



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 144 OF 2018

PWANI OIL PRODUCTS LTD.....APPELLANT

-VERSUS-

JOSIAH OMONDI OLANG.....RESPONDENT

(Being an appeal from the Judgment and Decree of the Magistrate's Court (Honourable E. Mutunga) Senior Resident Magistrate delivered on 16th July, 2018 in Mombasa Chief Magistrate's Court CMCC No.2053 of 2012)

J U D G M E N T

1. **Pwani Oil Products Ltd** has appealed the Judgment wherein **JOSIAH OMONDI OLANG**, the Respondent herein was awarded damages for wrongful and malicious prosecution. It does not contest that the Respondent was arrested and was to be prosecuted in **Mombasa Magistrates Criminal Case No.3468 of 2008** vide complaints it made to the police. The fact that the Respondent was acquitted is also not contested but the Appellant contends that the malicious prosecution action before the trial court should have been dismissed because the Respondent had not established acts of malice since there was probable cause to charge the Respondent for the offences he was facing before the trial court. However, to shine light to the foregoing, I will outline the background of the case culminating to the instant appeal.

Background

2. The Respondent is an ex-employee of the Appellant company. It was alleged that on diverse dates between **19th September, 2008** and **30th October, 2008** jointly with other servants of the Appellant Company, the Respondent stole from the company 80,000 litres of fuel oil valued at Kshs.4,313,350/=.

3. The genesis of those allegations was an investigation undertaken by one **Justus**, an Accountant at the Appellant company following directions issued to him by the Chief Operations Manager, **Mr. Rajan Ghoshal** to investigate if fuel oil had been delivered on the **30th October, 2008** by **Motor Vehicle Registration No.KAX 250R** as per a weigh bridge ticket **number 11922**.

4. Eventually, the investigations revealed that the motor vehicle had not entered into the premises since the same was not recorded in the gate register although later on at some point, the gate register was altered by inserting the entry.

5. Further, when goods entered the Appellant company premises, a receipt note would be filed but on this particular date, it was averred the Respondent altered the goods receipt note to reflect that **Motor Vehicle**

Registration No.KAX 250R had delivered its fuel load on **30th October, 2008** while knowing that that was not the case and the said motor vehicle had not accessed the premises.

6. The Appellant then made those complaints to the police and later on, the respondent alongside two others were charged vide **Mombasa Criminal Case Number 3468 of 2008** for inter alia the *offences of stealing by servant contrary to Section 281 of the Penal Code, fraudulent false accounting contrary to Section 330 of the Penal Code and stealing contrary to Section 275 of the Penal Code*. They all pleaded **NOT GUILTY** to the charges facing them. Upon full trial, they were acquitted under **Section 215** of the **Criminal Procedure Code** for the reason that the prosecution had failed to prove the case against them to the standard of proof beyond reasonable doubt.

7. The Respondent then resolved to sue his former employer for wrongful and malicious prosecution. In doing so, he filed **Suit No.2053 of 2012** before

the **Chief Magistrate's Court in Mombasa** vide a **Plaint** dated **2nd October, 2012**, in which he averred that the Appellant had caused him

to be prosecuted in malicious proceedings without any justifiable cause given that he was acquitted in all charges against him. The particulars of malice were pleaded as accusing, arresting and charging the Respondent without proper and adequate investigations; charging the Plaintiff without a reasonable or probable cause; and lastly, that it was malicious to prosecute the Respondent without any conclusive evidence.

8. As a result of the prosecution, the Respondent averred that he suffered mental anguish, was traumatized, embarrassment and his image was impaired in the eyes of right thinking members of the society. In the end, he sought the court to award him damages, both general and exemplary for the said malicious prosecution.

9. The Appellant on the other hand, filed a statement of defence and a Counter claim on **1st November, 2012** denying all the allegations by the Respondent, more specifically that the prosecution was malicious. Its case was that it lodged complaints against the Respondent with the police after it had found discrepancies in the office account. The investigations which ensued revealed that the Respondent had been involved in the diversion, misappropriation, theft and/or loss of fuel that had come into his custody while in employment with the Appellant.

