



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 23 OF 2016**

**KENYA POWER & LIGHTING CO. LTD..... APPELLANT**

**VERSUS**

**PETER AYARO OKUMU ..... 1<sup>ST</sup> RESPONDENT**

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

***[Being an Appeal against the Judgment of Hon. B. Kasavuli (PM) dated***

***the 6<sup>th</sup> day of April 2018 in Winam PMCCC No. 257B of 2012]***

**JUDGMENT**

The Appellant was held liable for the tort of Malicious Prosecution, and was ordered to pay compensation in the sum of Kshs 1,000,000/=.

1. In his appeal, the Appellant asserted that a proper consideration of the circumstances leading to the arrest and prosecution of the 1<sup>st</sup> Respondent could have exonerated the Appellant from the contention of malicious prosecution.
2. The Appellant submitted that it was entitled to lodge a report with the police, after it had suffered substantial loss due to the theft. Following the making of the said report, it was the police who conducted independent investigations, which led to the arrest and the subsequent prosecution of the 1<sup>st</sup> Respondent.
3. As far as the Appellant was concerned, the learned trial magistrate failed to give due consideration to the ingredients of the tort of malicious prosecution.
4. The Appellant expressed the view that the trial court had made an error by confining itself to the decision in the criminal case, as the basis of its judgment.
5. The Appellant further submitted that there was no basis upon which it could have been held jointly and severally liable, with the 2<sup>nd</sup> Respondent.
6. And as regards the award of General Damages in the sum of Kshs 1,000,000/=, the Appellant submitted that that was excessive in the circumstances.
7. In answer to the appeal, the 1<sup>st</sup> Respondent submitted that;  
  
***“..... the complaint culminating in the arrest, confinement and prosecution of the first respondent was instituted by the Appellant.”***
8. The 1<sup>st</sup> Respondent also submitted that his arrest and prosecution was instigated by the Complainant and/or report made by the Appellant.
9. The 1<sup>st</sup> Respondent submitted that the Appellant was malicious because the Appellant failed to provide any witness, from all its employees, to substitute PW2 who had died before producing and identifying the evidence that was at the heart of the criminal proceedings against him.

10. On the question regarding reasonable cause for the institution of the criminal proceedings against him, the 1<sup>st</sup> Respondent submitted that, because the Appellant did not have a monopoly over wires in the country, and as the evidence allegedly obtained from him did not have any markings of the Appellant;

***“..... the loss of Kshs 1,800,000/= conductors could not and should not have been attributed to the 1<sup>st</sup> Respondent.”***

11. In conclusion, the 1<sup>st</sup> Respondent submitted he had proved all the 4 ingredients necessary to establish that the 1<sup>st</sup> Respondent was liable for malicious prosecution.

12. Being the first appellate court I am enjoined to re-evaluate all the evidence on record.

13. **PW1, PETER AYORO OKUMU**, testified that he was a licensed dealer in scrap metal.

14. On the material day, he was at his scrap dealer yard when a vehicle belonging to the Appellant arrived there.

15. A total of 12 people alighted from the vehicle. The said 12 people comprised of both police officers and staff of Kenya Power.

16. **PW1** said;

***“They did not tell me anything. They just entered the yard and began searching. I did not know what they were looking for. They did not show me a search warrant. They emerged with 3 sealed metallic cooking pots.***

***They opened the cooking pots and said whatever was inside them is their property.”***

17. After the recovery of the cooking pots and pieces of scrap metal, the 1<sup>st</sup> Respondent was arrested, when he identified himself as the owner of the yard.

18. Thereafter, the 1<sup>st</sup> Respondent was charged, tried and finally acquitted.

19. When **PW1** was asked why he blamed the Appellant, he said;

***“I blame Kenya Power of maliciously prosecuting me. They did not investigate.***

***I also blame the arresting officer from the police. They should have investigated first. Had they conducted investigation, they would not have arrested me.”***

20. Later, when being cross-examined, **PW1** said that if he had suspected that a crime had occurred, he would first report to the police, who would then carry out their investigations.

21. **PW1** further explained thus;

***“I would not be to blame if I reported crime, and investigations were not done.”***

22. In this instance, **PW1** testified that he was not aware whether anyone made a report to the police prior to his arrest.

23. During re-examination, **PW1** said that after he was taken to the police station, he was questioned.

24. But prior to that, he said that he had never had any grudge with either the police officers or with any of the staff of Kenya Power.

25. He also testified that it was the Attorney General who gave orders for his arrest.

26. **PW2, MARTIN JAGONGO**, was the In-charge at the Criminal Registry at the Chief Magistrate’s Court, Kisumu. He produced in evidence, the original court file for the Criminal Case No. **394/2009**.

27. The 1<sup>st</sup> Respondent was one of the 4 accused persons in that criminal case.

28. I have perused the record of the proceedings in the criminal case.

29. In that case Ronald Musebe, who was a Security Officer working with Kenya Power, testified that wires and conductors had been stolen in the area of Migosi. After visiting the area and verifying the theft, he liaised with the residents and they reported to the police.

