IN THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 12 OF 2019

CHELESTINO NGOCHI NGARI.....APPELLANT

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

IRERI NYAGA.....2ND RESPONDENT

(Being an Appeal arising from the judgement of the SPMC at Siakago Civil Suit No. 23 of 2017 dated 5th July 2018)

JUDGMENT

1. The appellant having been dissatisfied with the judgement delivered on the 5.07.2018 by the SPM Thomas T. Nzyoki in Siakago SPMCC 23/2017 and having obtained leave to appeal out of time in Embu Misc. 71/2019 on 5.03.2019 appeals against the said judgment and sets forth the following grounds of appeal:

i. *That the trial magistrate erred in law and in fact in arriving at an erroneous judgement which is against the weight of evidence tendered.*

ii. *That the trial Magistrate erred in law and in fact by making a finding that the prosecution was not malicious or found on ill-will whereas there was evidence before him that the prosecution did prosecute the appellant without there being any act of trespass at all and this is adequate malice/ ill-will.*

iii. *The trial Magistrate erred in law and in fact in not finding that there was malice and ill will for prosecution to have failed to source relevant evidence material to wit the map of the position on the ground alleged to have been trespassed to satisfy itself that the position was part of the complainant land before prosecuting the appellant.*

iv. *That the trial Magistrate erred in law and in fact in not finding malice and ill-will in the face of overwhelming evidence as borne out in the judgment of Justice Bwonwonga on 14.06.2016 that the position on the ground alleged to have been trespassed was an access road for use by members of the public and prosecuting the appellant for this is malice and ill-will.*

v. *In view of grounds 1, 2, 3 and 4 the trial magistrate failed to address himself to what it is that amounts to malice, ill-will or lack of foundation or basis to mount a prosecution without relevant evidence and hence misdirected himself and dismissed the appellant's case for malicious prosecution unjustly and therefore prays that the appeal herein be allowed with costs to the appellant and damages as prayed in the lower court.*

2. The appellant herein instituted a suit against the respondents in the trial court being Siakago SPMCC No. 23 of 2017- Chelestino Ngochi Ngari v Attorney General & Ireri Nyaga. It was the case of the appellant that he had previously been arrested by police from Kiambere Police Station on 31.01.2011 in relation to a complaint reported by the 2nd respondent that he had trespassed on the 2nd respondent's land parcels No.4527 and 4591 at Riachina Adjudication section in Mbeere District. What ensued thereafter was that, the appellant was locked up at Kiambere Police Station and the following day charged with the offense of trespass in Siakago Criminal Case No.68/211. It was his case that a full trial ensued which culminated into a judgment delivered on 29.01.2013 when the appellant was convicted and sentenced to a fine of Kshs.500.00. That the appellant herein appealed the sentenced vide Embu High Court Appeal No.65/2013 upon which the appeal was allowed.

3. It is upon this background that the appellant filed Civil Case 23/2017 at Siakago Law Courts against the respondents for malicious prosecution, pain and suffering, special damages, interests and costs. Following which judgment was delivered on 05.07.2018 whereupon the appellant's case was dismissed with costs.

4. The appellant being dissatisfied with the said judgment of the trial court filed the appeal herein.

5. Directions were taken that the appeal be disposed off by way of written submissions wherein the appellant submitted that the trial magistrate erred in law in and in fact in finding that the appellant had not laid evidence to support his claim for malicious prosecution and that the trial court proceeded to ignore all the appellant's evidence. It was his case that despite the 1st and 2nd respondents having failed to defend themselves, the trial court still proceeded to dismiss his case.

6. The appellant thus prayed that the appeal be allowed; the lower court's judgment be set aside and judgment be entered against the respondents jointly as prayed.

