REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 1 OF 2019

DR. JOHN MWIREBUA NG'ONDU..APPELLANT

VERSUS

DR. WARIO ABERE...1ST RESPONDENT

POLICE SGT SAMSON WACHIRA MUCHIRA MUCHANGI....2ND RESPONDENT

S. P. CHAI, DCIO MERU CENTRAL...3RD RESPONDENT

THE HON. ATTORNEY GENERAL..4TH RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. L. Ambasi CM delivered on 4/12/2018 in CMCC No. 337 of 2012)

J U D G M E N T

1. On 23/1/1995, the 1st respondent, in the company of **Useviu Mugambi ("Mugambi") and George Kinoti Salim ("Kinoti"),** went to the CID, Meru Central and made a report. The report was to the effect that, **Mugambi and Kinoti** had been hired by the appellant to kill the 1st respondent.

2. After investigations that spurned 8 months, the appellant was arrested and charged at the Meru Law Courts on 18/9/1995 in Meru Cr. Case No. 2048 of 1995 for the offence of conspiracy to murder the 1st respondent. The prosecution paraded 9 witnesses but after the trial, the Court found that no case had been established against the appellant and acquitted him under ***section 210 of the Criminal Procedure Code.***

3. Armed with the said ruling of no case to answer, the appellant filed a suit for damages for unlawful arrest, confinement and malicious prosecution. The appellant further claimed damages for defamation and loss of income. The suit was tried vide a Further Amended Plaint amended on 16/11/2011.

4. The appellant alleged that the 1st respondent had maliciously made a report to the police and that the 2nd to 4th respondents unlawfully arrested and prosecuted him. All the respondents filed their defences wherein they denied the appellant's claim in *toto.*

5. After trial, the trial Court found that the appellant had not proved his case and dismissed the same. Aggrieved by that decision, the appellant has appealed to this Court setting out 4 grounds that can be summarized thus; ***that; the trial Court misapprehended the law and evidence thereby arrived at a wrong decision, the trial Court erred in holding that the appellant had not proved his case and that the proposed amount of quantum was too low.***

6. As the first appellate Court, this Court is duty bound to re-evaluate the evidence afresh and come to its own conclusions and independent findings. **(See Selle v. Associated Motor Boat Company [1968] EA 123).**

7. The appellant's case before the trial Court was that, the appellant was arrested in a humiliating manner in the presence of his staff and customers at his clinic. That the arrest was occasioned by a malicious report laid by the 1st respondent with the police. That the 2nd to 4th respondent prosecuted the appellant without cause. That the arrest was reported in *The Standard* Newspaper. That as a result of the said arrest and prosecution, the appellant had suffered loss of reputation as well as business.

8. On his part, the 1st respondent told the Court that on 23/1/1995, **Mugambi and Kinoti** told him that the appellant had approached them and asked them to kill him the previous night for a pay. That the appellant had given them some money to do so. That fearing for his life, he reported the matter to the police who investigated the same and independently charged the appellant.

9. The 2nd to 4th respondent produced the police file which included the investigation diary and statements of witnesses. They contended that, there was no malice and spite on their part. That a reasonable cause had been established to warrant the action they had taken.

10. On the foregoing, the trial Court found that there was no malice that was proved on the part of the respondents. The trial Court further found that the claim for defamation had not been established and dismissed the appellant's claim in its entirety.

11. The first and 2nd ground are intertwined and I propose to consider them together. These are that; the trial Court misapprehended the law and the evidence before it thereby arriving at a wrong decision and that the trial Court erred in holding that the appellant's case had not been proved.

12. Counsel for the appellant submitted that the 4 ingredients in a case for malicious prosecution were proved by the appellant. The cases of **Mbowa v. East Mengo District Administration [1972] EA. 352, Murunga v. Attorney General [1979] KLR 138** and **Kagane v. AG & Another [1969] EA 643** were cited in support of the appellant's submissions.

13. This Court has considered the judgment of the trial Court. After setting out the issues for determination, the trial Court examined the law relating to the tort of malicious prosecution in ***extensor.***

14. The trial Court reviewed various authorities in this area including the cases of; **Mbowa v. East Mengo District Administration [1972] EA 352, Gitau v. Attorney General [1990] KLR 13, James Karuga Kiiru v. Joseph Mwamburi & Others NRB CA No. 171 of 2000 [2001] eKLR, Kagane v. Attorney General [1969] EA 643** and **Simba v. Wambari KLR 601.** Further, it referred to the text of **Winfield & Jolowicz on Torts, 16th ed.** On the definition of defamation.

15. The trial Court correctly concluded that for the tort of malicious prosecution to be proved, it must be established that the defendant was instrumental in setting the law in motion against the claimant, the defendant must have acted without reasonable or probable cause, that the defendant must have instituted the criminal proceedings maliciously and that the criminal proceeding must have terminated in favour of the claimant.

16. The trial Court then examined the evidence before it on the basis of the said criteria. In **Mbowa v. East Mengo District Administration [1972] supra,** it was held by the Eastern Court of Appeal that: -

> ***"The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than for the public benefit. … It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion of the truth. Its essential ingredients are: (1) the criminal proceedings must have been instituted by the defendant, that is he was instrumental in setting the law in motion against the plaintiff …; (2) the defendant must have acted without reasonable or probable cause ie. there must have been no facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified; (3) the defendant must have acted maliciously in that he must have acted, … with an improper motive, that is, with an intent to use the legal process in question for some other purpose other than its legally appointed and appropriate purpose; and (4) the criminal proceedings must have terminated in the plaintiff's favour, …".***

17. In the present case, the appellant proved that the prosecution was instituted at the instance of the respondents. He also proved that the prosecution terminated in his favour. This the trial Court rightly found in favour of the appellant.

