



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CIVIL APPEAL NO.19 OF 2018

KONOIN TEA GROWERS SACCO SOCIETY LTD.....APPELLANT

VERSUS

JOEL CHERUIYOT SIGEI.....RESPONDENT

(From the decision and award in Sotik PMCC No.239 of 2015 delivered on 22nd February 2019 – B. Omwanza PM)

JUDGMENT

1. The appellant Konoin Tea Growers Sacco Society Ltd brought this appeal against the decision of the magistrate's court on the following grounds -

1. That the learned trial magistrate erred in law and fact in finding in favour of the Respondent against the appellant despite the lack of evidence and proof of all the claimants of wrongful confinement and malicious prosecution on the part of the plaintiff.
2. That the learned trial magistrate's erred in law and fact in putting more weight to the respondent's evidence while totally disregarding the appellants evidence and submissions, thus arriving at a wrong decision.
3. That the learned trial magistrate erred in law and fact to apportion liability and therefore finding the defendants 100% liable for damages.
4. That the learned magistrate erred in law and fact in making a finding on liability and an award that were neither supported by facts not by precedent in related case law.
5. That the learned magistrate erred in law and fact in failing to analyze and or accordingly evaluate the evidence from both sides and in holding that the appellant was liable against the weight of evidence on record to the contrary.
6. That the trial magistrate erred in law and fact in failing to consider that the suit was time barred.
7. That the entire award was manifestly harsh and excessive in the circumstances of the case.

2. The respondent Joel Cheruiyot Sigei on his part filed a cross – appeal on the following grounds –

- a) That the said award was manifestly low.
- b) That the said award was not supported by and did not follow previous decisions on award of damages in similar claims.
- c) That the trial magistrate erred in failing to appreciate that the award of general damages would have been higher than the previous decision of the superior courts in similar case after taking into account inflationary trends, which decisions and inflationary trends were not taken into account.

3. By consent of counsel for the parties the appeal proceeded by way of filing written submissions. The appellant's submissions were filed on 3rd March 2020 through counsel M/s E. M. Orina & Company, while the respondent's written submissions were filed on the same date through counsel M/s Tengekyon & Koske advocates.

4. I have perused and considered the submissions filed on both sides. I note that several court cases were relied upon.

5. This being a first appellate court, I am duly bound to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences - see the case of **Selle – vs – Associated Boat Co. Ltd[1968]EA**.

6. I have re-considered the evidence on record. In the trial court, the appellant herein was sued with a 2nd defendant the Attorney – General. At the trial, the respondent called one witness PW1 who was himself in person. The appellant also called one witness DW1 Richard Kiprono Koskei its director. The Attorney-General did not call any witnesses.

7. It was the evidence of PW1 the respondent (who was the plaintiff) that he was an accountant with the respondent until 2004 when he was arrested by the police, and charged with 13 counts in Sotik Criminal Case No.93 of 2005 on all of which he was acquitted because the police did not carry out their homework. He was later charged with parallel proceedings in Criminal Case No.2161/2005 – which was later transferred and became Bomet Magistrate’s Criminal Case No.808 of 2011 from which he was initially discharged, and then discharged again even after the State appealed to the High Court and the Criminal Case reinstated, because the police did not avail witnesses.

8. It was his evidence that the charges were malicious and asked for damages, costs and interests, as he suffered in custody and his name and reputation had been damaged.

9. The evidence of the appellant on the other hand was that of DW1 Richard Kiprono Koskei a director of the Konoin Savings & Credit Society, had taken over from the previous Board of Directors and they noted financial irregularities and made a complaint to the District Cooperative Officer, who reported the matter to the police. It was his evidence that Criminal Case No.93 of 2005 ended in acquittal because the Documents Examiner did not attend court to testify, while Criminal Case No.2161/2005 – was dismissed because the police file was not availed in court.

10. This is a case of malicious prosecution. For a plaintiff to succeed in such a case, there are vital elements which he or she has to prove on the balance of probabilities. In this regard, I fully agree with the reasoning in the case of **John Ndeto Kyalo – vs – Kenya Tea Development Authority & Another (2005)eKLR** wherein the court states as follows –

“In a claim for malicious prosecution it is incumbent upon

the plaintiff to prove, of course on the balance of probabilities, four essential aspects. Not one, not two, not even three but all four essential aspects. These are that: -

- 1. The defendants instituted the prosecution against the plaintiff.***
- 2. The prosecution ended in the plaintiff’s favour.***
- 3. The prosecution was instituted without reasonable and probable cause; and***
- 4. The prosecution was actuated by malice”***

11. I have considered the oral evidence tendered in the trial court herein, as well as the documents relied upon therein including the proceedings in the two criminal cases Sotik Magistrate’s Criminal Case No.93 of 2005, and Bomet Magistrate’s Criminal Case No.2161 of 2005. I note that the later criminal case was terminated by the magistrate twice because the prosecution failed to avail witnesses and the police file. On the other hand Criminal Case No.93 of 2005 ended in an acquittal of the respondent and his co-accused in a particularly short judgment because the Government handwriting examiner did not attend court.

12. The issues that arise in this appeal is whether the prosecution was instituted without reasonable or probable cause, and actuated by malice of the appellant. The second issue is whether the award is manifestly low or manifestly high.

13. With regard to the first issue, the evidence from witnesses in Criminal Case No. 93 of 2005 is clear and detailed. What the officials of the Konoin Tea Growers Sacco Ltd did was to report what they thought were financial irregularities to the District Cooperative Officer. The Cooperative Officer then informed the police about the matter and investigations were conducted by the police who charged the respondent and another.

14. The two were acquitted not because there was no evidence tendered by the officials from the appellant, but because the Document Examiner did not attend court and though the prosecutor asked the court for another hearing date, the court declined to allow the adjournment. The failure of the Document Examiner to attend court cannot in any way be associated with the Konoin Tea Growers Sacco Ltd. In those circumstances I find that the magistrate erred in finding that the respondent had proved his case for malicious prosecution on the balance of probabilities.

15. Was the amount of damages awarded either inordinately high or inordinately low? From the facts and circumstances in this case where the respondent stayed in custody for some days, it cannot be said to be too high. On the other hand since there is no evidence for unwarranted discomfort suffered by the respondent while in custody, I do not find the amount of damages awarded to be too low. If the appeal was going to succeed on liability, I would have retained the amount of damages awarded, as I find no justifiable ground to interfere with the exercise of discretionary power herein by the trial court in awarding damages. There are no irrelevant factors or considerations that the trial court took into account.

16. To conclude, I find merit in the appeal and allow the same, as I have found that the trial court erred in finding that the respondent proved his case against the appellant on the balance of probabilities. The cross-appeal is dismissed. I set aside the decision of the trial court. I order that the parties bear their respective costs of the appeal and in the trial court, as the issues seem to arise from an employer/employee

relationship.

Dated this 29th day of April 2020.

GEORGE DULU

JUDGE

Delivered through video conferencing in the presence of Mr. Langat court assistant, Mr. Musyoka ICT officer, Mr. Orina for the appellant and Mr. Koskei for the respondent.