7. As the first appellate court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Selle & Ano. v Associated Motor Boat Co. Ltd (1968) EA 123**). Further it is settled that an appellate Court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or on a misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. (See **Mwanasokoni v Kenya Bus Service Ltd (1982-88) 1 KAR 278** and **Kiruga -vs- Kiruga & Another (1988) KLR 348).**

8. I have certainly perused and understood the contents of the pleadings that were filed before the lower court, proceedings, judgment, grounds of appeal, submissions and by the appellant. I have further evaluated the evidence as was presented before the trial court and it is my considered view that the issue which this court is invited to determine is whether the instant appeal is merited.

9. The legal principle established by section 107 of the Evidence Act is that whoever asserts a fact is under an obligation to prove it in order to succeed (burden of proof). In civil cases, the degree of certainty with which a fact must be proved to satisfy the court of the fact (standard of proof) is that of balance of probabilities (See **Miller v Minister of Pensions [1947] 2 All ER 372**). Section 109 on the other hand captures the evidential burden. These two provisions were dealt with in **Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334,** in which the Court of Appeal held that:

> ***"As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in Sections 109 and 112 of the Act."***

10. The commonly accepted essential ingredients of malicious prosecution are as follows:

> ***i. The prosecution ought to have been instigated by the defendants.***
>
> ***ii. That the matter was finalized in the plaintiff's favour.***
>
> ***iii. The prosecution or its continuance was actuated by malice on the part of the defendants. [See Murunga v The Attorney General {1997} KLR 138]***

11. The definition of malice as defined in **Salmon on tort** means,

> ***"the presence of some improper and wrongful motive that is to say, an intent to use the legal process in question for some other than its legally appointed and appropriate purposes*** **[**See **Sitre v Waedrum {1952} Lloyd's Rep 431, 451].**

12. It would be natural to suppose that the plaintiff in a claim for malicious prosecution ought to demonstrate that there is connection in initiating investigations, arrest and subsequent prosecution for the impugned offence yet it is possible to claim that the nature and content of the criminal offence was in every respect motivated by combined factors aimed at an abuse of the Court process. The connection of thread which runs throughout the quest for action of general damages in a malicious prosecution is settled in **Mbowa v East Mengo District Administration {1972} EACA (EA) 352.** The outstanding characteristics for consideration by the Court is that the indictment complained of was determined in his favour and that, in so prosecuting the plaintiff, the defendants did so maliciously.

13. There could exist circumstances where, the respondent in setting in motion the criminal process, there was distortion of the truth in order to achieve an unjustified end. This is the element commonly referred to as the defendants/respondents acting without reasonable and probable cause not only in prosecuting the plaintiff/appellant but in subjecting him to investigations, arrest and detention for purposes of undergoing the criminal proceedings. In order to succeed, the plaintiff's case must be brought within the threshold in **Hicks v Faulkner {1878} 8Q.B.D. 167, 171** – where **Hawkins J** said:

> ***"I should define reasonable and probable cause to be an honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds of the existence of a state of circumstances which, assuming to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accused to the conclusion that the person charged was probably guilty of the same imputed."***

14. That each of the four essential elements or requirements of malicious prosecution as set out in **Murunga case (supra)** and **Mbawa case** must be fulfilled by the appellant herein in order to succeed for an award of damages against the respondents.

15. Murphy on evidence 11th Edition {2009} expressed the context as follows:

> ***"If the claimant fails to prove any essential element of his claim, the defendant will be entitled to Judgment. The position of the***

defendant is somewhat different. Since the claimant affirmatively asserts his claim, he bears the burden of proving the claim, and the defendant assumes no legal burden of proof by merely denying the claim. However, if the defendant asserts a defence which goes beyond a mere denial sometimes referred to as an affirmative defence, the defendant must assume the legal burden of proving such defence. An affirmative defence is most easily recognized by the fact that it raises facts in issue which do not form part of the claimant's case."

16. The basis of the appellant's claim is that the 1st and 2nd respondents set the law in motion against him without probable or reasonable cause for doing so, and that the 1st respondent acted without any reasonable belief in the truth of the information received from the 2nd respondent.

