REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CIVIL APPEAL NO. 27 OF 2018

PAUL KIPRONO LANGAT................................APPELLANT

VERSUS

JOSEPHINE NCHOROKE.......................1ST RESPONDENT

ATTORNEY General................................2ND RESPONDENT

(Being an appeal from the judgement and decree of Hon. R.M. Oanda,

PM, delivered on 3rd December2018 in Kilgoris PM'S Court Civil Case No.

24 of 2013, Josephine Nchoroke v Paul Kiprono Langat and Attorney General)

JUDGEMENT

Introduction

1. The appellant has appealed the against judgement and decree in respect of both liability and quantum of damages in the sum of Shs 360,000/-that were awarded to the first respondent; in respect of the tort of malicious prosecution and unlawful confinement.

2. The first respondent has supported the magisterial judgement in respect of both liability and quantum.

3. The second respondent has supported the appeal of the appellant in respect of both liability and quantum.

4. In this court the appellant has raised seven grounds in his memorandum of appeal.

The evidence of the appellant

5. The evidence of the appellant who testified as DW 1 was that he is a retired clinical officer and the 1st respondent is his neighbour. His further evidence is as follows. He shares a common boundary with appellant. He denied causing the arrest of the appellant. He testified having had a boundary dispute with the appellant earlier on. He also testified that the chief had planted a boundary with the appellant, which was in a position where it was not supposed to be.

6. It was the appellant's further evidence that the boundary position is known. As a result, he decided to go and report the matter to the police for assistance. The police then investigated the matter and charged the appellant in court. He did not participate in her arrest. He further testified that he was only called as a witness and he is not to be blamed. He also testified that he has no control over the police and that they acted on their own. It was also his testimony that the trespass was still going on. He finally, testified he also contributed to the cost of the surveyor.

The submissions of the appellant.

7. Messrs O.M Otieno & Co, advocates for the appellant submitted based on ***Susan Mutheu Muai v Joseph Makau Mutua (2018) eKLR***, that the 1st respondent failed to prove her case against the appellant. According to that case the plaintiff must prove the ingredients of malicious prosecution which are:

a. the prosecution was instituted by the defendant or by someone for whose acts he is responsible.

b. that the prosecution was instituted without reasonable and probable cause.

c. that the prosecution was actuated by malice.

d. that the prosecution was terminated in favour of the plaintiff.

8. Based on the foregoing authority, counsel for the appellant submitted that it is the police who instituted the prosecution and not the appellant. According to him, all that the appellant did was to lodge the complaint with the police. The police as law enforcers carried out investigations independently on their own and charged the 1st respondent. It was the further contention of the appellant's counsel that the 1st respondent failed to prove the four ingredients that constitute malicious prosecution. The appellant only reported the matter to the police and is therefore not to blame. He was only called as a witness.

9. Counsel for the appellant further submitted, based on ***Kenya Power & Lighting Co. Ltd v Florence Musau Nthenga & Another [2017] eKLR,*** that the appellant lodged a complaint at the police station upon reasonable and probable grounds. In that case the court set out what constitutes reasonable and probable cause by observing that: "*In Hicks vs. Fawkner (1878) 8 QBD 167 at p. 171 It was held that:* "*Reasonable and probable cause is 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 an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime impute…*"

10. Counsel for the appellant submitted that the appellant lodged a formal complaint at the police station based upon reasonable and probable grounds in view of the following. First, it is common ground between the appellant (Pw 1) and the first respondent (Dw 1) that there was a boundary dispute between themselves that had existed for a long time. Second, Pw 1 conceded under cross examination that the appellant had lived on the subject property long before Pw 1 bought a portion of the land besides the appellant. Third, both parties have been involved in various dispute resolution mechanisms, which is not disputed, but to no avail, before the appellant lodged a complaint with the police.

11. Furthermore, the respondent was acquitted under section 210 of the Criminal Procedure Code, because the surveyor who was called to fix the boundary dispute was unable to do so as he had no equipment to do so. According to the court the acts complained of appeared to have been a boundary dispute rather than trespass and ought to have been deliberated upon by the Land Registrar under section 21 of the now repealed Registered Land Act. She was acquitted on a technicality and not because of lack of evidence.

12. In addition to the foregoing submission, the appellant further submitted that the prosecution was not actuated by malice. In this regard, counsel submitted that in paragraph 9 of the plaint that the particulars of malice were set out by referring the plaintiff/1 st respondent as a trespasser and maliciously introducing witnesses to give evidence. The 1st respondent failed to prove malice as alleged in the plaint.

