



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 83 OF 2018

SAMUEL GITONGA RINGERA.....APPELLANT

VERSUS

HENRY MUTEGI MAINGI.....1ST RESPONDENT

DAVID KABOTO.....2ND RESPONDENT

MERU COUNTY GOVERNMENT.....3RD RESPONDENT

(Being an appeal from the Judgment and decree of the Hon. MRS. L. Ambasi (CM) delivered on 5/7/2018 in Meru CMCC No. 304 of 2010)

JUDGMENT

1. By an amended plaint dated 8/5/2012, the appellant sued the respondents seeking special damages and general damages for malicious prosecution, interests plus costs. In those proceedings, the appellant pleaded that on 11/7/2009 while in the cause of duty, the 1st and 2nd respondents visited the appellant's premises at plot No. 8 within Kiirua Market, harassed his servants and took away 2 bags of sugar on the allegation that he was operating a business without a county trade licence, despite him having paid and obtained the same from the 3rd respondent on 14/1/2009. On 24/7/2009, the respondents maliciously charged the appellant in Meru CMC Cr case No. 1180/2009 with the offence of operating a business without a county single business permit contrary to Section 3(1) of the County council of Meru Central by laws as read with legal notice No. 7331 of Local Government Regulations, 2002. The appellant pleaded that he was subsequently acquitted after a lengthy and protracted trial on 28/1/2010 with no case to answer. He further pleaded that the 3rd respondent was vicariously liable for the actions of the 1st and 2nd respondents, who were its employees.

2. In support of his case, **PW1, the appellant**, testified that he was charged with conducting a business without a licence, despite the fact that he had a business permit from Meru County Council in January 2009. He adopted his witness statement recorded on 23/11/2017 as his evidence in chief and produced his list of documents including business permit, summons to attend court, proceedings and ruling in the criminal case, demand letter and receipts issued by his advocate for professional fees, as exhibits Number 1-6. He was then stood down and recalled later to produce a registration certificate for a company as Exh.7. He prayed for damages for malicious prosecution, costs and interest.

3. During cross examination, he stated that 2 people arrested him but he was not taken to the police station. He only had 1 shop at Kiirua with 1 front door and another smaller door. He reiterated that he had a licence and receipt for the same.

4. The respondents denied the claim by their statement of defence dated 6/6/2011 and prayed for the appellant's suit to be dismissed but did not however tender any evidence. In law such defence remain mere allegations without supporting evidence and may not be the basis of any finding on the pleaded matters therein.

5. After the conclusion of the trial, the trial court in a reserved judgment found and held that the appellant had failed to prove his case on a balance of probability and dismissed his case with costs to the defendant.

6. That dismissal aggrieved the appellant who lodged his Memorandum of Appeal on 1/8/2018 setting out 6 grounds of appeal. The trial court is faulted for finding that the appellant had not proved malice against the respondents, when he had established and proved the ingredients of malicious prosecution against the respondents. He faulted the trial court for failing to find that the appellant had proved his case on a balance of probabilities, because his testimony was uncontroverted. He felt that the trial court's judgement was against the weight of the evidence on record, and faulted it for failing to find in his favour.

Submissions

7. Upon the directions by the court, the parties filed their submissions in respect to the appeal on 4/8/2020 and 28/8/2020 respectively. The appellant submitted that he was put on trial over a permit he had taken out on the allegation that he was operating the business without a business permit. He submitted that even after showing the business permit code 110 to the 1st and 2nd respondents, they still insisted that he was operating the business illegally. He submitted that there was no doubt that the permit was issued in respect to plot No. 8, which was confirmed as his place of business. He faulted the respondents for failing to produce anything to show that he was expected to take out a separate permit if he operated a store within the same plot. He submitted that the respondents confirmed that he had a valid permit code 110 issued in January 2009 and still brought the charges in July 2009. He submitted that he had been prosecuted without a probable cause and maliciously since he had a valid licence in 2009 issued by the 3rd respondent, and the case having been terminated in his favour, he had proved his case against the respondents on a balance of probabilities. He submitted that since the respondents never tendered any evidence to shake his evidence, the trial court fell into error when it found that he had not proved his case. He faulted the trial court for misapplying the evidence on record when it failed to find in his favour, despite there being no evidence to controvert the overwhelming evidence by the appellant. He urged the court to re-evaluate the evidence and come up with its own independent findings. In support of the appeal, he cited **Stephen Gachau Githaiga v Margaret Wambui Weru & anor (2015)eKLR and Stephen Mbuti & anor v Christine Nthakye Wambua & anor (2016) eKLR** on the ingredients of the tort to be that there was no reasonable and probable cause to initiate the prosecution, that the same was propelled by malice and that the same having been initiated by the defendant ended in favour of the plaintiff by an acquittal.