17. It is undisputed that the plaintiff was arrested by the police, locked in police custody and later arraigned in Court. It is also undisputed that the 1st respondent prosecuted the matter on behalf of the state, which upon appeal, terminated in the appellant's favour. At this juncture, it may be safe to hold the view that the 1st and 2nd issue for determination was satisfied since the proceedings in question were initiated and prosecuted by the defendants and terminated in the appellant's favor.

18. However, the mere fact that a person has been acquitted of criminal charges does not necessarily prove malice on the part of the defendants. In **James Karuga Kiiru v Joseph Mwamburi & 3 others, Nairobi Civil Appeal No. 171 of 2000,** it was held that:

"To prosecute a person is not prima facie tortious, but to do so dishonestly or unreasonably. The question that the Court has to ponder is whether the prosecution or its continuance was actuated by malice on the part of defendant(s)."

19. In light of the foregoing, the law is clear that an arresting officer has a right to arrest and detain a suspect where he has reasonable suspicion of commission of an offence. A person who arrests a suspect must have sufficient information justifying the arrest of the suspect. The arresting officer is also under a duty to ensure that prior to effecting an arrest on a suspect, he has verified the information or reports he has. The information that he relies on must be sufficient so as to cause a reasonable person to believe that an offence was committed. If he does not properly employ his mind and the report turns out to be false, the arrest becomes unlawful.

20. The appellant maintains the argument that he was maliciously prosecuted. The Director of Public Prosecution is the body charged with the responsibility to prosecute or initiate criminal proceedings [See **Article 157 (6) (a) of the Constitution**]. The next inquiry is whether there was reasonable and probable cause for setting the law in motion. As I have mentioned earlier, a person is said to have reasonable and probable cause to commence or continue the prosecution if he has reasons to believe that an offence has been committed and that institution of proceedings against the accused person is justified. The plaintiff has submitted that he was arrested at night, held in the cells and on the following day arraigned in court.

21. Thus, in the instant matter, to escape liability, a respondent placed in this situation ought to show that he had an honest belief which was based on reasonable grounds that the appellant had committed the offence in issue and that the institution of proceedings was justified. He must be aware of the nature and elements of the offence. It must be showed that any reasonable man placed in the position of the 1st respondent would be of the same view that an offence had been committed.

22. I have perused the proceedings of the trial court in the criminal matter in question. The appellant was arrested and charged with the offence of trespass to private land. On cross examination, the appellant admitted that he was arrested at night and thereafter arraigned in court on the following day.

23. To prove malice on the part of the 1st respondent, the appellant must provide evidence that exhibits a malicious intent/an improper and wrong motive which has an intention to start the legal process for some other purpose than its appropriate purpose. The appellant has to prove that the prosecution was personal and spiteful rather than for the public interest or benefit. [See **Chrispine Otieno v AG {2014} eKLR].**

24. In this case, it is not disputed that the said land parcels 4527 and 4591 were still under adjudication and so it is given that rights under an adjudication area as in this instance, are provisional in nature until that time as confirmed by the final adjudication authorities. From the court records, DW 3 (David Munohe) who testified before the trial court stated that he was the district land surveyor wherein the suit land is situated and further produced a registered index map (R.I.M) which generally showed that there was an access road between the two parcels of the lands herein. Bwonwonga, J. in quashing the decision of the trial court stated that:

"….I find as credible the evidence of the appellants, which is supported by that of the land officers ought to have been believed. I find that this was a purely civil dispute that could only be resolved by the adjudication authorities at the conclusion of the adjudication process. And this explains why the complainant only produced a letter from the district Land Settlement to show that he was the owner of the two parcels….titles could only be issued at the conclusion of the adjudication process.''

25. Section 3(2) of the Trespass Act states that:

(1) ….

(2) Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.

