REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CIVIL APPEAL NO. 32 OF 2015

KENNEDY SIMIYU WANYONYI.....APPELLANT

-VERSUS-

KENYA POWER & LIGHTING CO. LTD.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

This appeal arose out of a judgment delivered on 28th April 2015 (page 250 – 253 of the record of appeal) in **KITALE CMCC NO. 405 OF 2011; Kennedy Simiyu Wanyonyi –Vs- Kenya Power & Lighting Company Limited and the Attorney General**. In his Plaint, the Appellant contended that following a report by the 1st Respondent made at Kitale Police Station, the Appellant was charged with the offence of **stealing** contrary to **Section 275** of the **Penal Code** in **KITALE CMCR 1897 of 2010** later consolidated with **KITALE CMCR 1705 of 2010**. He was subsequently acquitted under **Section 210** of the **Criminal Procedure Code** on 21st June 2011. He averred that owing to the incredible, improper and shoddy investigations conducted, the 2nd Respondent was liable for the negligent and reckless actions of the investigating officers. He averred that he was unable to secure bond thereby committed to remand for period of 23 days. He suffered humiliating conditions, physical and mental trauma as well as illness during the period he spent in custody. He added that he suffered job deprivation. He stated that his reputation was seriously injured and lowered in the estimation of right thinking members of the society. He attributed the collapse of his budding political career to the criminal proceedings. He thus sought for general damages for defamation, general damages for malicious prosecution together with costs and interest. After full hearing, the trial magistrate dismissed the Appellant's claim. The learned magistrate found that the Appellant had not proved his case on a balance of probabilities.

The Appellant, being dissatisfied with the trial court's judgment, preferred the appeal. The Appellant's Memorandum of Appeal dated 27th May 2015 raised nine grounds of appeal. In summary, the Appellant faulted the trial court for failing to hold that he had proved his case on a preponderance of the evidence adduced; that the court failed to consider that the absence of witnesses adducing evidence on behalf of the 2nd Respondent vitiated their defence; that he was seriously traumatized; that he was acquitted on account of improper investigations before his arrest; that his evidence was weighty. In the premises, the trial court ought to have upheld his claim.

During the hearing of the appeal, parties by consent disposed of the same by way of written submission. In support of his Appeal, the Appellant contended that he was jointly charged with others in **Kitale CM Criminal Case no. 1705 of 2010; Republic –Vs- Kennedy Wanyonyi Simiyu and others** with the offence of stealing 30 litres transformer oil, 5kgs copper wires, 1kg aluminum wire, transformer plates and 2 pairs of transfer brackets all valued at Kshs. 2,000,000.00 the property of KENYA POWER & LIGHTING COMPANY. He pleaded not guilty to the charges thereby paving way for trial. Ultimately, he was acquitted under **Section 210** of the **Criminal Procedure Code**. It was on the basis of this decision, that the Appellant sued the Respondents citing malicious prosecution, false imprisonment and defamation. The Appellant submitted that the trial court improperly dismissed his suit as he was falsely arrested, charged and subsequently acquitted. He added that the severity of the punishment coupled with the period spent in custody pending his release on bail as well as the pain, emotional trauma and ridicule he endured should have been sufficient evidence for the trial court to find in his favour. He submitted that there was no basis for suspicion to be aroused on his account nor was he found in possession of the listed items. The Appellant cited that the conditions precedent for the tort for malicious prosecution to be established. The Appellant faulted the trial magistrate for failing to find that law enforcement officers ought to have conducted their investigations with decorum and within the confines of the law. He contended that had the prosecution acted with professionalism and exercised due diligence, he would not have been charged *ab initio*. He stated that his image has been tainted owing to the criminal charges.

The 1st Respondent on its part urged this court to uphold the trial court's judgment. It challenged the competency of the appeal for want of a decree and incomplete proceedings. It was its submission that the Appeal be dismissed as being incompetent. It was further submitted that the trial court was right in holding that on a preponderance of the evidence adduced, the Appellant failed to meet the required standard of proof threshold. It stated that the Appellant failed to establish the four critical elements to establish the tort of malicious prosecution. The 1st

Respondent further submitted that an acquittal *per se* does not support a claim for malicious prosecution. Furthermore, malicious prosecution cannot lie against a juristic person. It was further asserted that the Appellant was well aware that the 1st Respondent's transformers had been vandalized. Investigations were properly conducted. Ultimately, it could not be rationally concluded that there was malice on the part of the 1st Respondent. It was further stated that all the 1st Respondent did was lodge a complaint concerning criminal activities relating to its properties. There was thus no malice as indeed one of the accused persons was indeed found guilty. Finally, the Appellant failed to lay basis for the allegations that he suffered loss of business or that he was defamed.

