REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 22 OF 2020

MEHMOOD SHAUKATALI JAGANI.....APPELLANT

VERSUS

PIETRO CANNOBIO..... 1ST RESPONDENT

ABDALLA ALI..... 2ND RESPONDENT

THE ATTORNEY GENERAL..... 3RD RESPONDENT

(Being an appeal against the Judgment and Decree of the Senior Principal Magistrate's Court at Kilifi by Hon. R. K. Ondieki (SPM) made on 07th January, 2019 in Kilifi SPMCC No. 6 of 2016 but amended on 26th November, 2020 and read on 09th December, 2020)

Coram: Hon. Justice R. Nyakundi

Mogaka Omwenga & Mabeya advocate for the appellant

Odhiambo S. E. advocate for the 1st & 2nd respondents

The Attorney General for the 3rd respondent

J U D G M E N T

What is before this Court is an appeal against the decision of the trial Court in **SPMCC No. 6 of 2016**. The appellant made a complaint against the 1st respondent which resulted in a charge for the offence of malicious prosecution contrary to Section 339 of the Penal Code. After the trial, the respondents were acquitted under Section 215 of the Penal Code. The appellant then instituted a suit for malicious prosecution against the respondents. The trial Court analysed the submissions by the rival parties against the precedent set for a case for malicious prosecution to succeed and found that the plaintiff succeeded in proving his case on a balance of probabilities. The plaintiff was awarded Kshs.600,000/= as general damages and Kshs.200,000/= as special damages.

The appellant, being dissatisfied with the decision of the Court filed the present appeal vide a Memorandum of Appeal filed on 18th December, 2020. The appeal is based on the grounds that the trial Court erred in awarding excessive damages and in delivering the Judgment in the absence if parties without notice of such delivery. The other grounds were that the trial Court failed to consider all evidence on record and failed to specify who the Judgment had been entered against and why the appellant was liable to pay the 1st and 2nd respondents. The appellant also contended that the trial Court erred in Law in not specifying which parts of the Judgment were amended.

Appellant's case

The appellant filed submissions on 21st May 2021.

The appellant laid out the history of the case and submitted that the Learned Magistrate did not specify between the appellant and the attorney general who was liable to settle the decretal sum. The appellant filed a notice of motion seeking review dated 2nd June 2020 and on 26th November 2020 the Learned Magistrate made a Ruling allowing the order for review. He made a Ruling allowing the review and holding that the defendants were jointly and severally liable. He further awarded Kshs.100,000/= to the 2nd respondent herein. The appellant cited **Murunga v Attorney General {1979} KLR 138** and submitted that for the action to succeed there had to be the four elements proven. He further cited **Halsbury's Law of England, 4th Edition, Reissue Vol 45 (2).**

He contended that the 1st respondent was only supposed to demolish the part of the wall he had erected which wall blocked the access road

but he went further to demolish the perimeter wall. The complaint leading to the arrest of the 1st and 2nd respondent was made by the appellant. After a complaint has been made it is for the prosecution to investigate the matter. The appellant had not discretion over the matter. The appellant had every reason to report the incident to the police. He should not be punished for the failure of the attorney general to avail evidence on what made them charge.

The appellant cited **MCSK v Tom Odhiambo Ogola {2014} eKLR** and submitted that there was no collusion established between the appellant and the 3rd respondent therefore there was no basis for the trial Court to find the appellant jointly and severally liable. He submitted that the respondent had not proven all the four elements of malicious prosecution.

The appellant submitted that there was no power for the Court to revise the award substantially like it did. It altered its original Judgment where no such award had been made. He cited the case of Fredrick Otieno Outa v Jared Odoyo Okello & 3 others and submitted that the Learned Magistrate sat in an appellate jurisdiction on his own Judgment and made an award to the 2nd respondent significantly altering the original decree. The trial Court also erred by awarding excessively high awards without giving reasons or using comparable cases to reach those awards.

On the issue of malice, the appellant cited the Court of Appeal case of **National Oil Corporation v John Mwangi Kaguenyu & 2 others {2019} eKLR** where the Court held that:

> ***"where no malice is proved on the part of the defendant, the claim for malicious prosecution must fail."***

He also cited the case of **James Kahindi Simba v Director of Public Prosecution & 2 others {2020} eKLR** and submitted that the appellant had an honest belief that his property had been destroyed by the 1st and 2nd respondents.

Respondent's case

The respondents filed submissions on 10th June 2021.

The 1st respondent submitted that all the Court did was to correct an error and in a Ruling dated 26th November 2020. No Judgment was delivered on 9th December 2020 and he referred the Court to pages 149 and 204 -212 of the record of the appeal. Further, that there is no order allowing the filing of the appeal.

He submitted that the awards are not excessive and made without basis. Further, that the Judgment was delivered in the presence of the advocates of the 1st and 2nd respondents but in the absence of the defendants. The appellant has not stated what prejudice was suffered pursuant to the delivery of Judgment in his absence.

