



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CIVIL APPEAL NO 44 OF 2019**

**KENYA TEA DEVELOPMENT AGENCY.....APPELLANT**

**VERSUS**

**CHARLES NYAUNDI OKEMWA.....1<sup>ST</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment of Honourable CRJ Ateya (RM) delivered on the 27<sup>th</sup> March 2019 in Ogembo SRMCC No 311 of 2009)*

**JUDGMENT**

1. This is an appeal against the award of Kshs. 500,000/- and Kshs. 50,000/- as general and special damages respectively assessed by the trial court.

2. The brief background to this appeal is that the appellant through its agent Charles Gikunji and the Officer Commanding Station (OCS) Ogembo Police Station without reasonable and probable cause laid an information before the Senior Resident Magistrate, Ogembo Law Courts. The 1<sup>st</sup> respondent had been charged with the offence of conspiracy to defraud contrary to **section 317 of the Penal Code in Ogembo SRMCC No 230 of 2008**. He alleged that the appellant and the 2<sup>nd</sup> respondent prosecuted the charge against him and at the end of the prosecution case the trial court returned with a verdict of “no case to answer” and acquitted him.

3. The appellant denied the 1<sup>st</sup> respondent’s allegations.

4. In this appeal, the appellant has stated the following grounds of appeal:

*1. The trial Magistrate erred in law and in fact by failing to take into account the weight of evidence adduced before court thus making wrong conclusion*

*2. The trial Magistrate erred in law and in fact by awarding damages which were not proved by the defendant*

*3. The trial Magistrate applied wrong principles of law in the entire proceedings and judgment*

*4. The trial Magistrate erred in law and in fact by not considering the appellant’s submissions in her judgment.*

*5. The learned Trial Magistrate erred in law and in fact in finding the defendants 100% liable.*

5. Both parties the appellant and the 1<sup>st</sup> respondent filed written submissions. The appellant in its submissions contend that the criminal proceedings were never instituted by the appellant but were solely instituted by the Ethics and Anti-Corruption Commission who were not made a party to the suit. The motor vehicle alleged to be involved in an accident belonged to Ogembo Tea Factory who was also not a party to the suit. It was submitted that the 1<sup>st</sup> respondent did not prove that the prosecution was actuated by malice. It was submitted that prosecution of the 1<sup>st</sup> respondent was by the police acting as agents of the 2<sup>nd</sup> respondent and that they were not the complainant. That to qualify for the award of special damages in a suit for malicious prosecution, the plaintiff must prove that his reputation has been injured; he suffered indignity humiliation and/or injury to his feelings. It was submitted that the 1<sup>st</sup> respondent did not lead evidence to suffer any of the damages warranting the grant of special damages. They cited the case of **Socfinaf Kenya Limited vs Peter GuchiKuria (2002) eKLR, NAIROBI HIGH COURT CIVIL APPEAL NO 595 OF 2000** where the court held;

*“That a suspect was acquitted of a criminal case is not sufficient ground for filing a civil suit to claim damages for malicious prosecution or false imprisonment. Evidence of spite, ill will, lack of reasonable and probable cause must be established.”*

6. The 1<sup>st</sup> respondent submitted that the law was set in motion by the appellant who lodged the complaint not only with the Ethics and Anti-Corruption Commission but also with Ogembo police station. He explained that despite the appellant denying that they were not the complainant, the appellant's name appeared on the particulars of the charge. That from the ruling in **Ogembo SRMCC No. 230 of 2008** it is not in doubt that the proceedings before that court were terminated in the 1<sup>st</sup> respondent's favor. It was submitted that had the police conducted proper investigations, they would have established that no offence had been committed and they would not have charged the 1<sup>st</sup> respondent. It was further submitted that the appellant had an ulterior motive of stirring criminal proceedings against the 1<sup>st</sup> respondent. That the intent was to intimidate the 1<sup>st</sup> respondent to abandon the civil case it had instituted.

#### **ANALYSIS AND DETERMINATION**

7. This being a first appellate court, it is my duty to analyze and evaluate afresh all the evidence adduced before the lower court and to draw my own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. (See **Selle & Another v. Associated Motor Boat Co. Ltd & Others [1968] EA 123**).

8. The issues raised in this appeal are twofold. First, whether the appellant was the proper party to be sued and second, whether the 1<sup>st</sup> respondent on a balance of probabilities proved all the ingredients for malicious prosecution and whether he was entitled to damages.

