



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CORAM: R. MWONGO, J.

CIVIL APPEAL NO. 48 OF 2017

MUSIC COPYRIGHT SOCIETY OF KENYA.....1ST APPELLANT/APPLICANT

DANIEL ANJWANG.....2ND APPELLANT/APPLICANT

MILKA CHEPTOO.....3RD APPELLANT/APPLICANT

-VERSUS-

RICHARD CHERUIYOT TANUI.....1ST RESPONDENT

NYAMIRA LUXURY EXPRESS.....2ND RESPONDENT

THE ATTORNEY GENERAL.....INTERESTED PARTY

(Being an appeal from a Judgment of the CM'S Court Naivasha in *Civil Case No. 899 of 2012, R. M. Kitagwa - RM*)

JUDGMENT

Background

1. Richard Cheruiyot Tanui (the Plaintiff/1st Respondent) was driving a bus belonging to the Nyamira Luxury Express Company Limited along Maai Mahiu Narok Road on 26th October, 2011, when he was flagged down by police officers. They inspected the bus and found that he did not have a Music Licence Sticker from the 1st Defendant/Appellant. The second defendant/appellant was present with the officers. He also inspected the vehicle for payment of a licence on behalf of the 1st defendant, Music Copyright Society of Kenya.
2. The plaintiff and his bus were escorted to Maai Mahiu Police Station and detained. Eventually, the bus management posted cash bail and the bus proceeded on its journey. According to Tanui, he was later charged and acquitted in Criminal proceedings in Naivasha CMCC No. 3175 of 2011 Republic v Richard Cheruiyot Tanui. He produced as Exhibit 1 the said proceedings of the Criminal trial and the Ruling of no case to answer.
3. The charge against Tanui was infringement of copyrighted musical works contrary to **Section 38 (2)** as read with **Section 38 (7)** of the **Copyright Act, 2001**, Laws of Kenya.
4. The particulars of the charge were that while being a driver of a public vehicle registration number KBK 805D plying Mai Mahiu Narok Road he knowingly caused a public performance of copyrighted music work through a device radio without the authority/licence of the copyright owner/collector administration of copyright music, Music Copyright Society of Kenya.
5. After being acquitted for no case to answer the plaintiff sued the Music Copyright Society of Kenya, its officers and the Attorney General on behalf of the police for malicious prosecution.
6. In the suit, the trial court found against the defendants and awarded the plaintiffs damages jointly and severally against the defendants as follows:

- a. General damages for malicious prosecution - Kshs 400,000

b. Special damages - Kshs 100,000

c. Costs of the suit and interest on costs

7. Dissatisfied with the judgment of the lower court the 1st to 3rd appellants have appealed on the following summarized grounds:

1. The trial magistrate erred by giving 1st to 3rd appellants the role of the Kenya Police as provided in the National Police Services Act, whilst ignoring the provisions of the Act.

2. The learned magistrate erred in fact and law by ignoring the appellants' submissions and the legal authorities in malicious prosecution.

8. In the suit before the trial court, the plaintiff's claim was that: he was detained for several hours on false allegations of infringement of the Copyright Act; that he was basically charged; that the prosecution commenced on 27th November, 2011 and concluded with his acquittal on 2nd August, 2012 during which time he suffered humiliation and mental anguish for the baseless claims. He alleged that the prosecution was actuated by malice by the defendants jointly and severally. In paragraph 11 of his plaint the plaintiff set out the alleged particulars of malicious prosecution.

9. The appellants submit that they have powers under **Section 35** of the **Copyright Act** to complain to the police when there is an infringement of copyright law; that the appellant is a collection society charged with collection of royalties on behalf of members; that the legal duty to prosecute lies in the police who are not agents of the appellants; that it was the 3rd respondent, the police, represented by the Attorney General, who arrested and prosecuted the 1st and 2nd Respondents; and that the trial court failed to appreciate that these facts are the constitutional role of the National Police Service in the Criminal Justice System.

10. The appellants cited the cases of *Nzoia Sugar Co. Ltd v Fungutuli [1988] eKLR*, *Susan Mutheu Muia v Joseph Makau Mutua [2018] eKLR*, *Music Copyright Society of Kenya v Tom Odhiambo Ogowl [2014] eKLR* and *Bethwel Omondi Okal v Attorney General & another [2018] eKLR*. They submit that in these cases the learned judges held that a complainant cannot be held liable in a malicious prosecution case; and acquittal, per se, of an accused is not a sufficient basis for a suit of malicious prosecution.

11. The respondents submit as follows: that the Attorney General despite being jointly found liable, he has not filed an appeal; that the 1st and 2nd respondents being civilians and not coercive powers or enforcement machinery; that they enlisted the police to fulfil their mandate; that the police had no business enforcing the mandate of the 1st appellant; that the learned magistrate duly addressed her mind to the law and legal principles on malicious prosecution.

