REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. 38 OF 2019

MARGARET NDEGE.....1ST APPELLANT

JOHANES ODHIAMBO.....2ND APPELLANT

JUSTUS OTIENO.....3RD APPELLANT

GABRIEL OMONDI.....4TH APPELLANT

VERSUS

MOSES ODUOR ADEMBA.....RESPONDENT

(Appeal from the judgment and decree of Hon C.N. Sindani in Ukwala SRM Civil Suit No. 49 of 2018 delivered o 14th August, 2019)

JUDGMENT

Introduction

1. The four appellants herein having been dissatisfied with the judgment of the Honourable trial magistrate, C.N. Sindiani delivered on the 14th August 2019 lodged this appeal on 29.8.2019 seeking inter alia that the appeal herein be allowed with costs and the judgement on award of Kshs. 150,000 to the respondent be set aside and the appellants' counterclaim be assessed and damages awarded to the appellants. The appellants relied on the following grounds:

> *a) That the learned trial Magistrate erred in law and in condemning the appellants to pay Kshs. 150,000 to the respondent, when the appellants had been tried and found not culpable.*
>
> *b) That the learned trial Magistrate erred in law in dismissing the appellants' counter-claim and in not assessing at all what the appellants would have been entitled to in damages.*
>
> *c) That the learned trial Magistrate erred in law in relying on the respondent's exhibits which according to the law were just pieces of paper.*

2. The genesis of the dispute between the parties hereto is that the respondent herein **MOSES ODUOR ADEMBA** instituted suit against the appellants jointly and severally seeking damages of Kshs. 531,183 as general damages for the loss incurred as a result of the destruction and cutting down of his trees. In response, the appellants filed a joint statement of defence wherein they denied the Respondent's claim and they also counterclaimed for general damages for malicious prosecution.

3. In its judgement, the trial court found in favour of the respondent to the tune of Kshs. 150,000 being proven expenses of the value of the destroyed fence erected on the land that he had procured. The trial court dismissed all the respondent's other claims. The appellants' claims were also dismissed. Each party was to bear their own costs.

4. The appeal was canvassed by way of written submissions but only the appellants' counsel filed submissions. The respondent did not file his submissions despite being given adequate time.

Appellant's Submissions

5. It was submitted that the award of Kshs. 150,000 to the respondent was without any legal basis as the receipts produced by the respondent in support of his claim lacked any Revenue Stamps and thus contravened the provisions of Section 19 (1) (a & b) of the Stamp Duty Act.

6. The appellants further submitted that they were tried on three counts and acquitted on two the basis upon which they laid their claim for malicious prosecution and false imprisonment and as such, the trial magistrate erred by failing to award the damages of Kshs. 350,000 that they had prayed for.

Analysis of evidence and Determination

7. This being a first appeal, this court is under a duty to examine matters of both law and facts and subject the whole of the evidence to afresh and exhaustive scrutiny, drawing a conclusion from that analysis bearing in mind that this court did not have an opportunity to hear the witnesses first hand and test the veracity of their evidence and demeanor. This is captured by section 78 of the Civil Procedure Act, Cap 21, Laws of Kenya, which espouses the role of a first appellate court as to ***'…… re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.'*** The principles were buttressed by the Court of Appeal in the case of **Peter M. Kariuki vs. Attorney-General [2014] eKLR** where court stated that;

> ***"We have also, as we are duty bound to do as a first appellate court, reconsider the evidence adduced before the trial court and revaluated it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See Ngui v Republic, (1984) KLR 729 and Susan Munyi v Keshar Shiani, Civil Appeal No. 38 of 2002 (unreported)."***

8. Having considered the evidence adduced before the trial court and the grounds of appeal as submitted on by counsel for the Appellants, the issues to be determined in this appeal are whether the evidence adduced before the trial court was sufficient to warrant the award of Kshs. 150,000 to the respondent and whether the trial magistrate erred in failing to award damages to the respondent for malicious prosecution and false imprisonment.

9. From the trial court record, PW1, the respondent testified that he was the registered owner of LR No. Ugenya/Ligala/2136 and produced a title deed to this effect, as an exhibit. The respondent also told the court that on 13/5/2017 the appellants trespassed onto his land and in the process destroyed his fence which he valued at Kshs. 150,000. The respondent produced receipts to this effect. It was the respondent's testimony that trees were cut by the appellants on his land which trees he valued at Kshs. 153,163. In cross-examination, the respondent stated that he was not aware that his land was curved out of East Ugenya/Ligaga/867. He admitted that he was the complainant in the 3 charges brought against the appellants and further that the receipts he provided did not have revenue stamps. In re-examination, the respondent stated that the appellants did not oppose the production of the receipts he sought to rely on.