9. Before I consider the case before the trial court, I will set out, in summary, the evidence before the trial court. Charles Okemwa Nyaundi (Pw1) testified that he was charged with the offence of conspiracy to defraud in **Ogembo SRMCC No. 230 of 2008**. Prior to institution of the case against him he was involved in an accident while in a motor vehicle owned by Ogembo Tea Factory and sustained injuries. He instituted a suit against Ogembo Tea Factory in **Ogembo PMCCC No 180 of 2005** and obtained judgment against the defendant which was upheld by this court in **Kisii HCCA No 17 of 2006**. He testified that the criminal proceedings instituted against him tarnished his name and he suffered great loss as he had to attend court twice every month. He incurred transport costs and the cost of legal counsel. He claims that the appellant used the suit to threaten them from claiming against Ogembo Tea Factory in the civil case. He also testified that had the police carried out proper investigations, then he would not have been arrested.

10. William NgetichBii Dw1 testified that the civil cases instituted by Pw1 were against Ogembo Tea Factory, a separate entity from the appellant. He further testified that in any case the complainant was the Republic through Ethics and Anti-Corruption Commission.

11. The principles for sustaining a claim for malicious prosecution have been laid down in a number of cases including the case of **John NdetoKyalo v Kenya Tea Development Authority & another [2005] eKLR** as follows;

(a) *The Plaintiff must show that the prosecution was instituted by the Defendant, or by someone for whose acts he is responsible.*

(b) *The Plaintiff must show that the prosecution terminated in his favour.*

(c) *The Plaintiff must demonstrate that the prosecution was instituted without reasonable and probable cause.*

(d) *He must also show that the prosecution was actuated by malice*

**In Mbowa versus East Mengo District Administration [1972] EA 352, the court held** as follows:

*“ the action for damages 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 instigating criminal prosecution. 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 ingredients are:*

(1) *The criminal proceedings must have been instituted by the defendant.*

(2) *The criminal proceedings must have been terminated in the plaintiffs' favour.*

*The plaintiff in order to succeed, has to prove that the four essentials or requirements of malicious prosecution as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must “unite” in order to create or establish a cause of action. If the plaintiff does not prove then he would fail in his action....” [ emphasis mine]*

12. A look at the charge sheet reveals that the appellant was the complainant as its name appears on the particulars of the charge sheet. In the case of **Ruhi v Republic (1985) KLR 373**, the High Court held as follows;

*“We must state at the onset that we are satisfied that the term complainant in section 208(1) [now Section 204] of the Criminal Procedure Code includes the prosecution as well as the person so described in the particulars of the charge.”*

13. The appellant submitted that they ought not to have been sued as they were not a party to the civil proceedings that has been instituted by the 1<sup>st</sup> respondent. The tort of malicious prosecution is committed where there is no legal reason for instigating criminal prosecution. In this case it is the appellant who was the complainant in the criminal proceedings against the 1<sup>st</sup> respondent and therefore it is immaterial that the Ogembo Tea Factory had been sued earlier by the 1<sup>st</sup> respondent in the civil proceedings because it is clear that the tortfeasor in the 1<sup>st</sup> respondent's claim for malicious prosecution was the appellant.

14. It is not disputed that the 1<sup>st</sup> respondent was successful in the case against him in **Ogembo SRMCC No. 230 of 2008**. 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.” [emphasis mine]*

15. In this case since the appellant is an artificial person and the 1<sup>st</sup> respondent ought to have proved by way of evidence that there was spite or ill-will from the appellant’s employee/servant in instituting the suit against him. Charles Gikunju, employed by the appellant testified before the lower court in **Ogembo PMC Criminal Case No 230 of 2008** that he informed the OCS of the matter and the OCS involved the Ethics and Anti-Corruption Commission where he later went to record his statement. In **Gitau v Attorney General [1990] KLR 13**, the court held that:

*“To succeed in a claim for malicious prosecution the plaintiff must first establish that the defendant or his agent set the law in motion against him on a criminal charge. “Setting the law in motion” in this context has not the meaning frequently attributed to it of having a police officer take action, such as effecting arrest. It means being actively instrumental in causing a person with some judicial authority to take action that involves the plaintiff in a criminal charge against another before a magistrate.”*

16. The appellant contends that they were not the appropriate party to be sued as they were not liable and that the 2<sup>nd</sup> respondent was solely liable for the prosecution of the 1<sup>st</sup> respondent. They cited the case of **Douglas Odhiambo Apel & another v Telkom Kenya Limited & 2 others [2006] eKLR** to buttress their argument. In the **Douglas Odhiambo Apel case (supra)** Kihara Kariuki J held as follows;