13. As regards the award of general damages, counsel for the appellant submitted that the trial court failed both in law and fact in granting damages as awarded for the following reasons. First, the trial court failed to find as to who between the two respondents was to pay the awarded damages. The award of general damages in the sum of shs 300,000/= was not supported by the evidence produced by the first respondent. Finally, counsel has submitted that the trial court failed to give reasons for awarding the said award of general damages. Counsel for the appellant has therefore urged the court to allow the appeal.

Evidence of the first respondent

14. The evidence of the first respondent, who testified as Pw 1, was that the appellant who testified as Dw 1, was that she shared a common boundary with the appellant. The respondent is the owner of land parcel No. Transmara/Njipship/ 1210, while the appellant is the owner of land parcel No. Transmara/Njipship/ 1211.

15. Furthermore, the first respondent adopted her witness statement as her evidence in chief. According to that statement the two parcels of land share a common boundary following the subdivision of the land. The appellant then built his permanent house on the common boundary. As a result, the roof of the appellant's house discharges rain water into the land of the first respondent since the year 2002.

16. Additionally, it is when Pw1 wanted to build her house that she found from the surveyor that the appellant had interfered with the boundary by encroaching into her land. She further stated that in the rear side there is a stone that was placed by the land adjudicator as a feature of the common boundary. The appellant was charged with the responsibility of the subdivision and the boundary exists up to date. The boundary is clearly marked on the ground and is fenced and is clear for identification purposes. She also stated that she has on several occasions called for arbitration of the dispute even in the disputes tribunal of Transmara to rectify the boundary dispute. She also stated that the appellant complained that the first respondent fenced off the piece of land left by the contractors as the allowance between the two parcels of land and that is what caused the dispute.

17. The first respondent also stated that the surveyor observed that the boundary between the two parcels of land is supposed to run on a straight line. The first respondent stated that the appellant built his house on both parcels of land LR No. Transmara/Njipship/ 1210 and 1211.

18. The appellant was the complainant in Kilgoris PM'S Court Criminal Case No. 441 of 2010, in which the first respondent was charged with trespass. The charge of trespass against the first respondent was dismissed under section 210 of the Criminal Procedure Code. The court proceedings were put in evidence as exhibit exp P2 and the ruling was put in evidence as exhibit exp P3. The charge sheet was produced as exhibit exp P4.

19. Furthermore, the respondent testified that her "name" was spoiled as she was labelled a land grabber. She spent Shs. 60,000/= as legal fees which she paid her advocates, Messrs Rogito & Co. advocates, in respect of which she produced the receipts as exhibit exp P5 (a) (b)

20. While under cross examination, the respondent testified that there was a boundary dispute between the first respondent and the appellant, since 2003. Her complaint was that the appellant had encroached into her land. The dispute was heard at home by chief of Njipship and the matter was sorted out.

21. Later the appellant reported her to the police. She was then arrested and placed in cells for a day. Finally, she testified ever since the finalization of the case, they have never spoken.

The submissions of the first respondent

22. The first respondent filed written submissions in which her counsel, Messrs Obwocha & Co. advocates supported the judgement and decree through highlighting the evidence adduced and urged the court to dismiss the appeal. Counsel did not cite any authorities.

The submissions of the second respondent

23. The second respondent, through her counsel, the Attorney General filed written submissions in opposition to the judgement and decree. Counsel urged the court to allow the appeal and set aside the judgement and decree with costs to be awarded to the appellant and the second respondent. Counsel submitted that a plaintiff in a malicious prosecution suit to succeed must establish the following. 1) that the prosecution was instituted by the defendants. 2) that the prosecution terminated in favour of the plaintiff. 3)that the prosecution was instituted without reasonable and probable cause. 4) that the prosecution was actuated by malice.

24. On the issue whether the prosecution was instituted without reasonable and probable cause, counsel submitted that the prosecution was done in accordance with the law. Counsel submitted that the police investigated the complaint of trespass in accordance with section 24 of the National Police Service Act and recommended a prosecution that the first respondent be charged with trespass upon private land contrary to section 3 (1) of the Trespass Act (Cap 294) of the Laws of Kenya. This was after the police were satisfied that an offence of trespass had been committed.