The 2nd Respondent reiterated the 1st Respondent's submissions and stated that the Appellant failed to prove the elements required to prove the tort of malicious prosecution. On whether the prosecution was instituted by the Respondents or by someone for whose acts he is responsible, the 2nd Respondent submitted that the prosecution was prompted by 1st Respondent's report upon conducting preliminary investigation regarding the loss of its properties. On whether the criminal proceedings were terminated in favour of the Appellant, the 2nd Respondent stated that while the Appellant was acquitted, the court was duty bound to interrogate the evidence adduced as a whole.

On whether there was reason and probable cause, the 2nd Respondent submitted that there was basis upon which legitimate charges were laid against the Appellant. Accordingly, the 2nd Respondent urged that there was reasonable and probable cause for the prosecution of the appellant as several witnesses testified, it was established that transformers were stolen and proper investigations were conducted. This is despite the credibility or otherwise of the Appellant's defence. The 2nd Respondent submitted that an acquittal does not negate probable cause. On the fourth ground, it was submitted that there was no malice established as the proceedings emanated from the 1st Respondent's report to the police. It was not demonstrated by the Appellant that there was ill motive when the charges were laid against him. On defamation, the Appellant failed to meet the required standard of proof. The trial court noted that the appellant failed to comply with the provisions of **Sections 107, 109** and **110** of the **Evidence Act**. It was further observed that the Appellant failed to prove that his political ambition had suffered on account of the criminal charges that were laid against him. The 2nd Respondent denied the claim of false imprisonment by the Appellant. The 2nd Respondent submitted that the Appellant was arraigned in court within the mandated statutory period. In the premises, the 2nd Respondent urged this court to dismiss the Appeal with costs.

This court has carefully re-evaluated the evidence adduced before the trial court. It has also considered the submissions made by the parties to this appeal. This being a first appeal, this court is obligated to re-evaluate and re-appraise the evidence adduced in the trial court in order to arrive at its own independent conclusion taking into account the fact that it did not have the advantage of seeing or hearing the witnesses as they testified. **[Selle Vs Associated Motor Boat Company Ltd [1968] EA 123.]**

> **Having analyzed the evidence on record, the pleadings and the submission of the parties herein, this court forms the opinion that the present appeal shall be determined on the following issues for determination:**
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> > **1. Whether the appeal is competent?**
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> > **2. Whether the tort of malicious prosecution was proved?**
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> > **3. Whether the ingredients that constituent the tort of false imprisonment were established?**
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> > **4. Did the Appellant prove defamation to the required standard of proof?**

1. Whether the appeal is competent?

> *In its submission, the 1st Respondent urged this Honorable Court to dismiss the appeal as the record of appeal is incompetent. It was submitted that the absence of a certified decree (or copy thereof) rendered the appeal an academic exercise. The Appellant did not submit on this issue.*

Judgments and rulings take the form of decrees and orders respectively as the formal court decisions are summarized. A decree is thus essential and crucial particularly where an appeal has been preferred. It is for this reason that the requirement is expressly provided in the **Civil Procedure Act** and the rules made thereunder.

> **Section 65 (1) (b)** of the **Civil Procedure Act** provides that an appeal shall lie to the **High Court from any original decree or part of a decree** of a subordinate court. Under **Order 42 Rule 2** of the **Civil Procedure Rules**;
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> > **"where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed."**

From the above provisions, it is apparent that a decree or order appealed from forms part of record of appeal. In fact, **Order 42 Rule 13 (4) (f)** of the **Civil Procedure Rules** dictates that the judge shall be satisfied that the judgment, order or decree appealed from are in the court record and served on the parties before it. Once satisfied, the judge shall admit the appeal to hearing. While considering **Order 42 Rule 13 (4) (f),** the interpretation is that any of the pleadings, that is the judgment, order or ruling is sufficient enough to allow an appeal to be competent.