26. In regards to section 3 (2) above, it is incumbent upon the accused person to prove that he had all the rights to use the property and in this case, the access road between the two parcels owned by the 2nd defendant. But that notwithstanding, in **Prabulal v R (1971)EA 52**,where the

court held that **before the statutory burden of proof is shifted to the accused, the prosecution has to lay some factual by calling witnesses before the statutory burden of proof would shift to the accused person.** In the instant case, the prosecution carried out by the police as agents of the Attorney General ought to have called evidence from the land adjudication authorities to show that that there was no access road, before the burden would shift to the appellant herein.

27. In **James Karuga Kiiru v Joseph Mwamburi & Others [2001] eKLR** the court stated:-

> ***…however, the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect…On the other hand it would be obviously absurd to make a defendant liable because matters of which he was not aware put a different complexion upon facts, which in themselves appeared a good case for prosecution. But neglect to make a reasonable use of the sources of information available before instituting proceedings would be evidence of want of reasonable and probable cause and also malice. It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but whether there is a reasonable and probable case for a prosecution. Circumstances may exist in which it is right before charging a man with misconduct to ask for an explanation but no general rule can be laid down."***

28. A prosecution can either be mounted based on an offence committed in the presence of law enforcement officers or by way of a complaint lodged by a person to the said officers or agencies. However, the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. I am in agreement with the decision in the case of **G.B.M Kariuki v Attorney General (2016) eKLR where** the learned Judge at **page 20** held**;**

> ***"…Malice however, can either be express or can be gathered from the circumstances surrounding the prosecution. A prosecution can either be mounted based on an offence committed in the presence of law enforcement officers or by way of a complaint lodged by a person to the said officer or agencies. However, the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any prosecution arm of the government is not a mere conduit for complainants. The police must act impartially and independently on respect of a complaint and are expected to carry out through investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect…. I say "ordinarily" because the mere fact that the version of one of the parties is not considered does not make the subsequent prosecution malicious.***
>
> ***However, where the police deliberately decide not to take into account the version of the suspect and act on a story that eventually turn out to be improbable and which no ordinary prudent and cautious man would have relied upon, that failure may constitute lack of reasonable and probable cause for the purposes of malicious prosecution.***
>
> ***On the other hand it would be obviously absurd to make a defendant liable because matters of which he was not aware put a different complexion upon facts, which in themselves appeared a good case for prosecution. Neglect to make a reasonable use of the sources of information available before instituting proceedings would be evidence of want of reasonable and probable cause and also malice.***
>
> ***Nonetheless, it is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but whether there is a reasonable and probable case for a prosecution. Circumstances may exist in which it is right before charging a man with misconduct to ask for an explanation but no general rule can be laid down."***

29. In the given circumstances, the appellant was charged with trespass upon private land contrary to section 3(1) as read with section 11 of Trespass Act and while such crucial evidence as that of the land adjudication officers was never called by the prosecution in my humble view, shows that there was lack of diligence on the part of the prosecution in failing to investigate properly and availing crucial evidence. This is so since the 2nd respondent had only presented a letter before the court to show that he was the owner of the suitland instead of a title deed. The casualness with which the investigations and the prosecution of the said criminal case was conducted as shown in the proceedings leaves the court in serious doubt as to whether the 1st respondent honestly believed in the probable guilt of the appellant and truth of the prosecution.

30. I reiterate that it was upon the 1st respondent's/investigating officers concerned to countercheck the 2nd respondent's complaint as well as any exonerating material gathered from the said investigations in order to prove that there was probable and reasonable material upon which a successful prosecution could be mounted against the appellant. I say so since Bwononga J. was clear in his judgment and in acquitting the appellant that the conviction entered against the appellant is not supported by evidence since it is the duty of the police to ensure that proper investigations are carried out and not to assume that every arrested person must be prosecuted for the offence that he is suspected to have committed, simply because a report has been made.