10. The 1st appellant testified as DW1 and her evidence was adopted for her co-appellants. It was her testimony that LR No. Ugenya/Ligala/867 belonged to her late husband. She denied knowledge of the existence of the respondent's parcel and stated that she had been charged with 3 counts and found innocent of two and as such she was to be compensated for malicious prosecution. In cross-examination, she stated that she was charged in court and given a chance to defend herself. It was her testimony that she was convicted on one charge alone for which she was sentenced to six months' imprisonment but ended up only serving four after which she was released.

Determination

11. The burden of proof in civil cases on the balance of probability was defined in the case of **Kanyungu Njogu v Daniel Kimani Maingi [2000] eKLR** that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other.

12. From the evidence adduced there is no doubt that the respondent's fence was destroyed by the appellants as he proved ownership of the land upon which the fence was destroyed, by production of a title deed.

13. It is further not denied that the respondent incurred an expense of Kshs. 150,000 in buying materials for the fence and erecting it. The only point of departure is that the appellant's assert that the trial court erred in awarding the respondent compensation for the destroyed fence whereas the respondent's receipts lacked revenue stamps and could thus not be admitted as evidence as provided for under section 19 (1) (a & b) of the Stamp Duty Act. The said section provides that;

> ***"19. Non-admissibility of unstamped instruments in evidence; and penalty***
>
> ***(1) Subject to the provisions of subsection (3) of this section and to the provisions of sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except—***
>
> ***(a) in criminal proceedings; and***
>
> ***(b) in civil proceedings by a collector to recover stamp duty, unless it is duly stamped.***
>
> ***(2) No instrument chargeable with stamp duty shall be filed, enrolled, registered or acted upon by any person unless it is duly stamped."***

14. Regarding this issue of payment of revenue, in the case of **Leonard Nyongesa v. Derick Ngula Right, Mombasa Civil Appeal No. 168 of 2008 [2013] eKLR**, Hon. Kasango, J. was of the opinion that:

> ***"... a receipt for which payment of stamp duty is required under the Stamp Duty Act is admissible in evidence on condition that the person issuing the same takes it for stamp duty assessment before the court can attach any probative value to it. In my***

opinion, if that is not done, the court cannot award any damages based on such a receipt..."

15. However, the Court of Appeal, in **Paul N. Njoroge v Abdul Sabuni Sabuni [2015] eKLR** was of a contrary view. It held that:

> ***"The finding is often made by lower courts that documents which do not comply with the Stamp Duty Act, Cap 480, Laws of Kenya were invalid and inadmissible in evidence. But this Court has held that to be erroneous and accepts the view it took in the case of Stallion Insurance Company Limited v. Ignazzio Messina & Co S.P.A [2007] eKLR..."***

16. The Court proceeded to reiterate it position on the matter by emphasizing the position earlier adopted by **Law J.** (as he then was) in **Suderji Nanji Limited v Bhaloo [1958] EA 762** that:

> ***"...before holding a document inadmissible in evidence on the sole ground of its not being properly stamped, the court ought to give an opportunity to the party producing it to pay the stamp duty and penalty ... The appellant has never been given the opportunity to pay the requisite stamp and the prescribed penalty on the unstamped letter of guarantee on which he sought to rely in support of his claim against the 2nd Defendant/Respondent and he must be given the opportunity...We would adopt similar reasoning in finding that the trial court was in error in peremptorily rejecting evidential material on account of purported non-compliance with the Stamp Duty Act. At all events, the act itself provides a penal sanction for failure to comply with the provisions thereunder, but this is subject to proof..."***

17. In this case, the receipts were never objected to before the lower court. Indeed, the appellants did not object to production of the receipts by the respondent on account that they did not have stamp duty affixed. Nonetheless, in view of the decisions by the Court of Appeal that lack of stamp duty on receipts does not render the receipts inadmissible, the ground of appeal fails and is dismissed.

18. On whether the appellants were entitled to compensation for malicious prosecution and false imprisonment, the 1st appellant based her claim on the fact that despite being charged on three counts, she was only convicted on one. The respondent on his part admitted that he was the complainant in all the charges brought against the appellants.

