



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 16 OF 2016

(An appeal arising from the judgment of Hon. LN Nafula, Senior Principal Magistrate, delivered on 19th January 2016, by Hon. TA Odera, Principal Magistrate, in Mumias SPMCCC NO. 35 of 2012)

FRED ATEMBA.....APPELLANT

VERSUS

JOHN ABUTI ABUYABO.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

PC BILDAD SUMBA.....3RD RESPONDENT

JUDGMENT

1. The suit at the primary court was for compensation for malicious prosecution and false imprisonment, arising from Mumias SRMCCRC No. 1270 of 2006, where the appellant had been charged with stealing contrary to section 273 of the Penal Code, Cap 63, Laws of Kenya. The respondents were served but they never appeared, and the appellant obtained an *ex parte* judgment, which he formally proved on 13th August 2013. He said the 1st respondent caused his arrest and detention, by the police, for one day, before he was produced in court. He said the report to the police by the 1st respondent was false, and the police did not conduct investigations. The trial court found that malice was not proved, and dismissed the suit.

2. The appellant was aggrieved by the dismissal of the suit, hence the instant appeal. His grounds are that the trial court erred in finding that he had not proved his case on a balance of probability, considered extraneous matter, arrived at a wrong and unjust decision, and failed to consider all the evidence that he had tendered.

3. Directions were taken on 21st June 2021, for the canvassing of the appeal by way of written submissions. I have perused the record before me, and I have not seen any written submissions, filed by either of the parties.

4. What constitutes malicious prosecution has been discussed in such cases as *Kagane vs. Attorney General* [1969] EA 643 (Rudd J), *Egbema vs. West Nile District Administrator* [1972] EA 60 (Sir William Duffus P, Law Ag VP and Lutta JA), *Katerregga vs. Attorney General* [1972] EA 287 (Mead J) and *Murunga vs. Attorney General* [1979] KLR 125 (Cotran J). There are four essential elements - that the prosecution was instituted by the respondents, it terminated in favour of the appellant, it was instituted without reasonable and probable cause, and it was motivated by malice. See also *Mbowa vs. East Meno District Administration* [1972] EA 352 (Sir William Duffus P, Lutta & Mustafa JJA), *Simba vs. Wambari* [1987] KLR 601 (Mbaluto J), *Music Copyright Society of Kenya vs. Tom Odhiambo Ogowl* [2014] eKLR (Majanja J), *Chrispine Otieno Caleb vs. Attorney General* [2014] eKLR (Odunga J), *Stephen Gachau Githaiga & another vs. Attorney General* [2015] eKLR (Mativo J) and *Bethwel Omondi Okal vs. Attorney General & another* [2018] eKLR (Mwita J).

5. In the instant case, the trial court dismissed the matter primarily on the ground that malice was not proved.

6. I have looked at the record. It is clear that there was a prosecution of the appellant. The 1st and 3rd respondents had something to do with it, for the 1st respondent was the complainant, who caused the 3rd respondent to arrest the appellant, by making a report about him and identifying him as the suspect to the 3rd respondent. That would mean that the first two elements of the tort were established. However, was it established that there was a reasonable or probable cause; or that the prosecution was malicious?

7. The trial record in Mumias SRMCCRC NO. 1270 of 2006, indicates that the proceedings were initially heard by Hon. SN Abuya, Resident Magistrate. He took the evidence of two prosecution witnesses, being the 1st respondent herein, who was the complainant, and another. Hon.

Abuya was then transferred, and the file was allocated to Hon. Wandere, Senior Resident Magistrate. On 10th February 2010, the defence took directions, for the matter to start *de novo*. Curiously, when the hearing resumed, the court took the evidence of a witness who it recorded as the third prosecution witness, PW3, after PW1 and PW2, who had testified, before Hon. SN Abuya. Thereafter, the court found the appellant had no case to answer, as the complainant had not been presented to testify afresh after the *de novo* order was made on 10th February 2020. The appellant was subsequently acquitted.