12. Further the respondent submitted that all the issues addressed to the court by all parties were exhaustively dealt with in the trial court's determination; that the appellants have not specifically challenged the quantum of damages awarded and thus there is no basis to interfere with it; that it is the police who conduct investigations and that 1st, 2nd and 3rd appellants were specialist agents enforcing rules donated by an Act of Parliament; and that it was they who isolated the statutory transgressions to the police.

13. The respondent relied on the Court of Appeal **Case No. CA 251 of 2017 National Oil Corporation v John Mwangi Kaguenyu & 2 Others**.

Analysis and Determination

14. Having heard the parties' submissions and considered the material placed before me, I find that the sole issue for determination is whether the appellants maliciously prosecuted the respondents.

15. The principles of the tort of malicious prosecution were set out in **George Masinde Murunga v Attorney General [1979] KLR 138**. They are:

i. The defendant instituted the prosecution against the plaintiff.

ii. The prosecution ended in the plaintiff's favour.

iii. The prosecution was instituted without reasonable and probable cause.

iv. The prosecution was actuated by malice.

16. There can be no dispute that the first two principles are fulfilled in this case and need no further comment.

17. The next question is, was the prosecution in this case instituted without reasonable and probable cause?

18. The trial magistrate carefully considered two aspects of this question: whether the prosecutor had reasonable and probable cause to institute a criminal prosecution; and whether the investigating officer had reasonable and probable cause to recommend the institution of a criminal prosecution. In both cases, the trial magistrate answered in the negative, after perusing the evidence in the criminal case. In this regard, referring to the sole Defence witness in the criminal trial, Milkah Cheptoo, 3rd Appellant herein, the trial court also stated that:

“.....there was an inspector whose work was to conduct inspection and then seek the assistance of the police for arrest if any wrong was detected. Having that knowledge as a person running the Copyright Music Society, the inspector would not have asked the police to arrest the driver. He ought to have satisfied himself that the radio was playing music that had a copyright. In all honesty why would you direct the arrest when you know well that you cannot establish if at all that music had a copyright and therefore an infringement? What was the motive of arrest and pushing for cash bail to be paid in the circumstance?”

19. The trial magistrate concluded that *“there was no evidence adduced to support the prosecution of the plaintiff”*, and that the “prosecutor was under duty to reject any recommendation for prosecution that did not pass the legal test”. Consequently, she found that punitive damages should issue.

20. In the criminal case, **Section 38 (2)** of the **Copyright Act** was invoked to charge the respondent/plaintiff with infringement of copyrighted musical works. The Section provides:

“38 (2) Any person who causes a literary or musical work, an audio-visual work or a sound recording to be performed in public at a time when copyright subsists in such work or sound recording and where such performance is an infringement of that copyright shall be guilty of an offence unless he is able to prove that he had acted in good faith and had no reasonable grounds for supposing that copyright would or might be infringed.” (Emphasis added)

21. That provision makes the performance in public of copyrighted works an infringement and an offence. **Section 35 (1)** of the Act defines “infringement” inter alia as follows:

“35 (1) Copyright shall be infringed by a person who, without the licence of the owner of the copyright -

a. does, or causes to be done, an act the doing of which is controlled by the copyright; or

b. imports, or causes to be imported, otherwise than for his private and domestic use, an article which he knows to be an infringing copy.”

22. In this case there was no evidence available that there was performance in a public place copyrighted works. DW2 Milkah Cheptoo in the civil case who was the star witness in the earlier criminal case, is a Licensing Officer with the Music Copyright Society. She testified that the bus was stopped and inspected and it was found that their licence had expired. The inspector who testified in the criminal case but not in the civil case, Daniel Ajwang, also said the bus licence sticker was expired. He said the bus had a radio but they did not remove it, or take photographs of it, or obtain its serial number. He said the radio was playing Kisii music and he could not tell whether it was copyrighted.

23. Clearly, as found by the trial court and the criminal court, the investigations done were incapable of supporting a charge of public performance of copyrighted material. To that extent I agree with the lower court that the prosecution was initiated without reasonable and probable cause. The only wrongdoing that the plaintiffs could potentially have faced was failure to renew a copyright licence, but there is no such offence in law.

24. The final issue which must be proved in malicious prosecution cases is whether the prosecution was actuated by malice.

25. In my view, the initial arrest and detention for statement taking was allowable under the copyright law and not unreasonable in the circumstances.

26. **Section 42** of the **Copyright Act** allows a police officer with or without a warrant to arrest any person suspected on reasonable grounds to have committed an offence under the Act. The plaint at paragraph 8 complains that the bus was ordered to be driven to Maai Mahiu Police Station where it was detained for several hours as statements and charges were drawn up on infringement of the Copyright Act.