19. For an action to succeed in malicious prosecution, certain conditions must be demonstrated. The legally acceptable criteria was set out by Cotran, J. in the High Court decision of **Murunga v The Attorney General (1979) KLR 138** as well as by Rudd, J in **the Kagane v Attorney General (1969) EA 643** as follows: -

> ***"a) The plaintiff must show that the prosecution was instituted by the defendant; or by someone for whose acts he is responsible;***
>
> ***b) That the prosecution terminated in the plaintiff's favour.***
>
> ***c) That the prosecution was instituted without reasonable and probable cause;***
>
> ***d) That the prosecution was actuated by malice;"***

20. The following discussion was taken up by Justice G. V. Odunga in the case of **Chrispine Otieno Caleb v Attorney General (2014) eKLR** in expounding the foregone principles. The Judge referred to several decisions on the issue and in the following manner:

> **"32. "The law surrounding the tort of malicious prosecution is well settled in this country. In Mbowa v East Mengo District Administration [1972] EA 352, the East African Court of Appeal expressed itself as follows:**
>
> > ***"The action for damages for malicious prosecution is part of the common law of England...The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than for the public benefit. It originated in the medieval writ of conspiracy which was aimed against combinations to abuse legal procedure, that is, it was aimed at the prevention or restraint of improper legal proceedings...It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion of the truth. Its essential ingredients are: (1) the criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority; (2) the defendant must have acted without reasonable or probable cause i.e. there must have been no facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified; (3) the defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose; and (4), the criminal proceedings must have been terminated in the plaintiff's favour, that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge...The plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must "unite" in order to create or establish a cause of action. If the plaintiff does not prove them he would fail in his action. The damage that is claimed is in respect of reputation but other damages might be claimed, for example, damage to property...The damage to the plaintiff results at the stage in the criminal proceedings when the plaintiff is acquitted or, if there is an appeal, when his conviction is quashed or set aside. In other words, the damage results at a stage when the criminal proceedings came to an end in his favour, whether finally or not. The plaintiff could not possibly succeed without proving that the criminal proceedings terminated in his favour, for proving any or all of the first three essentials***

of malicious prosecution without the fourth which forms part of the cause of action, would not take him very far. He must prove that the court has found him not guilty of the offence charged...The law in an action for malicious prosecution has been clearly defined and in so far as the ordinary criminal prosecution is concerned the action does not lie until the plaintiff has been acquitted of the charge. In this case the respondent could have brought his action for malicious prosecution until the prosecution ended in his favour. He could not have maintained his action whilst the prosecution was pending nor could he have maintained an action after he had been convicted. His right to bring the action only accrued when he secured his acquittal of the charge on appeal, and he then had the right to bring this action for damages...Time must begin to run as from the date when the plaintiff could first successfully maintain an action. The cause of action is not complete until such a time, and in this case this was only after he was acquitted on appeal".

33. In **Egbema v West Nile Administration [1972] EA 60,** it was held:

"False imprisonment and malicious prosecution are separate causes of action; a plaintiff may succeed on one and fail on the other. If he established one cause of action, then he is entitled to an award of damages on that issue...For the purposes proof that the criminal proceedings have been determined in the appellant's favour it is enough that the criminal proceedings have been terminated without being brought to a formal end. The fact that no fresh prosecution has been brought, although five years have elapsed since the appellant was discharged, must be considered equivalent to an acquittal, so as to entitle an appellant to bring a suit for malicious prosecution...There was no finding that the prosecution instituted by Uganda Police was malicious, or brought without reasonable or probable cause. The Uganda Police, unlike Administration Police, are not servants or agents of the respondent...The decision whether or not to prosecute was made by the Uganda Police, who are not servants of the respondents after investigation. There is no evidence of malice on the part of the respondent. The appellant was an obvious suspect as he was responsible for the security of the office from which the cash box disappeared. It cannot be said that there was no reasonable and probable cause for the respondent instigating a prosecution against the appellant. The actual decision to do so was taken by the Uganda Police. As the Judge has made no finding as to whether the instigation of the prosecution was due to malice on the part of the respondent, this Court cannot make its own finding. The circumstances of this case reasonably pointed to the appellant as a suspect and there was not sufficient evidence that in handing the appellant over to the Uganda Police for his case to be investigated and, if necessary, prosecuted, the respondent was actuated by malice".

34**.** In **Gitau v Attorney General [1990] KLR 13,** Trainor, J had this to say:

"To succeed on a claim for malicious prosecution the plaintiff must first establish that the defendant or his agent set the law in motion against him on a criminal charge. Setting the law in motion" in this context has not the meaning frequently attributed to it of having a police officer take action, such as effecting arrest. It means being actively instrumental in causing a person with some judicial authority to take action that involves the plaintiff in a criminal charge against another before a magistrate. Secondly he who sets the law in motion must have done so without reasonable and probable cause…The responsibility for setting the law in motion rests entirely on the Officer-in-Charge of the police station. If the said officer believed what the witnesses told him then he was justified in acting as he did, and the court is not satisfied that the plaintiff has established that he did not believe them or alternatively, that he proceeded recklessly and indifferently as to whether there were genuine grounds for prosecuting the plaintiff or not. The Court does not consider that the plaintiff has established animus malus, improper and indirect motives, against the witness".