10. It is maintained that the decision to prefer the criminal proceedings and/or arrest the Respondent, was unilaterally made by the police and it would be misleading to infer malice or any other improper motive on part of the Appellant simply because the Appellant acted in the *bona fide* discharge of its civil duty to report a crime to the proper authorities.

11. Lastly, the Appellant has averred that although the Respondent had been acquitted of the charges preferred against him, he was not exonerated from the fact that he stole the fuel from the Appellant. The Appellant then counterclaimed against the Respondent and averred that he (the Respondent) colluded with other staff, altered the records of the Defendant to wrongfully reflect receipt of 80,000 litres of fuel oil worth Kshs.4,313,350/= whereas he knew that the said fuel had been diverted for other personal use.

12. Further, the Appellant has averred that it lost use of the fuel and counterclaimed from the Plaintiff the sum of Kshs.4,313,350/= plus interests thereon from the **year 2005**.

Evidence on Trial

13. In support of his case, the Plaintiff/Respondent testified that he used to work for the Appellant Company as a boiler operator and the alterations the Appellant complained of were mere typing errors. He added that it was unfair to be charged on an unascertained facts and offences which he was later acquitted of. To him, the arrest and prosecution were malicious and occasioned him shame, embarrassment, financial expenses, and above all, made him be seen as an offender. He produced receipts marked as **Exhibits "B"** showing costs incurred for travelling, accommodation and court attendance for the case.

14. In cross examination, he conceded that the prosecution was in charge of the case but not the Appellant. Further, that it had been observed that some key witnesses were not called to testify and he was acquitted under **Section 215** of the **Criminal Procedure Code** for lack of evidence.

15. When re-examined, he stated that it was for the Appellant to adduce evidence in support of their case and the complaint presented to the police. He however maintained that there was no theft at all as had been intimated by the Appellant. That besides being malicious, the prosecution led to him losing his job and tainting his name before the public.

16. **DAISY TABITHA** testified on behalf of the Defendant/Appellant. She told the court that she had been working for the Appellant for more than ten (10) years as a laboratory specialist and her major duties were to conduct a test on the goods received and sign the relevant documents. However, on **20th October, 2008**, although she was not at work, a colleague by the name **Simeon Mambo** took her place and it was established that the documents established on that day were forged and the signature therein was not hers. She added that the Appellant was justified to lodge a complaint to the police as it did without any form of malice being inferred.

17. On cross examination, she conceded that she was not at work on **30th October, 2018** and could not tell what happened on that material date. That the documents which are alleged to have been forged were not presented to court or some sort of general audit on those documents conducted. She however backed up the allegation for forgery by stating that she was the only person authorized to sign the documents while she was not the one who had signed the documents under question. As for the Respondent, she confirmed that he was working as boiler operator whereas she was working as a lab technician.

18. Based on the above evidence, the trial court made a conclusion that the Respondent was maliciously prosecuted given that it was upon the laboratory technician to prepare weigh-bridge tickets and goods receipt note and not a boiler operator like the Respondent. The court was also of the view that the Appellant failed to call key witnesses some of whom are alleged to have colluded with the Respondent to alter the goods receipts note and the evidence presented by the Appellant revealed there was no probable cause to warrant the prosecution of the Respondent. The court then went ahead to award the Respondent Kshs.1,200,000/= for general damages, Kshs.50,000/= as exemplary damages and Kshs.68,400/= as special damages.

