was cooked, fried and eaten. It will be pretentious to

analyse the rest of the evidence upon the finding that they had a case to answer. The surrounding circumstances, equally vindicate the court.

45. A mere fact that a person has been acquitted without more is not a ground to sue for malicious prosecution. This is because the test as set out, correctly in my view, relying on the case of George Masinde Murunga v Attorney-General [1979] eKLR, where Justice E. Cotran, as then he was stated as doth: -

> " As to malicious prosecution the plaintiff must prove four things:
>
> (1) that the prosecution was instituted by Inspector Ouma (there is no dispute as to this);
>
> (2) that the prosecution terminated in the Plaintiffs' favour (there is also no dispute as to this);
>
> (3) that the prosecution was instituted without reasonable and probable cause; and
>
> (4) that it was actuated by malice."

46. There was judicial determination that the Appellant had a case to answer. A case to answer, was held to mean, in the case of Republic v Robert Zippor Nzilu [2020] eKLR, that: -

> " I have considered the material on record as well as the submissions made on behalf of the accused in this ruling where the court is being called upon to decide whether or not the prosecution has made out a prima facie case against the accused that would warrant this court to call upon him to give their defence. In other words, does the accused have a case to answer?

47. In Republic vs. Abdi Ibrahim Owl [2013] eKLR a prima facie case was defined as follows: -

> " Prima facie" is a Latin word defined by Black's Law Dictionary, 8th Edition as "Sufficient to establish a fact or raise a presumption unless disproved or rebutted". "Prima facie case" is defined by the same dictionary as "The establishment of a legally required rebuttable presumption". To digest this further, in simple terms, it means the establishment of a rebuttal presumption that an accused person is guilty of the offence he/she is charged with. In Ramanlal Trambaklal Bhatt v. R [1957] E.A 332 at 334 and 335, the court stated as follows:
>
>> "Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one "which on full consideration might possibly be thought sufficient to sustain a conviction." This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is "some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence". A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence...It is may not be easy to define what is meant by a "prima facie case", but at least it must

mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence."

48. In the case of Ronald Nyaga Kiura vs. Republic [2018] eKLR, the Court held follows:

> " 22. It is important to note that at the close of prosecution, what is required in law at this stage is for the trial court to satisfy itself that a prima facie has been made out against the accused person sufficient enough to put him on his defence pursuant to the provisions of Section 211 of the Criminal Procedure Code. A prima facie case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebuttal is offered by an accused person. This is well illustrated in the cited Court of Appeal case of Ramanlal Bhat -vs- Republic [1957] EA 332. At that stage of the proceedings the trial court does not concern itself to the standard of proof required to convict which is normally beyond reasonable doubt. The weight of the evidence however must be such that it is sufficient for the trial court to place the accused to his defence."

49. This means that the prosecution had evidence, which is not worthless or just a scintilla of evidence. The termination in favour of the Appellant applies at the case to answer stage. It is not always that all cases terminated at the case to answer are to be taken as malicious. It could simply because there was sloven prosecution.

50. Once an accused is placed on their defence, they have passed the Rubicon. There cannot be malicious prosecution. The court having found that they had a case to answer, means that there was a probable cause to complain. This is not to state that if a party is not put on their defence, then it is malicious protection.

51. It is that once a party is put on their defence, they cannot complain that there was no reason to be charged.

52. In this case find worth 1,100,000/= was lost through they were charged for such worth 1,108, 189. It is conceded that it too lost in their case. The court in its wisdoms did not find the accused guilty hence they were given a benefit of doubt. In this matter, we are dealing with a civil standard.

53. There was sufficient evidence that the complaint was well merited. The Respondents alluded to the fact that PW5 was malicious in putting the figure of 5,189 extra. He could not have been, since the lapse was the cause of the acquittal, otherwise the facts disclosed commission of an offence.

54. Lastly, whether the defendant is the right party. After the promulgation of *the Constitution* 2010, the role of protection was placed on the office of the Director of Public Prosecution. The investigations are done by the police.

55. The complaint is also made by a complainant. All these parties were not sued. The Attorney General was not sued on behalf of the said parties. It is important that the state department involved and the complaint be joined to a suit of this nature. It is not enough. It is not enough to sue the Attorney General. The office of the Director of Public Prosecution are the repository of the evidence on protection without them, the Appellant is left without any evidence.

56. It is true that if a defendant failed to tender evidence then their factual defects is useless. However, there can be no evidence to be tendered by the Attorney General as they are not involved from day to day.

57. In the end I find and hold that the court fell into error when he stated that the suit had been proved. There was no proof of malice on part of the defendant. The defendant in any case was a wrong party to be sued.

58. The leave granted was equally underserved and was erroneously issued.

59. The appeal is thus merited and I allow the same in its entirety.

Determination

i. The upshot of the foregoing s that the appeal is merited and I allow the same with costs of Kshs. 175,000/= to the Appellant.

ii. The file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 24TH DAY OF OCTOBER, 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for parties

Court Assistant - Brian