In light of the above provisions, can the present appeal be found incompetent? This court finds support in the Court of Appeal case of ***Chege –vs- Suleiman [1988] eKLR*** that stated that failure to attach a decree goes to the root of the jurisdiction of the appellate court and

held thus:

> ***"But we concur positively in the submission of Mr Lakha that this is not a procedural but a jurisdictional point. Those holdings were founded on a proper interpretation of section 66 of the Civil Procedure Act which confers a right of appeal from the High Court to this Court from "decrees and orders of the High Court". And those holdings were predicated on the fact that since the appeal could only lie against a decree or order, no competent appeal could be brought unless those decrees or orders were formally extracted as the basis of the appeal."***

In **Kilonzo David t/a Silver Bullet Bus Company –vs- Kyalo Kiliku & another [2018] eKLR** the High Court held:

> **"Despite the provisions of Article 159 (2) (d) of the Constitution of Kenya, 2010 that mandates courts to administer justice without undue regard to procedural technicalities, this court took the firm view that omission to include the decree or order to be appealed from in the Record of Appeal was not a procedural technicality for the reason that the word "shall" in Order 42 Rule 2 of the Civil Procedure Act contemplates that the furnishing of the decree or order is mandatory and cannot be wished away. Indeed, this court's position was buttressed by the fact that Order 42 Rule 13 (4) (f) of the Civil Procedure Rules…"**

The Supreme Court of Kenya in **Bwana Mohamed Bwana -vs- Silvano Buko Bonaya & 2 Others [2015] eKLR** had this to say:

> **"Without a record of appeal, a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law, or the Constitution, where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues."**

It is clear that a certified copy of a judgment or order forms an essential part of the record of appeal. Indeed, the Appellant did not furnish a copy of the same in its record of appeal. This requirement is couched in mandatory terms. Consequently, the record of appeal is incompetently before this court for failure to attach the decree appealed from.

However, this court shall proceed to consider the merits of the appeal this failure notwithstanding.

2. Malicious Prosecution

> *The tort of malicious prosecution arises where the Defendant causes the arrest and unjustified prosecution of the Plaintiff. The tort will succeed if the proponent establishes certain elements. The court in* ***Kasana Produce Store Vs Kato [*****1973] E.A. 190*** *laid them down as hereunder in:*
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> i. The plaintiff was prosecuted by the defendant in that the law was set in motion against him by the defendant on a criminal charge. The test is not whether the criminal proceedings have reached a stage at which they may be described as a prosecution but whether they have reached a stage at which damage to the plaintiff resulted;
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> ii. That the prosecution was determined in the plaintiff's favour;
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> iii. That it was without reasonable or probable cause. On the evidence the defendant did not believe in the justice of his own case;
>
> iv. It was malicious. The defendant had improper and indirect motives in pursuing the false charge against the plaintiff.

It is critical to note that the elements are not disjunctive in their nature. All elements must be proved in an action for malicious prosecution. This court shall proceed to consider these elements in determining whether the Appellant proved his case to the required standard. On whether the Appellant was prosecuted by the Respondents having set in motion a criminal charge, the Appellant was charged with the offence of ***stealing*** *contrary to* **Section 275** of the **Penal Code** in **KITALE CMCR 1897 of 2010** later consolidated with **KITALE CMCR 1705 of 2010**. It is further not disputed that the Appellant was subsequently acquitted. The Appellant's charges were premised upon an incident report made by the 1st Respondent at the police. According to the proceedings at trial, a whistleblower tipped the investigation officers on the whereabouts of the suspects. One of the suspects' wife then disclosed to the officers that the Appellant was an accomplice to his husband. It was based on this tip off that the Appellant was arrested and charged. This court thus finds that there was basis upon which the charge was laid against the Appellant. On whether the prosecution was determined in favour of the Appellant, the Appellant was acquitted on no case to answer stage. The proceedings were terminated in his favour.