27. In **James Karuga Kiiru v Joseph Mwamburi & 3 Others [2001] eKLR** it was held:

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

28. What was the evidence in the present case? PW1 testified that the bus had previously had a radio and hence a Music Copyright licence which had expired in 2010. He said the bus had no radio at the time of arrest but also that *“the radio had been spoilt”*. To me that is prevarication. DW1 said she did not go to the bus herself and *“did not confirm that there was a working radio”*. In cross-examination she said that if the radio does not function, the person is not required to pay royalties.

29. In the criminal case in the lower court, however, the testimony was that there was a radio and it was playing Kisii music. In my view, there was or had been a radio in the bus at some time or at the material time, but the police and Music Copyright Society of Kenya inspectors did not care to obtain its details such as serial number or a photograph of it. Without evidence of a radio or other device capable of playing music, the decision to prosecute was purposeless; further, without evidence that copyrighted material was being publicly played or performed the decision to prosecute was doomed to fail.

30. The complainant in the criminal case was the Music Copyright Society. Its officers, including an inspector under the Copyright Act, gave evidence. There was a police investigator involved in investigating the alleged offence. The Music Copyright Society of Kenya are undoubtedly a royalty collection and enforcement society. They have the expertise and technical knowledge to identify copyrighted music

and type of equipment that reproduces or plays it. The police and the Music Copyright Society of Kenya, acting together, made the decision to proceed with the prosecution of the offence. I so find.

31. The trial magistrate in the civil case found there was no reasonable and probable cause to institute the proceedings. She put it this way:

“.....the investigating officer assembled statements from the 2nd and 3rd defendants. It was his duty to test the accuracy and veracity of the allegations..... Collecting statements from complainants is not investigations.....

.....the investigator should have located the vehicle again, established whether at the bare minimum the radio was there and it was functional.

.....there cannot be in all honesty any semblance of a reasonable and probable cause to recommend prosecution.”

32. I agree entirely with the reasoning of the trial court. An inspector under the Copyright Act is defined in **Section 39** of the **Copyright Act** as a person issued with a certificate of authority to act as an inspector for purposes of enforcing the provisions of the Act. Such a duly certified inspector is authorized under **Section 41 (1) and (2)** of the **Copyright Act** to inspect any equipment and to seize and detain any article which he has reasonable cause to believe is used to commit an offence under Act. In this case, the inspector, as a law enforcement agent, did not exercise his due authority to do all that was required to support his belief that an offence was or had been committed. He should have. Equally, the police investigator ought to have insisted on more than just a verbal complaint proceeding with prosecution.

33. In the **Kiiru Case** (supra) the Court of Appeal 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. 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 acts 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. 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.” (Emphasis added)

34. In **Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance Ltd [2014] AC 366** Lord Kerr said:

“In demonstrating an absence of reasonable or proper cause ‘requires the proof of a negative proposition, normally among the most difficult of evidential requirements.’ The test for establishing whether there is an absence of reasonable and proper cause requires both a subjective and objective assessment. The subjective test requires an assessment as to whether the claimant honestly believed the defendant was liable in respect of the claims brought. If the Court is convinced as to the subjective state of mind, it should then consider whether, based on the information available to the claimant at the time it initiated proceedings, it was reasonable for the claimant to have reached the conclusion it did in respect of the defendant. Lord Kerr in **Crawford considered that there was no reason for proof of malice in the civil context to be any less stringent than in the criminal context. Malice covers not only spite and ill-will, but also improper motive (**Gibbs v Rea {1988} AC 786**).”**

35. Thus, in the instant matter, to escape liability, a defendant placed in this situation should show that he had an honest belief which was based on reasonable grounds that the plaintiff 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 able to show that any reasonable man placed in the position of the defendant would be of the same view that an offence had been committed. This was not the case here.

36. The evidence shows that the inspector and investigator did not do the basic investigations necessary to prove the offence under **Section 38 (2)** of the **Copyright Act** that is to show that there was a public performance of a copyrighted work. That was the infringement that they charged the plaintiffs for and which required to be proved. In my view, pushing forward with the prosecution was reckless and unnecessary. To that extent, it was a malicious prosecution, and I so find.

37. The appellants did not challenge the quantum of the damages awarded. The general damages of Shs 400,000/= were based on authorities availed. The special damages were specifically proved. I see no reason to interfere with the award of damages.

Disposition

38. Ultimately, I affirm the trial court’s decision and dismiss the appeal in its entirety with costs to the respondents.

Administrative directions

39. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

40. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

41. Orders accordingly.

DATED AND DELIVERED IN NAIVASHA BY TELECONFERENCE THIS 28TH DAY OF APRIL, 2021

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. No representation for Midikira for the Appellants
2. Mr. Gacheingo for the 1st and 2nd Respondents
3. Court Clerk – Quinter Ogutu