*“The Second difficulty is that by the time the case came before me with a direction to write judgment, the claim against the Commissioner of Police and the Attorney –General had already been withdrawn leaving Telkom Kenya as the sole Defendant in the suit. The Plaintiffs were arrested and charged by the Police. And the prosecution was undertaken by the Attorney-General as the public prosecutor. Telkom Kenya was merely a complainant. The decision to charge and prosecute the Plaintiffs was taken by the Police and the Attorney-General. Telkom Kenya as a complainant would not have been involved in that process. Once Telkom Kenya had made a complaint to the Police, it was left to the Police to investigate the complaint and decide whether or not to charge the Plaintiffs. That is why in a claim for damages for unlawful arrest, false imprisonment and malicious prosecution, the proper defendant is always the Attorney-General.”*

17. The facts before Kihara Kariuki J were that the case against the Commissioner of Police and the Attorney –General had been withdrawn and the complainant was the only defendant. In this the 1<sup>st</sup> respondent instituted the suit against the appellant and the 2<sup>nd</sup> respondent as they were instrumental in setting the law in motion leading to the arrest and prosecution of the 1<sup>st</sup> respondent. The Court of Appeal in **Paramount Bank Limited v Vaqvi Syed Qamara & another [2017] eKLR** held as follows;

*“In the appeal before us it was incumbent upon the 1<sup>st</sup> respondent to demonstrate that appellant was “instrumental” in setting the law in motion leading to the arrest of the 1st respondent. It was explained in the case of Gitau v. Attorney General (1990) KLR 13 that if the person making a complaint or the police officer to whom the complaint is made genuinely believed the facts and acted upon them, being satisfied that a probable crime has been established, then the arrest and subsequent prosecution would be justified. But if the court is satisfied that the report was made recklessly and indifferently then those who are “instrumental” would be liable depending on the answers to the other three elements.”*

18. In this case it is the suspicion and complaint by the appellant’s employee that led to the arrest of the 1<sup>st</sup> respondent and the mounting of the charge against him.

19. The 1<sup>st</sup> respondent was charged with the offence of conspiracy to defraud contrary to **Section 317** of the **Penal Code** and at the center of the dispute was motor vehicle Registration No. KZX 214. It is not dispute that the motor vehicle Registration No. KZX 214 owned by Ogembo Tea Factory and therefore the actions of the appellant in making a report against the 1<sup>st</sup> respondent was reckless and malicious.

20. I now turn to consider whether the 1<sup>st</sup> respondent demonstrated that the prosecution was instituted without reasonable and probable cause. In **Kagane v Attorney General [1969] EA 643** where the court observed:

*Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded on reasonable grounds of existence of a state of circumstances which assuming them to be true, would lead to an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty.*

In **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001**:

*“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable”.*

21. At the time the 1<sup>st</sup> respondent was charged and the time of filing his suit before the lower court, the 2<sup>nd</sup> respondent had the power to commence criminal proceedings. It is undisputed that motor vehicle Registration No. KZX 214 owned by Ogembo Tea Factory and thus any

prudent and cautious prosecutor would have not mounted a criminal prosecution against the 1<sup>st</sup> respondent.

22. I find and hold that the 1<sup>st</sup> respondent proved on a balance of probability the existence of all the four requirements discussed in **John Ndeto Kyalo v Kenya Tea Development Authority case (supra)**.

23. I now turn to the issue of quantum. The 1<sup>st</sup> respondent proposed general damages of Kshs 700,000/-. They cited the case of **Thomas Mboya Oluoch & another vs Lucy Muthoni Stephen & another** where the court awarded Kshs 300,000/- and urged the court to consider the issue of inflation as it was a 2005 decision. The appellant did not submit on quantum. It has not been demonstrated that the award of general damages in this case was inordinately high to warrant interference. The appellant has failed to do so. The 1<sup>st</sup> respondent was not to prove that his reputation had been injured. The 1<sup>st</sup> respondent also adduced a receipt from J.S Odongo & Co. Advocates being payment of legal fees to prove his claim for special damages.

24. In the circumstance, I find no merit in the appeal and dismiss it. The 1<sup>st</sup> respondent shall have the cost of this appeal.

**Dated, signed and delivered at KISII this 22<sup>nd</sup> day of July 2020**

**R. E. OUGO**

**JUDGE**

**In the presence of:**

**Mr. Nyachiro For the Appellant**

**Miss Kusa For the 1<sup>st</sup> Respondent**

**Absent For the 2<sup>nd</sup> Respondent**

**Ms Rael Court Assistant**