30. Musebe testified thus;

***“On 5/9/09 I.P. Ndikwe called me and I accompanied him to car wash area, where he had information that the stolen wires were kept. We went to the premises of the 1<sup>st</sup> accused – business premises.***

***We searched the place and got several of the wires cut in pieces.”***

31. The second witness in the criminal case was Patrick Murandafu Isakhasia. He corroborated the evidence of Musebe, concerning the vandalism of Kenya Power conductors. He also corroborated Musebe’s evidence about the recovery of some of the stolen conductors, at the premises of the 1<sup>st</sup> accused.
32. The third witness in the criminal case was I.P. Peter Ndikwe.
33. He testified that Musebe made a report to the police, about the theft of 6,000 metres of transmission cables, from the Migosi area.
34. I.P. Ndikwe visited the area, and confirmed the said loss.
35. On 5<sup>th</sup> September 2009, I.P. Ndikwe received information that the stolen conductors were at various places which were run by scrap metal dealers.
36. I.P. Ndikwe visited the premises of the 1<sup>st</sup> accused, where they conducted a search and recovered some of the stolen conductors.
37. During cross-examination, I.P. Ndikwe made it clear that the decision to prefer charges against the accused, was made by him. He also testified that the charges were based upon what had been recovered.
38. He explained that although the accused persons were licenced scrap metal dealers, they were not entitled to have the items which formed the subject matter of the criminal charges.
39. When the 1<sup>st</sup> accused, (who is the 1<sup>st</sup> Respondent herein) was put to his defence, he confirmed that;  
  
***“Three sufurias with wires condensed, were found in my place. We opened and we saw the same. The rest were not found at my place.”***
40. He testified that he had received the items as scrap metal. He also said;  
  
***“I do not know the source of these items. I do not know that the items were from KP & L Company.”***
41. Having given due consideration to all the evidence adduced in the Civil case, I note that the 1<sup>st</sup> Respondent confirmed that some items were recovered from his business premises after a search had been conducted.
42. In my understanding, the acquittal of the 1<sup>st</sup> Respondent was based solely upon the fact that the recovered items were not produced as exhibits in court. The failure to have the items produced in evidence was attributable to the fact that **PW2**, who had been scheduled to produce them, died before he did so.
43. If, as the 1<sup>st</sup> Respondent said in his evidence, he could not be to blame for the failure by the police to carry out investigations, after he had reported a crime, I find that the Appellant cannot be held accountable for the steps taken by the police, after the Appellant’s Security Officer had reported to the police about the theft of wires and conductors.
44. In his evidence, **PW1** blamed the Appellant for maliciously prosecuting him. However, he also testified that the decision to have him arrested was made by the Attorney General. And there was absolutely no evidence tendered at the trial, two show that the prosecution was carried out by the Appellant.
45. The record of the proceedings before the court handling the criminal case shows that the prosecutor was I.P. Osemo.
46. The said prosecutor was later promoted to the rank of Chief Inspector.
47. I find that there was no evidence at all that the said Chief Inspector was promoted to carry out his function, at the instigation of the Appellant.
48. By law, the Attorney General and the Director of Public Prosecution are independent offices; who carry out their respective mandates without the need to seek either the consent or authority of any person.
49. The 1<sup>st</sup> Respondent did not lead evidence to show that the Appellant imposed an obligation upon the prosecutors to prosecute the 1<sup>st</sup> Respondent.
50. Furthermore, when the police arrived with the staff of Kenya Power, at the scrap metal yard of the 1<sup>st</sup> Respondent, they inquired about

the owner of the place, after they had conducted the search, which had yielded some of the allegedly stolen goods. It is the 1<sup>st</sup> Respondent who then informed them that he was the owner of the yard.

51. Considering that the 1<sup>st</sup> Respondent had never had grudges with either the police or the staff of Kenya Power, and as they only knew who he was after they had done the search, I hold the considered view that the Appellant cannot have had malice against a person whose identity it was not aware of, in advance of the material date.

52. Furthermore, the Appellant is an artificial person. Therefore, as the court held in the case of **NZOIA SUGAR COMPANY LTD. Vs FUNGUTUTI, CIVIL APPEAL NO. 7 OF 1987;**

*“Acquittal per se, 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. The mental element of ill- will or improper motive cannot be found in an artificial person like the Appellant; but there must be evidence of spite in one of the servants, that can be attributed to the company.”*

53. In this case, there was no evidence of spite or of ill-will, held by any employee of the Appellant. Therefore, I find that the trial court erred when it held that the Appellant had malice against the 1<sup>st</sup> Respondent.

54. Accordingly, the learned trial magistrate erred in law and in fact, when he held the Appellant liable for malicious prosecution.

55. Therefore, the appeal is allowed. I set aside the judgment against the Appellant, and I substitute it with an Order dismissing the Plaintiff’s suit.

56. Costs of the appeal and the costs of the suit are awarded to the Appellant.

**DATED, SIGNED AND DELIVERED AT KISUMU**

**THIS 29TH DAY OF JULY 2021**

**FRED A. OCHIENG**

**JUDGE**