The Appeal

19. Aggrieved by the trial court's Judgment, the Appellant preferred the instant appeal and approached this court vide its **Memorandum of Appeal** dated **10th August, 2018** wherein it cited eight grounds of appeal as below;

a) *That the learned Magistrate misdirected himself by failing to evaluate the evidence presented by the Appellant clearly*

demonstrating that there was a probable cause to prosecute the Respondent of stealing by servant and in so doing arrived at an erroneous decision.

b) That the learned Magistrate erred in law and in fact by failing to consider the proceedings and the Judgment of Criminal Case No.3468 of 2008 and in so doing, misdirected himself by making a finding that the plaintiff's detention was malicious and not instituted with reasonable and probable cause.

c) That the learned Magistrate erred in law and in fact by considering extraneous matters not pleaded and arriving at the erroneous decision that the prosecution was malicious and one not instituted with reasonable and probable cause against the weight of evidence presented by the Respondent.

d) That the learned Magistrate erred in law by –shifting the burden of proof from the Respondent to the Appellant and in so doing misdirected himself on the law and facts.

e) That the learned Magistrate erred in law and fact by awarding a high and excessive amount of Kshs.1,200,000/= as general damages without any basis in law.

f) That the learned Magistrate erred in law and fact by awarding Kshs50,000/= as exemplary damages without any basis in law.

g) That the learned Magistrate erred in law and fact by failing to consider the submissions of the Appellant and in so doing misdirected himself.

h) That the learned Magistrate erred by making a finding

that the Respondent had proved his case against the Appellant contrary to the evidence presented.

20. By consent of the parties, directions were issued that the appeal be canvassed by way of written submissions and the record reflects that both parties dutifully complied with the Appellant filing its submissions on 27th May, 2021 while the Respondent filed his on 22nd June, 2021.

Appellant's Submissions

21. In their submissions, the Appellant begins by reminding this court of its duty as the first appellate court to analyse and re-evaluate the evidence tendered at trial and make its own conclusion. It goes further to cite the Court of Appeal case of National Oil Corporation –vs- John Mwangi Kaguenu and 2 Others [2019]eKLR, wherein the superior court held thus on an allegation for malicious prosecution, that the Plaintiff must prove that;

a) The prosecution was instituted against him by the Defendant;

b) The prosecution was terminated in his favour;

c) The prosecution was instituted without reasonable and probable cause; and

d) The prosecution was actuated by malice.

22. The Appellant went on to submit that the prosecution of the Respondent was a public one and that it was justified to make complaints for the lost fuel, which was not against any one specifically but against the employees concerned. In any event, the decision to prosecute the Respondent was a decision for the police based on the investigations they had conducted and the Appellant had no control thereof.

23. The Appellant adds that in the criminal case it was merely a witness and had no control of how the evidence was presented so that the fact that the Respondent was acquitted for lack of enough evidence, it is not *prima facie* proof that the prosecution was commenced without reasonable and probable cause.

24. On the contrary, the Appellant submitted that there was a probable cause to complain as it was in the evidence of DW1 that the records of 30th October, 2008 had been manipulated and the record forged to show that she had signed for the goods delivered to the Appellant and there was no evidence whatsoever to show that the complaint and prosecution were malicious.

25. To buttress its submissions, the Appellant has relied on the cases of National Oil Corporation –vs- John Mwangi (supra), James Karuga Kiiru –vs- Joseph Mwamburi & Other [2001]eKLR and Dallison –vs- Caffery [1965] IQB 348, wherein the latter case it was held that the onus of proving that the prosecutor did not act honestly or reasonably, lies on the person prosecuted.

26. According to the Appellant, the trial court failed to appreciate the evidence presented and the fact that the decision to prosecute was the discretion of the police and not the duty of the Appellant. It was also argued that the trial court failed to appreciate the principles set out in binding and persuasive authorities as set above.