25. Furthermore, counsel submitted that the issue of reasonable and probable cause was dealt with in ***Kagane & Others v Attorney General &Another [1969] EA 643 at page 646,*** in which the court held that the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of an object test. It further held that to constitute reasonable and probable cause, the totality of the material within the knowledge of the prosecutor is whether that material consists of facts discovered by the prosecutor or information which has come to him must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man that the accused is probably guilty. That court finally held that if the material is based upon information, the information must be reasonably credible such that an ordinary prudent and cautious man could honestly believe it to be substantially true and to afford a reasonable strong basis for the prosecution.

26. Counsel further submitted based on ***James Karuga Kiiru v Joseph Mwamburi & 2 Others [2001] eKLR,*** in which the court observed that there was no reason in the absence of necessary evidence for making a police officer liable when he had only done his duty in investigating an offence.

27. Counsel also cited ***Mbowa v East Mengo District Administration [1972] EA 352*** in which the court held that: *"The action for malicious prosecution is part of the common law of England. 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."*

28. Again counsel cited ***Susan Mutheu Muai v Joseph Makau Mutua, supra,*** in which the court made the following observation in respect of a malicious complaint; "*Even if a complainant in a criminal case makes a malicious complaint that malice cannot be automatically be transferred to the prosecutor unless it is proved that there was collusion between the complainant and the prosecutor in bringing up the prosecution. The mere fact that a person has been acquitted of the criminal charge does not necessarily connote malice on the part of the prosecutor*."

29. Finally, counsel cited ***Nzoia Sugar Co Ltd v Collins Fungututi, Civil Appeal No. 7 of 1988 (1988 eKLR****),* in which the respondent had been acquitted under section 210 of the Criminal Procedure Code and thereafter he filed a suit for malicious prosecution, which suit was dismissed. In dismissing the suit, the court inter alia held as follows: "*It is trite learning that acquittal, per se, on a criminal case or 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 or 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. The respondent gave no evidence from which it can be reasonably inferred that the security officer made this report to the police on account of hatred or spite that he had for him*."

The grounds of appeal and findings thereon.

30. This is a first appeal. As a first appeal court I am required to re-evaluate the entire evidence and make my own independent findings. I have done so. As a result, I find the following in respect of the grounds of appeal as indicated herein below.

31. In ground 1 the appellant has faulted the trial court both in law and fact for failing to find that there was probable and reasonable cause for the appellant to lodge a complaint against the first respondent and there was thus tenable defence to avoid liability. In this regard, I find that it is common ground between the appellant and the first respondent that there was a long running unresolved boundary dispute between the appellant and the first respondent. I further find that both parties have been involved in various dispute resolution mechanisms, which is not disputed, but to no avail, before the appellant lodged a complaint with the police. I also find that following the lodgment of the complaint at the police station, the first respondent was acquitted because the boundary between her and the appellant had not been determined. This is clear from the ruling of the magisterial court that was put in evidence as exhibit exp P3. It therefore follows in evidentiary terms that it is not possible to tell which party is trespassing upon the other's parcel of land. I further find that on the evidence the appellant lodged a complaint

with the police after the chief of Njipiship location planted a boundary with the appellant, which was in a position where it was not supposed to be.

32. As a result, I find that the appellant lodged a complaint with the police to assert the proper boundary between him and the first respondent. He did not believe that there was a reasonable and probable cause that the respondent was guilty of criminal trespass to warrant a report to the police. I therefore find that the appellant made a report to the police to assert his position in respect of the proper boundary, which then set in motion the prosecution of the first respondent. The ensuing prosecution was for improper motives. It was for his own benefit and not for the public good. I find as persuasive ***Mbowa v East Mengo District Administration [1972] EA 352*** in which the court held that:

33. *"The action for malicious prosecution is part of the common law of England. 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."*

34. I find that the appellant was wrongly using the process of the criminal law in his struggle with the first respondent in respect of the boundary dispute between him and the first respondent. I therefore find that there is no merit in ground 1 which I hereby dismiss.

35. In grounds 2 and 3 the appellant has faulted the trial court in law by misapprehending the salient ingredients, which would sustain a claim for false and malicious prosecution. He also has faulted the trial court for failing to analyze the evidence and as a result arrived at an erroneous decision. In this regard, the trial court found that to succeed in a claim for malicious prosecution the plaintiff must prove that she/he was arrested and charged of a criminal charge; and that those charges must be investigated at the instance of the defendant. The trial court also found that the case must have been resolved in favour of the defendant or accused. That court found that the first respondent was charged and prosecuted on a charge of trespass and was acquitted.