The next ingredient is whether the prosecution preferred did arise out of reasonable and probable cause. What is reasonable and probable cause in the context of the tort of malicious prosecution was defined in **Hicks v Faulkner (1881-1882) L.R. 8Q.B.D 167** (which received the unanimous approval by the House of Lords in **Herniman V Smith [1938] A.C. 305**) as follows:

> **"...an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed."**

In **Nigel Lashley v The Attorney General of Trinidad and Tobago Civ Appeal No 267 of 2011,** Narine JA stated as follows:

> **"…The test for reasonable and probable cause has a subjective as well as an objective element. The arresting officer must have an honest belief or suspicion that the suspect had committed an offence, and this belief or suspicion must be based on the existence of objective circumstances, which can reasonably justify the belief or suspicion. A police officer need not have evidence amounting to a prima facie case. Hearsay information including information from other officers may be sufficient to create reasonable grounds for arrest as long as that information is within the knowledge of the arresting officer: O'Hara v. Chief Constable (1977) 2 WLR 1; Clerk and Lindsell on Torts (18th ed.) para. 13-53. The lawfulness of the arrest is to be judged at the time of the arrest."**

From the above definition, reasonable and probable cause is on the basis of the belief that the Respondents had at the time the report was made to the police. Accordingly, it must be demonstrated that any right thinking man would not have preferred charges against the appellant. If it is demonstrated that there was belief that the accused would be found guilty of the offence in question, this element of malice is not established.

In **Glinski v McIver [1962] AC 726 at page 758,** Lord Denning stated as follows;

> **"In the first place, the word 'guilty' is apt to be misleading. It suggests that, in order to have reasonable and probable cause, a man who brings a prosecution, be he a police officer or a private individual, must, at his peril, believe in the guilt of the accused. That he must be sure of it, as a jury must, before they convict. Whereas in truth he has only to be satisfied that there is a proper case to lay before the court ... After all, he cannot judge whether the witnesses are telling the truth. He cannot know what defences the accused may set up. Guilt or innocence is for the tribunal and not for him … So also with a police officer. He is concerned to bring to trial every man who should be put on trial, but he is not concerned to convict him . . . No, the truth is that a police officer is only concerned to see that there is a case proper to be laid before the court."**

Turning to the facts of this case, the Appellant was charged with the offence of stealing. The proceedings at trial run from page 46 – 107 of the record of appeal. The particulars of the circumstances leading to the arrest of the Appellant are captured in the evidence of PW1. He stated that the 1st Accused person was the first to be arrested. He then implicated the 2nd Accused person. The 2nd Accused person's wife informed PW1 that her husband and the Appellant acted in cahoots when vandalizing transformers. They had been in such business together for some time. PW3, who was the investigation officer, corroborated this evidence. This court finds that the circumstances leading to arrest of the Appellant cannot in the circumstances be said to be unreasonable. While conducting its investigations, it was disclosed that the Appellant was one of the persons involved in vandalism of transformers. This court finds that the tip off was sufficient ground for the relevant officers to prefer charges upon the Appellant. To conclude, this court finds that the reasons for the Appellants arrest were reasonable, probable and sufficient to mount the charge that was laid against the Appellant.

The last element is whether there was malice. Mendonca JA in **Sandra Juman v The Attorney General Civil Appeal No. 22 of 2009** held as follows:

> **"Malice must be proved by showing that the police officer was motivated by spite, ill-will or indirect or improper motives. It is said that malice may be inferred from an absence of reasonable and probable cause but this is not so in every case. Even if there is want of reasonable and probable cause, a judge might nevertheless think that the police officer acted honestly and without ill-will, or without any other motive or desire than to do what he bona fide believed to be right in the interests of justice: Hicks v Faulkner [1987] 8 Q.B.D. 167 at page 175."**

This court finds that there were no ill motive, ill will or spite on the part of the Respondents. This can be confirmed from the fact that four people were brought to book to answer to the charges preferred. According to the trial court proceedings, all the accused persons were related in one way or the other. While the Appellant was subsequently acquitted, one of the accused persons was convicted thus laying credence to the charges. The Appellant has not demonstrated that there malice on the part of the investigators when he was charged. The Respondents simply complied with their respective legal mandates. They cannot be faulted. Mere acquittal does not connote malice. The Appellant failed to demonstrate the existence of malice.

The elements of malicious prosecution are not disjunctive in their nature. This Court finds that the trial court was right in holding that malicious prosecution had not been proved to the required standard of proof. The Appeal on this ground consequently fails.

3. False imprisonment

The Appellant lamented that he was kept in unlawful detention. He submitted that he was arraigned in court after a lapse of 24-hours. He alleged that he was falsely imprisoned because he was unable to promptly secure bond thus condemning to lose his liberty for a period of 23 days after arrest. The Respondents denied this assertion. They reiterated that the Appellant was arraigned in court within 24 hours. Furthermore, the Appellant was in custody in compliance with a duly issued committal warrant of the court.