Respondent's Submissions

27. For the Respondent, he began by reiterating that he was arrested and kept in custody for 2 days. He maintains that the arrest, prosecution and detention were malicious given that there was no evidence to link him to the offence of stealing by servant and was acquitted on all charges preferred against him. The Respondent submits that he suffered shame and embarrassment as a result of the criminal proceedings. He maintained that there was no probable cause for his prosecution given that the evidence presented was so questionable to prefer the criminal proceedings against him. This is so because as a boiler operator, it was not upon him to prepare weighbridge tickets and the 'goods received' notes. Reliance has been placed on the cases of **Zablon Mwalumba Kadori -vs- National Cereals Produce Board [2005]eKLR**, **Thomas Mboyi Omondi & Another -vs- Lucy Muthoni Stephen & Another** and **Michael Kagoma Maina -vs- Attorney General [2012]eKLR**.

Analysis and Determination

28. I have considered the grounds of appeal, rival submissions filed by either party alongside cited authorities and statute law in line with the proceedings and Judgment of the trial court.

29. It is not every prosecution that is concluded in favour of the accused person that necessarily leads to a successful claim for **malicious prosecution**. So much depends on the absence of a reasonable and probable cause, and the malice or *animus iniuriandi* of the defendant in instigating, initiating or continuing the prosecution. It is widely accepted that reasonable and probable cause means an honest belief founded on reasonable ground(s) that the institution of proceedings is justified. It is about the honest belief by the defendant that the facts available at the time constituted an offence and that a reasonable person could have concluded that the plaintiff was guilty of such an offence.

30. I do agree with both parties and the authorities cited that a reasonable and probable cause would best be based on an honest belief in the guilt of an accused founded on reasonable grounds and on the existence of a state of circumstances, which assuming them to be true, would reasonably lead to 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.

31. The test therefore contains a subjective as well as an objective element in that there must be both actual and reasonable belief on the part of the prosecutor. This is to say that there must be a subjectively honest belief founded on objectively reasonable grounds that the institution of proceedings was justified. A combination of both the subjective and objective tests means that the Defendant must have subjectively had an honest belief in the guilt of the Plaintiff and such belief must also have been objectively reasonable. Therefore such a Defendant will not be liable if he/she held a genuine belief in the Plaintiff's guilt founded on reasonable grounds. In effect, where reasonable and probable cause for the arrest or prosecution exists, the conduct of the Defendant instigating it is not wrongful.

32. Given the above principles, this court has the duty as the first appellate court to analyse and re-evaluate the evidence before the trial court and arrive at its own conclusion, while bearing in mind that it neither saw nor heard the witnesses testify (**See the case of Selle -vs- Associated Motor Boat Co. Ltd [1968] EA 123**). It then follows that having carefully considered the record of appeal and the submissions by the parties, I note that the only issues that fall for determination are;

a) Whether the Respondent proved his case for malicious prosecution against the Appellant to the required standards? And if so,

b) Whether the Appellant is liable to compensate the Respondent in damages for malicious prosecution and what damages should be awarded to the Respondent.

c) Who should bear the costs of the appeal?

33. On the first issue as to whether the Appellant had established a case for malicious prosecution, I note that both parties as shown above have aptly addressed themselves to the law relating to the tort of malicious prosecution as expressed by courts in the numerous cases that they relied on. I agree with the parties that in order to succeed in an action for malicious prosecution, the Plaintiff must prove that;

a) The prosecution was instigated by the defendant;

b) It was concluded in favour of the Plaintiff;

c) There was no reasonable and probable cause for the prosecution;

d) That the prosecution was actuated by malice.

34. Although the first two requirements may appear to be straight-forward, they are no less difficult to prove than the last two. The burden of proving that there is reasonable and probable cause for prosecuting a person is as challenging as proving that the prosecutor was motivated by malice.

35. Considering the above four (4) conditions to be met in a claim for malicious prosecution alongside the facts of the present case, it was not in dispute that criminal proceedings were instituted against the respondent at the instance of a complaint lodged by the appellant through its manager at the Changamwe Police station. Further, that the said criminal proceedings ended in the Respondent's acquittal, in which case, the said proceedings were terminated in the Respondent's favour.

36. Therefore what this court needs to determine is the third and fourth condition as set above, which is, whether the appellant had reasonable or probable cause and/or justification to make the complaint to the police and whether the criminal prosecution was actuated by malice.

