



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CIVIL APPEAL NO. 2 OF 2017**

**JOHN MURIGU WACHIRA.....APPELLANT**

**VERSUS**

**PETER IRERI NTHIA.....1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The appellant, *John Murigu Wachira* was the plaintiff in Embu CMCC No. 287 of 2014. He sued the two respondents seeking general damages for malicious prosecution and special damages in the total sum of KShs.82,000 as well as costs of the suit and interest.

2. The trial court's record shows that upon being served with summons, the respondents filed their respective statements of defence denying liability as alleged. The record also reveals that despite the fact that the 2<sup>nd</sup> respondent had filed a memorandum of appearance on 22<sup>nd</sup> February 2016 together with a statement of defence dated 19<sup>th</sup> October 2015, upon application by the appellant vide a Notice of Motion dated 21<sup>st</sup> March 2016, interlocutory judgment was entered in favour of the appellant against the 2<sup>nd</sup> respondent on 5<sup>th</sup> May 2016.

3. In his statement of defence, the 2<sup>nd</sup> respondent denied liability stating that the appellant's prosecution was mounted in accordance with the law on the basis of investigations conducted on a legitimate complaint made to the Kenya police.

4. During the trial, the appellant and the 1<sup>st</sup> respondent testified in support of their respective cases but the 2<sup>nd</sup> respondent did not participate in the trial.

5. In his judgment delivered on 25<sup>th</sup> January 2017, the learned trial magistrate made a finding that the appellant had failed to prove his case to the required legal standard and dismissed it with costs to the respondents. The appellant was aggrieved by this decision hence this appeal.

6. In his memorandum of appeal dated 24<sup>th</sup> February 2017, the appellant listed eleven grounds of appeal in which he principally complained that in making his decision, the learned trial magistrate erred in law and fact by : dismissing his suit even though there was interlocutory judgment in force against the 2<sup>nd</sup> respondent who had failed to defend the suit; rendering a judgment which was ambiguous and which was not based on the evidence on record and by ignoring the arguments he had advanced during the trial.

7. This being a first appeal to the High Court, it is an appeal on both facts and the law. I am fully alive to my duty as the first appellate court which as succinctly summarized by the Court of Appeal in the case of *Abok James Odera T/A A.J. Odera & Associates V John Patrick Machira & Company Advocates, [2013] eKLR* is to:

***“ ..... re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”***

8. I have carefully considered the grounds of appeal, the evidence presented before the trial court and the parties' rival written submissions. Having done so, I find that the only issue which crystallizes for my determination is whether the learned trial magistrate erred in dismissing the appellant's suit with costs on grounds that he had failed to prove his claim to the required legal standard.

9. The appellant in his submissions emphasized that the learned trial magistrate erred in dismissing his suit because at the time of making his decision, interlocutory judgment had already been entered against the 2<sup>nd</sup> respondent for failure to file a memorandum of appearance and defence and that his decision was against the weight of the evidence on record.

10. The 1<sup>st</sup> respondent in his submissions urged me to find that he was not a proper defendant in the suit as the appellant's claim was

predicated on the tort of malicious prosecution which ought to have been made against the 2<sup>nd</sup> respondent because it is the 2<sup>nd</sup> respondent who decided to prefer charges against the appellant. He argued that he was within his rights to report the accident to the police. Further, the 1<sup>st</sup> respondent supported the trial court's decision arguing that it was based on the law and the evidence presented before the court.

11. Starting with the appellant's claim that the trial court erred in dismissing the suit when there was at the time interlocutory judgment in force in his favour against the 2<sup>nd</sup> respondent, it is my view that though the learned trial magistrate did not apparently address his mind to this fact, it is my finding that the interlocutory judgment in question was entered erroneously considering that it was entered on 5<sup>th</sup> May 2016 which was over two months after the 2<sup>nd</sup> respondent had entered appearance and filed his statement of defence.

12. In addition, I am not convinced that there was evidence of proper service of the plaint and summons to enter appearance on the 2<sup>nd</sup> respondent on 4<sup>th</sup> June 2015 as stated in the affidavit of service sworn by *Mr. James Igati Mwai* which supported the appellant's request for entry of the default judgment against the 2<sup>nd</sup> respondent. The copy of summons on which the 2<sup>nd</sup> respondent allegedly acknowledged service of the summons was not annexed to the affidavit of service as deposed in paragraph 1 of the affidavit.

13. The learned trial magistrate does not appear to have interrogated the court record and the affidavit of service to satisfy himself that the 2<sup>nd</sup> respondent had been properly served with summons and had indeed failed to enter appearance or file a defence before allowing the Notice of Motion dated 21<sup>st</sup> March 2016. I am thus satisfied that the interlocutory judgment entered against the 2<sup>nd</sup> respondent was irregular and nothing turns on the trial court's failure to take it into account when arriving at its decision.