36. I have perused the judgement of the trial court. I find that the trial court did not consider two essential elements of the tort of malicious prosecution which are as follows. The first element is whether the prosecution was instituted without reasonable and probable cause. The second element is whether the prosecution was actuated by malice. As a first appeal court I am by law required to consider them. See *Selle & Another v Associated Motor Boat Co. Ltd [1968] EA 123.* I have already found that the institution of the prosecution was without reasonable and probable cause in the foregoing paragraph. This point is now moot. The second element is whether the prosecution was actuated by malice. In this regard, it is important to point out that the boundary dispute started in 2003 according to the evidence of the first respondent under cross examination. According to the charge sheet (first respondent's exhibit Pexh 4) the first respondent was arrested on 21st June 2010 and taken to court on 22nd June 2010 on a charge of trespass. For about close to seven years the boundary dispute remained unresolved. The appellant only reported to the police after the chief of Njipship location adjudicated the dispute, which appears to have been favourable to the first respondent. If the appellant reasonably believed the first respondent had committed the offence of trespass, he should not have waited for seven years to report to the police that the first respondent had committed the offence of trespass. This is a clear indication that the appellant's report to the police was actuated with malice. The appellant's ground 2 and 3 are hereby dismissed for lacking in merit.

37. I find that the first respondent has proved the four ingredients that constitute the tort of malicious prosecution namely:

a. the prosecution was instituted by the defendant or by someone for whose acts he is responsible.

b. that the prosecution was instituted without reasonable and probable cause.

c. that the prosecution was actuated by malice.

d. that the prosecution was terminated in favour of the plaintiff.

38. It is important to point out that the police are servants of the national government and for that reason the Attorney General is properly sued vicariously on their behalf. The charge sheet which was put in evidence as exhibit exp P4 clearly shows that it is the police who arrested the first respondent and it is them who arrested her. The charge sheet is signed by the OCS Kilgoris Police station. In view of this, the submission of counsel for the appellant that his client was not involved in the arrest and prosecution of the first respondent does not hold water; because he is the one who set in motion the events that led to the arrest and prosecution of the first respondent.

39. The position in England is different. In that country the police are not servants of the crown (the national government). They are employees of the local councils. Therefore, English case law in respect of the vicariously liability arising of the police omissions or actions are not useful.

40. In grounds 4 and 5 the appellant has faulted the trial court for finding that the appellant was liable to pay damages to the first respondent and that the quantum of damages awarded was manifestly high. I have re-assessed the entire evidence. As a result, I find that the first respondent proved her case on a balance of probability and therefore damages were properly awarded to her.

41. The only issue that falls for consideration is whether the quantum of damages awarded were manifestly excessive or not. The assessment of damages is in the discretion of the trial court. In assessing damages, a court has to take into account all relevant matters, the impact of inflation and comparable awards in similar cases. On the evidence I find that special damages were pleaded and proved to be in the sum of shs. 60,000/=.

42. In awarding general damages in the sum shs 300,000/= the trial court was guided by the case of ***Dr. Willy Kaveruka v A. G. (Uganda)***. I did not have the advantage of perusing the authority relied upon by the trial court, since the original court file was not forwarded to this court. The appellant was in police custody for one day. He was prosecuted and acquitted of trespass.

43. I have re-evaluated the entire evidence. I find that the award was guided by a decision of the Ugandan court. The cost of living in that country is different from that prevailing in Kenya. It is therefore not a good guide. In the circumstances, I do not find it useful. In the circumstances of this case I find that the award was manifestly excessive, with the result that I hereby set it aside.

44. After taking into account all the circumstances of the case including the inflationary trend, I find that an award of shillings eighty thousand (Shs 80,000/=) general damages will be adequate compensation, which I hereby award with costs of this appeal to the first respondent.

45. Counsel for the appellant submitted that the trial court failed to find as to who between the two respondents was to pay the awarded damages. I find that the first respondent had pleaded that the second respondent was sued vicariously as representing the Government and is liable even if the police had acted criminally. See ***Muwonge v Attorney General of Uganda [1967] EA 17.*** By virtue of those pleadings and the evidence adduced, I hereby enter judgement for the first respondent against both the 2nd respondent and the appellant jointly and severally as follows.

a) General damages ………………………Kshs 80,000/=

b) Special damages………………………..Kshs 60,000/=

c) Plus, costs and interest at court rates.

Judgment signed, dated and delivered at Narok this 27th day of February, 2020 in the presence of

Ms Adallah holding brief for Mr. O. M. Otieno for the appellant and

Mr. Kariuki holding brief for Ms. Komu for the A.G. and in the absence of the 1st respondent.

J. M. Bwonwong’a

J u d g e

27/2/2020