37. As I have earlier stated herein-above, a reasonable and probable cause is founded on an honest belief by the defendant that the facts available at the time constituted an offence and that a reasonable person could have concluded that the plaintiff was guilty of such an offence. An important adjunct to the subject matter is the concept of the objective sufficiency of the information available to the prosecutor. It should be reasonably credible and capable of satisfying an ordinary, reasonable, prudent and cautious man to the extent of believing that the accused is probably guilty. In such an instance we can safely say there was a probable cause for the prosecution or that the same has been satisfactorily established.

38. In the instant case, it was the Appellant's case that it acted on its accountant's report which upon auditing, the records revealed that there were some discrepancies in the office accounts, the record having been altered to reflect that a **Motor Vehicle Registration No.KAX 250R** had delivered its consignment of 80,000 litres of fuel oil valued at Kshs.4,313,350/= to the Appellant on **30th October, 2008**, when indeed the said motor vehicle had not accessed the premises on the material date. It also came out that the weigh bridge tickets and goods receipt notes for that material date had been altered and/or forged to reflect that the fuel had been received although that was not the case.

39. That complaint was presented to the police and the police went further to summon DW1, **Tabitha Daisy** who in her evidence before court was the only person authorized by the Appellant to sign the weighbridge ticket as well as the goods receipt notes. She confirmed that on **30th October, 2008** she was not at work and did not sign any document for that day although the weigh bridge and good receipt notes for **30th October, 2008** had been altered to reflect that she was the person who had signed them. She also added that the Respondent was working as a boiler operator on that day and as I can gather from the witnesses who testified in the criminal case, a boiler operator was the person responsible of offloading fuel from the vehicles when the same is brought and would sign the goods receipt note.

40. In acquitting the Respondent, the criminal court made finding that at some point the documents presented before it especially the vehicle movement register showed that **Motor Vehicle Registration No.KAX 250R** had accessed the Appellant's premises, even weighed at the weigh bridge and even the operator involved signed. That court further held that there were key witnesses who had not been called as witnesses and went on to acquit the Respondent for lack of enough evidence. On the other hand, the trial court in the civil case held that since the Respondent had been prosecuted for fake accounting which he was not in charge of, then the prosecution was malicious.

41. In my humble view, the totality of the circumstances under which the Respondent was arrested and charged in court for the offence of theft by servant point to the fact that the said action was taken by the Appellant prematurely before first verifying all the facts of the case. The Appellant purports that it acted on the basis that the weigh bridge ticket and good receipt note had been altered with intentions to defraud it of 80,000 litres of fuel oil. It backed up those allegations on the basis of DW1 who had testified that she was the only person authorized to sign both the weigh bridge ticket and the goods receipt note but on **30th October, 2008** she did not sign those documents but none the less they were signed by some unknown person.

42. It has however not been rebutted that on **30th October, 2008**, DW1 was not at work and this means that her duties were delegated to some other person although the Appellant was not clear on this. It was also shown in the criminal case that the **Motor Vehicle Registration No.KAX 250R** had accessed the premises and a gate pass generated and also the vehicle movement register confirmed the same.

43. In its defence, the Appellant alleged that the details were later inserted to show that the said motor vehicle had entered its premises. The appellant would have acted prudent enough to ascertain from its gate entry records concluded that the said motor vehicle had not accessed its premises. Nonetheless, the invoice for the delivery of the fuel was signed by some representative of the Appellant Company. Therefore, although it was reasonable for the appellant to believe that an offence had been committed or intended to be committed owing to the altered **weigh bridge** and **goods receipt note**, from a reasonable man's point of view, there existed no reasonable grounds to infer that the alleged fuel oil had been stolen.

44. It was incumbent for the Appellant to ascertain whether the quantity of oil it had received was less by 80,000 litres which it accused the Appellant of stealing. In any event, as admitted by DW1, the respondent was employed as a boiler operator and was not at all responsible for signing and/or preparing the weigh bridge ticket or the goods receipt note.

