



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**CIVIL APPEAL NO.49 OF 2018**

**BUMBE TECHNICAL TRAINING INSTITUTE.....APPELLANT**

**VERSUS**

**HUMPHREY ONYANGO.....RESPONDENT**

**J U D G M E N T**

[1] This appeal arises from Busia **CM CC No.136 of 2009** in which the appellant, **Bumbe Technical Training Institute**, and the Attorney General of the Republic of Kenya, were sued by the respondent, **Humphrey Onyango**, for damages arising from malicious prosecution and false imprisonment. It was pleaded that the appellant was the complainant in Busia PM Criminal Case No.1355 of 2005 in which the respondent was charged with the offence of failing to prevent the commission of a felony, contrary to s.392 of the Penal Code. That, the complainant and subsequent prosecution of the respondent was malicious and motivated by spite and ill-will on the part of the appellant as a result of which the respondent suffered loss and damage and prayed for damages and costs.

[2] The appellant's statement of defence was a denial of the respondent's claim and a contention that the complaint was not actuated by malice but was made in good faith. That, the appellant made a report to the police whose investigations arm preferred charges against the respondent.

The appellant therefore prayed for the dismissal of the respondent's claim with costs.

[3] At the trial, the respondent (**PW 1**) testified that he was at the material time employed as a watchman by the appellant when a theft occurred at the appellant's property on the night of 4<sup>th</sup>/5<sup>th</sup> July 2005. As a result, a letter of suspension was served upon him but his employment was ultimately terminated. He was jointly charged together with a colleague for the offence but was acquitted. He contended that the appellant acted wrongly and maliciously in arraigning and prosecuting him in court. He therefore prayed for general damages for unlawful arrest, confinement and malicious prosecution.

[4] In defence, the appellant's principle (**DW 1**) testified that the respondent was on duty on the night of the theft which resulted in the loss of sewing machines, school uniforms and bulbs. A report was made to the police who investigated the matter, arrested and charged the respondent.

[5] The trial court considered the evidence and rendered itself thus, **"The first defendant didn't initiate any preliminary investigations because (sic) accusing the accused person for stealing their sewing machines. The police failed to do their work properly and failed to prove the first defendant's case against the plaintiff and he was acquitted. For this they are liable for malicious prosecution for charging the accused without evidence after incarcerating him in custody for two days.**

**I am satisfied the plaintiff proved his case on a balance of probabilities against the first and second defendant who is responsible for the police. I enter judgement in favour of the plaintiff as against the defendant jointly and severally.**

**General damages for unlawful confinement Kshs.20,000/=**

**General damages for malicious prosecution Ksh.50,000/= Total 70,000/=**

**I also award the plaintiff costs of the suit plus**

**Interest at court rates till payment in full"**

[6] The appellant, being aggrieved with the judgment, preferred the present appeal on the basis of the grounds set out in the memorandum of

appeal dated 16<sup>th</sup> October 2013.

The hearing of the appeal proceeded by way of written submissions. In that regard, the appellant's summons dated 15<sup>th</sup> September 2021, were filed by **Balongo & Co. Advocates**, while those of the respondent dated 24<sup>th</sup> September 2021, were filed by **Ashioya & Co. Advocates**.

[7] Having considered the grounds of appeal against the rival submissions and also having reconsidered the evidence bearing in mind that the trial court had the advantage of seeing the witness, this court holds the view that the respondent's case against the appellant as may be deciphered from the pleadings was unsupported by sufficient and credible evidence from the respondent. There was nothing to show that the appellant's action of reporting the theft to the police was actuated by malice or ill-motive. It was not that they pinpointed the respondent and said that he was responsible for the theft. They merely performed their civic duty of reporting an offence to the rightful law enforcement agency i.e. the police.

[8] It was the said agency that investigated the complaint made to them and determined the respondent's culpability in the transaction. Thereafter, they acted lawfully by arresting the respondent before arraigning him in court for failure to prevent the theft rather than for the theft itself. It was the respondent's obligation to establish on a balance of probabilities whether or not their actions were actuated by malice or ill-motive.

[9] This court does not think that the respondent discharged his burden of prove against the police nor the appellant.

The fact that the police did not perform their duty properly was not established and even it was, it did not amount to proof of malice. There was no evidence that the appellant was required to carry out a preliminary investigation before reporting an offence of theft to the police. In any event, as was pointed out by the appellant's principle, the appellant merely reported to the police the theft of its property when the respondent was on duty as one of the appellant's night guards or watchmen. The appellant did not say that the respondent was the thief neither did the police charge him with theft which is not the same thing as failing to prevent a felony.

[10] Indeed, in this entire case, there was no scintilla of evidence from the respondent showing or establishing that the appellant or even the police were actuated by malice in doing what they respectively did, being that the appellant made a report to the police who acted on it and carried out necessary investigations before arraigning the respondent.

[11] Besides an acquittal in a criminal case may be based on a legal technicality or lack of sufficient and proper evidence. It does not necessarily prove malice on the part of the complainant which in the material criminal case was either the appellant or the police or both. It is without doubt that an acquittal would provide good grounds for a claim of false imprisonment and malicious prosecution. However, such a claim must necessarily be established and proved by sufficient and credible evidence.

[12] With the greatest respect, and for all foregoing observations, it is this court's finding that the trial court's findings and decisions were against the weight of the evidence for a verdict of liability against the appellant or indeed the police thought the Honourable the Attorney General of Kenya. There was nothing to show that the respondent's arrest and arraignment in court was actuated by spite rather than for the benefit of the public or that it was an exercise in abuse of the criminal justice process. It was not in dispute that there was theft at the appellant's premises when its night guard or watchmen including the respondent were on duty but failed to prevent it.

[13] In sum, ground one and two of the appeal which were the most important and relevant in the present circumstances are hereby sustained. Grounds three and four were insignificant and mostly pedestrian.

Ultimately, this appeal must be and is hereby allowed with costs to the appellant.

Ordered accordingly.

**[DELIVERED AND SIGNED THIS 30TH DAY OF SEPTEMBER 2021]**

**J.R. KARANJAH**

**J U D G E**