14. Besides, entry of the default judgment albeit irregularly did not absolve the appellant from his responsibility of proving his claim that he had suffered loss and damage as a result of a malicious prosecution instituted by the respondents and that he was therefore entitled to an award of damages. Even if the default judgement was regularly entered, the appellant still had the burden of proving his claim against both respondents on a balance of probabilities -See: ***Karugi & Another V Kabiya & 3 Others [1983] eKLR***

15. The next question that I must now determine is whether the learned trial magistrate erred in his finding that the appellant failed to prove his case to the required legal standard.

16. To resolve this issue, it is important to understand what constitutes the tort of malicious prosecution.

Malicious prosecution is an intentional tort designed to provide redress to persons who suffer loss or damage as a result of an unjustified and baseless prosecution. For a plaintiff to successfully sustain a claim for malicious prosecution, he or she must prove the following:

a) **That the prosecution was initiated and instituted by the defendant or his agents.**

b) **That the prosecution was initiated without reasonable and probable cause.**

c) **That the prosecution was actuated by malice.**

d) That the prosecution was terminated in the plaintiff's favour.

17. As held by the Court of Appeal in ***Mbowa V East Mengo District Administration [1972] EA 352***, **all the above four ingredients of the tort must be proved together to establish the claim. In the words of the Court:**

***"... 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. ..."***

18. In this case, it is evident from the plaint which instituted the suit in the trial court that the appellant's cause of action was founded on claims that he was arrested and charged in Embu Chief Magistrate's Traffic Case No. 662 of 2011 with the offence of careless driving; failing to report an accident and failing to stop after an accident contrary to *Sections 49 (1), 73 (b) and 71 (1) of the Traffic Act*; that the prosecution was false and malicious and that after trial, he was acquitted of all the charges.

19. Having studied the pleadings and the evidence on record, I find that it was not disputed that the 1<sup>st</sup> respondent reported to the police that he had been hit from behind by a motor vehicle registration number KAV 278P following which the appellant was arrested and charged with the aforesaid traffic offences. It is also evident that the prosecution terminated in his favour as he was acquitted of the charges under *Section 215 of the Criminal Procedure Code*.

20. In his evidence before the court, the appellant reiterated his pleadings that his prosecution was founded on baseless allegations but he admitted having been the driver of the aforesaid motor vehicle when the accident in question occurred. In cross-examination, he testified that the 1<sup>st</sup> respondent did not make any mistake when he reported the occurrence of an accident in which he was injured. He produced a typed copy of the trial court's proceedings in the traffic case in support of his case.

21. In his evidence before the trial court, the 1<sup>st</sup> respondent narrated how the accident involving him and the vehicle being driven by the appellant occurred on 4<sup>th</sup> January 2011. His evidence was supported by the evidence of PW2 and PW3 who were passengers in that vehicle as well as the evidence of PW4, a doctor who confirmed having seen treatment notes and a discharge summary showing that the 1<sup>st</sup> respondent had sustained injuries following involvement in the accident. PW5 confirmed that the accident had been reported at Embu Police Station and gave an account of the basis upon which the appellant was prosecuted for the traffic offences.

22. Upon my own appraisal of the evidence and all material presented before the trial court, I am satisfied that there was sufficient evidence to prove as a fact that an accident involving the 1<sup>st</sup> respondent and the subject vehicle which was being driven by the appellant occurred on the material date. As correctly admitted by the appellant, the 1<sup>st</sup> respondent, having been injured in the accident had every right to report the same to the police. The appellant in my view failed to tender any evidence to prove that the report made to the police by the 1<sup>st</sup> respondent was false and malicious and that his prosecution was instituted on behalf of the 2<sup>nd</sup> respondent without any reasonable and justifiable cause.

23. The fact that the 2<sup>nd</sup> respondent did not offer any evidence during the trial is immaterial since the burden of proof lay on the appellant and not on the respondents. The law as set out in *Sections 107 to 109* of the *Evidence Act* is clear that he who alleges must prove. The appellant having alleged that his prosecution was false and malicious had the burden of proving as a fact that his prosecution lacked any factual or legal basis. The appellant failed to discharge that burden.

24. Having failed to prove one of the four essential elements of the tort of malicious prosecution and considering that all the four ingredients must be proved together before the tort is established, it is my finding that the learned trial magistrate was correct in his finding that the appellant had failed to establish his case against both respondents to the standard required by the law. I am thus satisfied that this appeal lacks merit and it is hereby dismissed with costs.

It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF MARCH 2021.**

**C. W. GITHUA**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT EMBU THIS 18TH DAY OF MARCH 2021.**

**L. NJUGUNA**

**JUDGE**

**In the presence of:**

No appearance for the appellant

Ms Muriuki holding brief for Mr. Ithiga for the Respondents

Esterina: Court Assistant