8. It is trite that the mere fact of an acquittal or withdrawal of a criminal prosecution or termination of a criminal prosecution in any way or form, is not a basis for finding that there was malicious prosecution. The plaintiff must establish that the prosecution had no basis or foundation or probable cause, or that it was actuated by malice. See *Nzoia Sugar Company Limited vs. Fungututi* [1988] eKLR (Platt, Apaloo JJA & Masime Ag. JA) and *Robert Okeri Ombaka vs. Central Bank of Kenya* [2015] eKLR (**Githinji, Musinga & Mohammed JJA**).

9. That should come out clearly from the case presented by the prosecution. If the prosecution failed, because no witnesses were available to testify, that would not suffice as proof of a malicious prosecution. Indeed, prosecution witnesses ought to testify, so that the civil court can assess, from their testimonies, whether the prosecution case, as presented before the criminal court, had any foundation or basis or probable cause. Where the prosecution failed to present witnesses, for whatever reason, and the case collapsed, there would be no foundation for the civil court, before whom a claim for malicious prosecution is presented, to conclude, without such evidence, that the prosecution case was either not properly grounded or was driven by spite or ill-will or improper motive.

10. The criminal case, in Mumias SRMCCRC NO. 1270 of 2006, was to start *de novo*. After the *de novo* order was made, only one witness was presented. A police officer. She had nothing to do with the case. She was not the one who had investigated it. She was not the one who had arrested the appellant and had him locked up. None of the key players in the matter, who would have presented facts to demonstrate that the case had or had no foundation, did not testify. There was, therefore, no material upon which the trial civil court could assess whether or not the prosecution was without foundation.

11. The fact that there was no material, placed before the trial criminal court, which the appellant could use to demonstrate lack of probable or reasonable cause for the prosecution or that the prosecution was actuated by malice, the burden was on him to place before the civil court other evidence to demonstrate the point that the prosecution was malicious or not properly founded. That is to say evidence other than what was in the trial record in Mumias SRMCCRC No. 1270 of 2006, which would have demonstrated that the charges were improbable or unreasonable, or were driven by malice. He could do so by dwelling on the relationship between him and the complainant, the 1st respondent, which could have motivated or caused the 1st respondent to conjure up charges against him, to achieve some ulterior motive of his own, and to have colluded with the police and the prosecution in furthering the said ulterior motive. No such independent evidence was placed before the civil court. The appellant was just happy to prove that the prosecution terminated in his favour. Yet, that of itself was not adequate.

12. The title or nomenclature for the tort is malicious prosecution. The prosecution must be shown to have been driven by some malice or spite or ill-will or wrongful motive. Without such, there can be no malicious prosecution. The appellant made no attempt to prove any of that, and the trial court was justified to find that malice was not proved. See *Susan Mutheu Muia vs. Joseph Makau Mutua* [2018] eKLR (C. Kariuki J), *Patrick Nyamuke Etori vs. National Police Service Commission & 2 others* [2019] eKLR (Mwita J) and *Dickson Chebuye Ambeyi vs. National Police Service & another; Peter Sifuna Wesonga & another (Interested Parties)* [2020] eKLR (Musyoka J).

13. A part from malicious prosecution, the appellant was also claiming damages for false imprisonment. The court made no finding on false imprisonment. I cannot fault it for not doing so, for the appellant did not seek to demonstrate that his arrest was false. The detention of a suspect becomes of false if it exceeds the twenty-four hours allowed in law, before presentment in court on arraignment. See Article 49(f) of the Constitution of Kenya 2010. The appellant did not testify on when he was arrested and arraigned in court, to demonstrate that he was held in custody for more than the twenty-four hours allowed in law, to make his arrest and pre-arraignment detention false. The appellant has not raised any issue on this in his appeal, and I shall be happy to leave it at that.

14. Overall, there is no merit in the appeal, and I hereby dismiss the same. I note that the 1st respondent has been attending court religiously, but he filed no documents, so I shall not impose any costs in his favour. The other respondents stayed completely clear of the appeal.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 25th DAY OF February 2022

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Mr. Mwebi, instructed by CM Mwebi & Company, Advocates, for the appellant.

John Abuti Wabuyabe, 1st respondent, in person,