21. Turning to the matter at hand and on the first principle, it is clear that the proceedings in the criminal case were instituted after complaints were lodged by the respondent.

22. The second principle relates to how the criminal proceedings were terminated. I have carefully perused the proceedings in the criminal case. The appellants were acquitted of two charges and convicted of one.

23. On the aspect of the prosecution having been instituted without any reasonable and probable cause, **Salmond**, a legal scholar in his book **Salmond on the Law of Torts** defines reasonable and probable cause to mean:-

"…. a genuine belief, based on reasonable grounds, that the proceedings are justified."

24. Rudd, J in the **Kagane** case (supra) adopted the definition of Hawkins, J in **Hicks v Faulkner (1878) 8 QBD 167** where reasonable and probable cause was defined as follows:

"Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonable 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 crime imputed. This definition was relied upon also in the case of Thomas Mboya Oluoch & another –vs- Lucy Muthoni Stephen & another (2005) eKLR (appellant's list of authorities). The prosecutor must himself honestly believe in the case which he is making. The defendant (in this case the respondent) is not required to believe that the accused is guilty: it is enough if he believes there is reasonable and probable cause for a prosecution. He need only be satisfied that there is proper case to lay before the court. If the prosecution is based on information received, it was held in the Kagane case cited above that, "……. the information must be reasonably credible, such that an ordinary reasonable prudent and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for the prosecution."

25. In **James Karuga Kiiru v Joseph Mwamburi & 3 Others (2001) eKLR** the Court held:

"…. To prosecute a person is not prima-facie tortuous but to do so dishonestly or unreasonably is. And the burden of proving that the prosecutor did not act honestly or reasonably lies on the person prosecuted."

26. And, in **Simba v Wambari (1987) KLR 601** reasonable and probable cause was defined as:

"…. The Plaintiff must prove that the setting of the law in motion by the Inspector was without reasonable and probable cause..... if the inspector believed what the witnesses told him then he was justified in acting as he did and I am satisfied the plaintiff has not demonstrated that he did not believe them or alternatively that he proceeded recklessly and indifferently as to whether there were genuine grounds of prosecuting the plaintiff or not..."

27. In the instant case, there is no evidence of malice, no evidence of unlawful actions, no evidence of excess or want of authority, no evidence of harassment or intimidation or even of manipulation of court process so as to seriously deprecate the likelihood that the appellants' did not get a fair hearing and trial as provided for under Article 50 of the Constitution.

28. It is not enough to simply state that the criminal proceedings were malicious. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the appellants were under serious threat of being undermined by the criminal prosecution. In the absence of concrete grounds for supposing that a criminal prosecution is an "abuse of process", is a "manipulation", "amounts to selective prosecution" or such other processes, or even supposing that the appellants did not get a fair trial as protected in the Constitution, it is not mechanical enough that the existence of an acquittal on two out of three charges is sufficient enough to amount to malicious prosecution and false imprisonment.

29. In the humble view of this court. The arrest, confinement and prosecution of the Appellants was not instituted without reasonable and probable cause. There were reasonable grounds for the arrest, confinement and prosecution of the Appellants.

30. Nevertheless, was the said prosecution actuated by malice? In **Joseph C. Mumo v Attorney General & Another (2008) eKLR** 'malice' was defined as:

"… prosecution for a reason other than the vindication of justice..."

31. Malice is hence demonstrated when an action is taken for some improper and wrongful instance or interest to use the legal process in question for some other reason than its legally appointed and appropriate purpose. Malice, however, can either be express or can be gathered from the circumstances surrounding the prosecution by imputation. This was so rightly held in the **Kagane** case (supra) thus: -

".....want of reasonable and probable cause to be taken into consideration as being some evidence of malice..."

32. The law remains very clear that the mere fact that a person has been acquitted of criminal charges does not necessarily connote malice on the part of the prosecution. In **Nzoia Sugar Company Ltd v. Fungututi (1988) KLR 399** the Court of Appeal held that:

"Acquittal person on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecutor....."

33. Having found that there was every reasonable and probable cause that led to the arrest, confinement and prosecution of the Appellants, it naturally follows that there was equally no malice that was demonstrated on the part of the Respondent or the relevant government agencies in undertaking the arrest, confinement and prosecution of the Appellants.

34. ***The upshot of the above is that the instant appeal is found to be devoid of any merit and therefore it is hereby dismissed. As the respondent did not file any submissions to challenge the appeal, I order that each party bear their own costs of the appeal as dismissed.***

35. Orders accordingly.

Dated, Signed and Delivered at Siaya this 22nd Day of March, 2021

R.E. ABURILI

JUDGE

In the presence of:

A Clerical staff from the appellant's counsel's office

CA: Modestar and Mboya