8. The respondents submitted that the 1st and 2nd respondents were in their cause of duty and had acted in good faith on the belief that the appellant operated 2 shops with 1 permit. They submitted that the criminal charges were not fuelled by malice on their part as they were only carrying out their routine duties. They cited **John Ndeto Kyalo v Kenya Tea Development Authority & Anor (2005) eKLR and Douglas Odhiambo Apel & anor v Telkom Kenya & Attorney General(2014)eKLR**, on the essential aspects to be proved in a claim for malicious prosecution. They faulted the appellant for failing to enjoin the Attorney General in his claim, despite the fact that his prosecution was instituted by the Attorney General. They maintained that the acquittal of the appellant was based on a technicality. They further submitted that the appellant did not have a licence to carry on business and therefore their enforcement of the bylaws was reasonable. They praised the trial court for rightly holding that they were carrying out their lawful duties and there was no malice on their part. In praying for the dismissal of the appeal, they submitted that they acted in good faith and believed that their evidence was sufficient to get a conviction of the appellant. In the alternative and without prejudice to the foregoing, they submitted that if the court finds that the appellant proved his case, general damages of Kshs 100,000 would be fair compensation. On special damages, they submitted that the same is not awardable because it was not proved by way of receipts.

Analysis and Determination

9. This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify a benefit this court lacks. See **Gitobu Imanyara & 2 others v Attorney General [2016] eKLR**.

10. It is clear that the determination of the appeal revolves around the question whether the appellant proved his case on the balance of probabilities. From the evidence on record, the appellant was charged and prosecuted for operating a business without a county council permit. It later turned out that the appellant indeed had a permit to run the said business issued by the 3rd respondent. The trial court found that the appellant had proved that the prosecution was instituted by the respondents without a reasonable and probable cause. It also found that the element of the prosecution being terminated in favour of the appellant had been established. It however observed that:

“The final test is whether defendants were driven by malice in prosecution of the plaintiff. From the foregoing, I can find no element of malice against the defendants by taking the action they did. Consequently on this aspect, I find that the defendants merely acted on their routine duties in their usual line of work, and however wanting their decision that the plaintiff required to have 2 permits was, this, in my view is not the same as malice. I find the plaintiff failed to proffer any shred of evidence or any particulars of malice against the defendants, or any of them.”

11. The settled laid down principles to be satisfied and proved by a claimant in a case of malicious prosecution as held in **Kagame & Others v The Attorney General (1969) EA 643** are as follows:

- i. That the prosecution was instituted by the appellant.**
- ii. That the prosecution terminated in the respondent’s favour.**
- iii. That the prosecution was instituted without reasonable and probable cause.**
- iv. That the prosecution was actuated by malice.**

12. The trial court fully appreciated the applicable principles, found that the first 3 elements of malicious prosecution had been established but that no malice had been proved. The appeal must thus be decided on the question whether or not the prosecution was accentuated by malice

13. What would constitute malice must be viewed in the context of the conduct of the person setting the prosecution in motion. If he genuinely believes that the complaint is backed by evidence that is probably true, he is not liable. However if he proceeds *recklessly and indifferently as to whether there were genuine grounds of prosecuting the plaintiff or not, then he is liable. In my view indifference or just recklessness on whether there exists a justifiable ground to initiate prosecution other than being evidence of abuse of court process is also evidence of malice.*

14. The law makes it imperative that the belief in the guilt of the accused be founded upon a decision made after due inquiry into and consideration of the facts presented to the respondents. But the reasonable belief need not be based on actual existence of a definite cause, but upon reasonable belief held in good faith in the existence of facts as are perceived by the respondents. The converse is that where there is no basis to believe that the accused is guilty of the accusation and the prosecution is all the same set in motion, there is clear evidence of malice.

15. I have read the ruling by the court on whether the appellant had a case to answer. It was admitted by the respondents during the criminal proceedings that the appellant indeed had a permit for the general shop code 110. Despite having such knowledge and evidence of the licence itself, the respondents pursued the prosecution of the appellant till the court determined that there was no prima facie case established. I find that the respondents in prosecuting the appellant proceeded recklessly and indifferently whether there was truth and purpose to be served by such prosecution. I find that the prosecution was pursued devoid of good faith and thus maliciously.

16. It was thus erroneous for the trial court to hold that there was no proof malice when the prosecution was initiated on the face of a licence issued by the same respondents. I find that there was proof of malice and that the case as a whole was proved to the requisite standards on a balance of probabilities. On that basis and there being no cross appeal against the assessment of damages, I uphold that award.

17. On special damages, there appellant produced, without objection, three receipts issued by Ms Gichunge Muthuri on 20.8.2009, 22.12.2009 and 9.4.2010 for an aggregate sum of Kshs 63,000. That is the sum I find to have been pleaded and strictly proved.

18. In conclusion the appeal succeeds, the finding dismissing the suit is substituted with a finding that judgment is entered for the appellant against the three respondents, jointly and severally in the sum of Kshs 500,000 for general damages and Kshs 63,000 special damages. The special damages shall attract interests from the date of the suit while the general damages shall attract interest from the date of the judgment of the trial court. Interests be calculated at court rates.

19. The appellant is equally awarded the costs of this appeal and the costs at the trial court.

Dated signed and delivered virtually this 30th day of December, 2021.

Patrick J.O Otieno

Judge

In presence of

No appearance for appellant

No appearance for the respondent.

Patrick J.O Otieno

Judge