45. Malice can, in the circumstances of this case, be inferred from the hurried and flippant manner in which the Appellant's agents acted on the investigations allegedly conducted and even without involving the respondent or seeking his clarification. It is worthy to note that the Respondent had been working for the Appellant prior to the events that led to the case at hand and therefore the more reason why the appellant ought to have exercised extreme caution and diligence. The Respondent learnt of the allegations against him the moment he was called to the police station.

That is the moment he was arrested. In my view, the manner in which the Appellant conducted its investigations cannot be said to have been prudent, cautious or in good faith, especially by making a rash and premature decision to involve the police in the matter. The police on their part did not tender any defence or evidence before the trial court on how the decision to arrest and charge the respondent was arrived at.

46. Consequently, this court has no option but to find that there was no probable or reasonable cause to warrant the respondent's prosecution. Clearly, from the evidence presented, the police solely acted on the basis of the Appellant's purported investigations without carrying out their own independent investigations in order to verify the Appellant's claim. The failure to carry out independent investigations so as to confirm the veracity of the Appellant's claim as against the Respondent, amounts to malice. In the end, it is this court's finding that the Respondent was not justified in his claim for damages for malicious prosecution.

47. Now, I turn to the second issue which is on the assessment of damages. The underlying principle in law is that an appellate court should not interfere with the exercise of discretion by the trial court when assessing damages unless it is shown that the trial court took into account irrelevant fact and left out relevant factors or when the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.

48. Going by the above principle, I find that the trial Magistrate's exercise of discretion in so far as the award on general damages is concerned was in tandem with the principles stated hereinabove and was therefore exercised judicially. It is therefore my finding that the award of Kshs.1,200,000/= as general damages made to the Respondent was justified.

49. With regard to exemplary damages, my understanding is that Punitive or exemplary damages are awardable only under two circumstances, namely *(i) where there is oppressive, arbitrary or unconstitutional action by the servants of the government; and (ii) where the Defendant's action was calculated to procure him some benefit not necessarily financial, at the expense of the Plaintiff.* (See the Court of Appeal exposition in the case of **Obongo & Another –vs- Municipal Council of Kisumu [1971] EA 91**). Clearly in this case the Respondent did not qualify for the award on exemplary damages taking into consideration that he was only held in police custody for two days and thereafter released. Neither did he establish that the arrest and/or prosecution by the police was not oppressive, arbitrary or unconstitutional nor did he establish that the Appellant was acting in some manner geared to procure some benefit at his (the Respondent's) expense. In the premises, the award on exemplary damages for Kshs.50,000/= is hereby set aside.

50. Lastly on special damages, it is trite in law that special damages must not only be specifically claimed (pleaded) but also strictly proved and they should not be considered as direct natural or probable consequence of the act complained. In the instant case, the Respondent never pleaded with specificity the amounts he was claiming as special damages. The Respondent ought to have pleaded with some degree of certainty and particularity than merely alleging in the plaint that he was claiming for expenses incurred in travelling and incidentals, advocates, terminal benefits and loss of earnings. Consequently, for failing to properly plead for special damages with specificity, I am of the view that the claim ought to fail and award made by the trial court for Kshs.68,400/= on special damages is hereby equally set aside.

51. In conclusion, and in view of the foregone discussion, the following orders do issue;

a) Appeal is allowed in part.

b) Accordingly, Judgment entered in favour of the Respondent and the award of Kshs.1,200,000/= as general damages is hereby upheld.

c) Kshs.50,000/= as exemplary damages and Kshs.68,400/= as special damages are hereby set aside.

d) Each party shall bear its own costs.

It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT MOMBASA THIS 28TH DAY OF JANUARY , 2022.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Omangi Gichora counsel holding brief Mr. Kevin for the Appellant

No appearance for the Respondent

Court Assistant – Bancy