31. Therefore under the subjective test I am satisfied that on the evidence adduced in this matter, a reasonable, prudent and cautious man would not have been satisfied based on the material availed that the 1st respondent had a proper case to put before the court of law for the prosecution of the appellant. As was held by **Ojwang, J** (as he then was) in **Nairobi HCCC No. 1729 of 2001 – Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another**:

> ***"Unless and until the common law tort of malicious prosecution is abolished by Parliament, policemen and prosecutors who fail***

> ***to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense... I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State's prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes". [****emphasis added****].***

32. In the end, I find and hold that the plaintiff has proved on a balance of probabilities that the 1st respondent maliciously prosecuted the appellant when there was no reasonable cause to.

33. The other issue is **whether the appellant is entitled to an award of damages and if so what damages are awardable to the appellant for malicious prosecution.**

34. With respect to general damages for malicious prosecution, the Court must take into account the applicable principles as was held in the **Uganda case of Dr. Willy Kaberuka v Attorney General Kampala HCCS No. 160 of 1993 that:**

> ***"The plaintiff suffered injury to his reputation….He spent a period of over four months appearing in court on charges, which were hardly investigated by the defendant's servants. He must have suffered the indignity and humiliation. He is also entitled to recover damages for injuries to his feelings especially the possibility of serving a sentence…There are no hard and fast rules to prove that the plaintiff's feelings have been injured or that he has been humiliated as this is inferred as the natural and foreseeable consequence of the defendant's conduct. The plaintiff's status in Society is also a relevant consideration and for all these reasons the plaintiff is entitled to damages…A plaintiff who has succeeded in his claim is entitled to be awarded such sum of money as will so far as possible make good to him what he has suffered and will possibly suffer as a result of the wrong done to him for which the defendant is responsible". [emphasis added].***

35. In ***Republic v. Rosemary Wairimu Munene (Ex parte Applicant) v Ihururu Dairy Farmers Co-operative Society Ltd*** **Judicial Review Application** ***No. 6 of 2004*** *Mativo J.* held that the issue of costs is the discretion of the Court and is used to compensate the successful party for the trouble taken in prosecuting or defending the case and not to penalize the losing party. [See ***Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another [2016] eKLR]***.

36. The import is that a successful party is entitled to costs unless he or she is guilty of any misconduct or there exists some other good reasons and or cause for not awarding costs to the successful party.

37. The drift therefore is that it is not on every issue that success will bring a right to the costs. As ***Kuloba notes in Judicial Hints (supra)***, in case of total success, the successful party may be deprived of the costs of a separate issue on which he was unsuccessful.

38. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In ***Morgan Air Cargo Limited v Evrest Enterprises Limited [2014] eKLR*** the court noted that;

> ***"The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that ''Cost follow the event'' was driven by the fact that there could be no ''one-size-fit-all'' situation on the matter. That is why section 27(1) of the Civil Procedure Act is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case."***

39. It is clear from the evidence adduced in the court and the applicable law that this was purely a civil matter, which should have been dealt with in a civil court, if the adjudication authorities were unable to resolve the dispute. The appellants should have complained to the Land Adjudication authorities concerning the access road and not to re-open the road themselves. The appellant approached this court with unclean hands by cutting trees on the two suit lands without following well laid down procedures in seeking for redress and therefore, in my view, he is only entitled to a minimal award in general damages.

40. In the premises, I therefore hold that: -

i. *The appeal has merits.*

ii. *I hereby award the appellant an amount Kshs. 50,000/= as general damages.*

iii. *Kshs. 149,200/= as special damages.*

iv. *Each party to bear his costs of the appeal and that of the lower court.*

41. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 26TH DAY OF JANUARY, 2022.

L. NJUGUNA

JUDGE

…….....FOR THE APPELLANT

……..……..FOR THE 1ST RESPONDENT

……..……..FOR THE 2ND RESPONDENT