The appellant filed an application to file the appeal out of time and he was granted conditional leave to deposit Kshs.800,000/= and he failed to do so and withdrew the appeal. The respondent also submitted that the trial Court analysed the evidence and submissions of the parties in its Judgment at pages 131-136 and the Ruling at page 149.

The trial Court in its Ruling dated 26th November reviewed the 22nd June 2020 Judgment and gave its reasons for its Ruling. The appellant did not oppose the application and is estopped from raising objection. Further, the Court stated which parts of the Judgment were amended and awarded Kshs.100,000/= to the 2nd plaintiff.

Issues for determination

After perusal of the record of appeal, submissions from the rival parties and pleadings, I have identified the following issues for determination;

1. ***Whether malice was proven.***

2. ***Whether the trial Court erred in awarding Kshs.100,000/= in damages after review.***

Whether malice was proven

It is trite law that for malicious prosecution to be proven there are four elements that must be proven as was held in **Mbowa v East Mengo District Administration {1972} EA 352;**

(a). The plaintiff must show that prosecution was instituted by the defendant, or by someone for whose acts he is responsible;

(b). That the prosecution terminated in the plaintiff's favor;

(c). That the prosecution was instituted without reasonable and probable cause;

(d). That the prosecution was actuated by malice.

From the facts of the case, it is clear that all the elements were fulfilled save for the issue of malice.

The appellants are relying on reasonable cause as their justification for reporting the matter to the police. However, one has to take a look at the facts of the case to determine whether there was a substantial reason to report the matter to the police and have the plaintiff arrested.

The appellant was well aware that the 1st respondent sold him the suit property with the perimeter wall which he had erected. The question that is to be posed is; the resorting of the demolition as malicious damage was as a means to what ends? The appellant cannot pretend not to know what the consequences of the complaint would be. It is my opinion that the appellant could have resolved this matter through a civil suit as he was well aware of the circumstances leading up to the demolition. Further, he would be in a better position to be compensated and have the damage to his property rectified vide a civil suit.

In **Nzoia Sugar Company Ltd v Fungututi {1988} KLR 399,** the Court of Appeal held;

> ***"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 its servants that can be attributed to the company."***

As a neighbour who was well aware that the wall had been erected by the plaintiff before he sold him the property, it was spiteful of the plaintiff to file the complaint over an issue that would have been resolved through civil litigation.

In **Thomas Mutsotso Bisembe v Commissioner of Police & Another {2013} eKLR** the Court relied on the case of **James Karuga Kiiru v Joseph Mwamburi & 3 others, Nrb C.A. No. 171 of 2000** where it was held:

> ***"….. to prosecute a person is not prima facie tortuous, but to do so dishonestly or unreasonably is the burden of proving that the prosecutor did not act honestly or reasonably being on the person prosecuted. Malice, however, can either be express or can be gathered from the circumstances surrounding the prosecution. A prosecution can either be mounted based on an offence committed in the presence of law enforcement officers or by way of a complaint lodged by a person to the said officers or agencies. 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."***

After examining the circumstances surrounding the prosecution of the 1st respondent, I find that there was malice in the making of the complaint and in the attempted prosecution of the 1st respondent.

In the premises malice was proven.

Whether the trial Court erred in awarding Kshs.100,000/= in damages after review

The notice of motion dated 22nd June 2020 sought an amendment to the Judgment with regards to providing with precision which of the defendants is liable to settle the decretal sum. The amendment that is in issue is whether the award of Kshs.100,000/= to the defendant that was part of the Ruling dated 26th November 2020. From a reading of the facts and the Judgment, the Ruling has an error in awarding Kshs.100,000/= to the 2nd defendant. It is clear that the Court meant to award the 2nd plaintiff. The reasoning given in awarding the Kshs.100,000/= was that the initial award was for the 1st plaintiff only.

Section 99 of the Civil Procedure Coe provides:

> ***"Clerical or arithmetical mistakes in Judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court either of its own motion or on the application of any of the parties."***

As to what amounts to an error on the face of the record, the Court in **National Bank of Kenya Limited v Ndungu Njau {1997} eKLR** held:

> ***"A review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the Court proceeded on an incorrect exposition of the Law and reached an erroneous conclusion of Law. Misconstruing a statute or other provision of Law cannot be ground for review."***

The award of Kshs.100,000/= to the 2nd plaintiff is explained by the trial Court as a rectification of the error of the Court not entering Judgment for the second plaintiff. In my perusal of the Judgment, it is apparent that the Court awarded the plaintiff general and special damages. It is clear that the 2nd plaintiff was omitted in the award. In my view the error is self-evident. Having established that the defendants were liable for malicious prosecution I find that it was in order to award the damages. The Kshs.100,000/= award qualifies as an omission and does not require much explanation.

In the premises, the appeal fails in its entirety and is dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT MALINDI ON 17TH DAY OF DECEMBER, 2021

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R. NYAKUNDI

JUDGE