According to **Black's Law Dictionary, 7th Edition at page 618** false imprisonment is defined as:

> **"A restraint of a person in a bounded area without justification or consent. False imprisonment is a common law misdemeanor and a tort. It applies to private as well as government detention."**

In other words, if a party pleads false imprisonment, he must demonstrate that his right to liberty has been illegally infringed. Turning to the present appeal, a cursory perusal of the charge sheet reveals that the Appellant was arrested on 13th July 2010 and arraigned in court on 14th July 2010 (see page 42 of the record). He was then released on bond after pleading 'not guilty' to the charges. Further proceedings reveal that the Appellant was subsequently released on bond when he was able to secure the same. The detention of a person in compliance or in pursuance to an order of the court is lawful; such order is prima facie lawful. **[**See ***Greaves v Keene*** **(1879) 4 Cox D 73** and ***Henderson V***

***Preston* (1888) 21 QBD 362, CA]**.This court finds that the Appellant was lawfully detained as he was unable to secure bond. However, upon compliance with the bond terms, he was released on bail pending trial. It is further noted that the Appellant was arraigned before court within 24 hours of his arrest as prescribed by the **Constitution.** This court therefore holds that the Appellant failed to establish to the required standard of proof that he was unlawfully detained or was falsely imprisoned.

4. Defamation

The Appellant faulted the learned magistrate for failing to hold that he was vilified. The particulars of defamation, according to the Appellant were that he operated a chemist, was a farmer and a budding politician. He aspired to be a Councillor in 2007 general elections under the NARC Kenya party. He stated that in his 2013 bid, he received only 40 votes for the position of MCA Namanjalala ward where the registered voters in that year were 1000. It was pointed out that he demonstrated his aspirations but was not nominated to represent the party in the General elections. He was informed by his agents that the MCA at that time tainted his image during the campaign season. He stated that he closed his chemist while in custody. Consequently, he suffered loss of business. He added that he lost friends in the society who viewed him a thief. The Appellant called a second witness to these proceedings. His evidence was taken by consent from the proceedings in KITALE CMCC NO. 404 of 2011. They have not been reproduced in this appeal.

A plaintiff must establish the following elements in order to succeed in an action for defamation:

i. The words complained of must be defamatory and;

ii. They must refer to the Plaintiff and;

iii. The said words must tend to lower the reputation of the Plaintiff in the estimation of right thinking members of the society and;

iv. The element of malice must be demonstrated and;

v. The words must be shown to have been published by the Defendant and;

vi. The words must be false.

Defamatory words were defined in Ondonkara Vs. Astles [1970] EA 374 as follows;

> **" A statement is defamatory of a person of whom it is published if it is calculated to lower him in the estimation of ordinary, just and reasonable men".**

The Appellant's basis for the claim for defamation lies on the fact that he was acquitted from the criminal proceedings. Additionally, the Appellant alleged that his political rivals took advantage of the criminal charges levelled against him to cast him in bad light. He added that they spread vile comments to tarnish his name. Consequently, he pleaded loss of friendship, loss of business and a frustrated political career.

The above allegations of defamation are analysed in two ways. Firstly, the Appellant alleged defamation on account of statements of his political opponents. Not only did the Appellant fail to demonstrate the exact defamatory words complained of but also proceeded against the wrong party (the Respondents). If indeed he was painted a thief, he ought to have instituted proceedings against the author or maker of those statements. Secondly, the Appellant in his own notion, assumed that the collapse of the criminal charges laid against him must mean that the proceedings in totality defamed him. As reiterated in this judgment, mere acquittal is not equivalent to conclusive proof of malice. Further, no defamatory words allegedly published by the Respondents that allegedly injured the reputation of the Appellant were pleaded and particularized. The circumstances thus bring this court to conclude that the tort defamation was not proved to the required standard of proof.

In conclusion, this court finds no reasons to interfere with the findings of the trial court. Consequently, the Appeal herein lacks merit. It is hereby dismissed with costs to the Respondents.

It is so ordered.

DATED AT KITALE THIS 16TH DAY DECEMBER 2021.

L. KIMARU

JUDGE