18. The testimony of the 1st respondent that, when two men (Kinoti and Mugambi) came and informed him that they had been hired by the appellant to kill him, he feared for his life and reported the matter to the police. The trial Court found as a fact that any reasonable man receiving such information is expected to act the way the 1st respondent did.

19. It should be noted that not only did the 1st respondent appear at the appellant's trial before the criminal trial, the two men who gave him the information, **Mugambi and Kinoti** also appeared and testified as much. The criminal trial did not fail because the information was not true, but because the prosecution failed to properly investigate the matter and cogently present its case. Most important, is the failure by the prosecution to properly present in the criminal trial the tape recording that should have connected the appellant to the offence.

20. As regards the 2nd to 4th respondent, they went to the trouble of procuring the tape recording device from the CID headquarters in Nairobi and attempt to record the appellant. That shows that they took the 1st respondent's allegations seriously as they are expected. The investigations took about 8 months before they finally decided to charge the appellant. In the view of this court, that was not the conduct of people acting without reasonable and probable cause.

21. Reasonable or probable cause is but an honest belief that an accused is guilty of the charge alleged based on the conviction founded upon reasonable grounds of the existence of the state of affairs alleged. If the alleged state of affairs are to be true, they should lead a reasonable and prudent person placed in the position of the accuser to conclude that the person charged may be guilty of the allegation levelled against him.

22. In a malicious prosecution case, it is for the plaintiff to prove to the court convincingly that; a reasonable, prudent and cautious man in the position of the accuser would not have been satisfied that there was a proper case to put before the court. That is only when it can be said that absence of reasonable and probable cause has been established.

23. In the present case, the 1st respondent was accosted by two people hitherto unknown to him. He stated that he was apprehensive of his life. He honestly believed the information. He took the two to the police and had them paraded as witnesses during the trial.

24. On their part, the 2nd to 4th respondents carried out investigations that spurned 8 months. Applying the objective test, it cannot be said that no reasonable man could honestly believe that the prosecution would succeed. The prosecution bungled its case only when it failed to properly lay evidence of the tape recording before the criminal trial court.

25. In **James Karuga Kiiru v. Joseph Mwamburi & Others [2001] eKLR,** the Court held that: -

> ***"To prosecute a person is not prima facie tortious, but to do so dishonestly or unreasonably is. And the burden of proving that the prosecutor did not act honestly or reasonably lies on the person prosecuted".***

26. In the present case, apart from alleging in the statement of claim that the prosecution was malicious, there was no evidence that was produced at the trial to show that the prosecution was actuated by malice on the part of the 2nd and 3rd respondent. It was not shown that the prosecution was for other purposes other than that intended by law.

27. In the claim for defamation, that tort was not proved at all. Apart from the poor pleading of the same, the appellant made no effort at all to prove that he had been defamed. No doubt defamation is the publication of a statement which tends to lower a person's reputation in the eyes of right thinking members of the society.

28. In the present case, several questions remained unanswered; what statement was published by the respondents that tended to lower the appellant's reputation? Where was it published? To whom was it published? At the trial, none of the right thinking members of the society was called to testify to the effect that he knew the appellant to be of good reputation, that he read any statement published by the respondents which made him look at the appellant differently than he/they used to. To that extent, no case for defamation had been made out by the appellant.

29. In view of the foregoing, the trial Court cannot be faulted in its finding that the appellant had not proved his case to the required standard. Grounds 1, 2 and 3 of the Memorandum of Appeal therefore fails.

30. The next complaint was that the quantum proposed by the trial Court was too low and not backed by law. Quantum is in the discretion of the trial Court. An appellate Court can only interfere with the quantum of damages if it is shown that the amount assessed is too low or too high as to amount to an erroneous estimate or it was founded on wrong principles. **See Butt vs Khan [1982 – 1988] KAR 1.**

31. The principles applicable in the award of damages are well known; damages should not be inordinately too high or too low, they should be commensurate with the injury suffered, they should be aimed at compensating the victim and not to enrich him/her but to restore him to the position he/she was before the injury and that past decisions are but a guide and each case depends on its own peculiar circumstances.

32. In **Daniel Njuguna Muchiri v Barclays Bank of Kenya Ltd [2016] eKLR,** the Court awarded Kshs.2,000,000/-. In **Geoffrey Githiri Kamau v. AG [2015] eKLR** the Court awarded Kshs.900,000/- and in **Joseph Njogu Kamunge v. Charles Muriuki Gachari [2016] eKLR,** an award of Kshs.1,500,000/- was made.

33. Taking into consideration the circumstances of this case, the arrest and prosecution as well as the stature of the appellant the award of Kshs. 5,000,000/- was in this court's view manifestly excessive. I would have awarded the appellant Kshs.2,000,000/-.

34. In the end result, I find the appeal to be without merit and the same is hereby dismissed with costs.

Signed at Meru

A. MABEYA

JUDGE

DATED and DELIVERED at Meru this 23rd day of January, 2020.

A. ONG'INJO

JUDGE