



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 99 OF 2019**

**NJUCA CONSOLIDATED COMPANY LTD ..... APPELLANT**

**VERSUS**

**GEORGE OTIENO.....RESPONDENT**

*(Being an Appeal from the Judgment delivered by Hon. Adalo, Senior Resident Magistrate, on the 29<sup>th</sup> October 2019 in Mariakani Civil Suit No. 12 of 2018 )*

**Coram: Hon. Justice R. Nyakundi**

**Wachenje Mariga Advocates for the appellant**

**Chamwada Advocate for the respondent**

**JUDGMENT**

This is an appeal by the defendant in the primary Court against the decision made by the Senior Resident Magistrate Court (**Hon. Adalo**) in **SRMCC No. 12 of 2018** delivered on 29.10.2019 in favour of the plaintiff/respondent to this appeal.

**Background**

The plaintiff **George Otieno** worked as a supervisor with a security company engaged in providing security services to various clients. On 22.1.2018 the plaintiff brought a claim against the defendant seeking general and special damages for unlawful and malicious arrest, and malicious prosecution arising out of a complaint lodged with the police. That an offence of stealing contrary to Section 268 (1) as read with Section 275 of the Penal Code had been committed. The particulars of the charge were that on the night of 28/29/10/2015 at weighbridge area, Mariakani the plaintiff jointly with another stole one generator make Honda – valued at Kshs.378,950/= the property of the defendant **Njuca Consolidated Company Ltd.**

What happened later was for the plaintiff being arrested, indicted and prosecuted for the offence. Thereafter, the prosecution applied with leave of the Court to have the charges withdrawn under Section 87(1) (a) of the Criminal Procedure Code. Subsequently discharging the plaintiff of any wrong-doing. On this basis of the acquittal taken for malicious prosecution filed against the defendant was heard and determined by the Learned trial Magistrate. Followed with a Judgment delivered on 29.10.2019 awarding general damages of Kshs.800,000/= plus cost of the suit.

The defendant being aggrieved with the decision by the Learned trial Magistrate preferred an appeal to this Court on the following grounds:

- 1. The Learned Magistrate erred in Law and in fact in finding that the respondent had proved his case against the appellant on a balance of probability.***
- 2. The Learned Magistrate erred in Law and in fact in failing to find and hold that the respondent had not submitted any evidence of malice on the part of the appellant or the prosecution, in instituting and maintaining the respondent's prosecution.***
- 3. The Learned Magistrate erred in Law and in fact in treating the alleged failure by the appellant's witnesses to appear in Court as evidence of malice in the respondent's prosecution.***
- 4. The Learned Magistrate erred in Law and fact in entering Judgment in favour of the respondent when the respondent had failed to enjoin the attorney general or the Director of Public Prosecutions, who originate all criminal cases for and on behalf of the Government of Kenya.***

5. *The Learned Magistrate erred in Law and in fact in concluding that the respondent was arrested without reasonable or probable cause.*

6. *The Learned Magistrate erred in Law and in fact in holding that malice was proven by the failure of the appellant in attending Court at all.*

7. *The Learned Magistrate erred in Law and in fact in finding that the appellant had charged the respondent when it was in fact the Director of Public Prosecutions who had preferred charges upon investigations conducted by the police.*

8. *The Learned Magistrate erred in Law and in fact in concluding that because no fresh charges had been made against the respondent since February 2017, the case had terminated in favour of the respondent.*

**Mr. Wachenje Mariga** for the appellant contended that the main issues for interpretation are whether the plaintiff allegations on arrest, false imprisonment and malicious prosecution were proved against the defendant to sustain loss and damage awarded by the Learned trial Magistrate.

Further, that by reason of the alleged report made by the defendant to Mariakani Police Station, the charges brought against the plaintiff could be said to be malicious and without reasonable or probable cause.

Learned counsel submitted that looking at the claims by the plaintiff the whole Judgment against the defendant was motivated by extraneous matters not supported with cogent evidence. Further, counsel argued in the end the plaintiff failed to discharge the burden of proof to the standard laid down in the Law to support the claim. In seeking the discretion of the Court to overturn the impugned Judgment, Learned counsel cited the principles set out in **Abubakar Simba v Njoroge Wambare CA No. 131 of 1991**.

Generally, in relation to the malicious disputed question of liability Learned counsel placed reliance on the witnesses called by the plaintiff which in his view failed the threshold for the Court to comfortably award damages as borne out by the nature of their testimony given at the trial. In his view taking the grounds of appeal together, duly suffice for the Court to allow the appeal. Concerning the contention by counsel there is no misdirection or wrong principles on the part of the Learned trial Magistrate to warrant an appeal Court to interfere with the impugned Judgment. For this proposition counsel relied on the authority of **Chemagong v R {1984} KLR 611, Hahn v Singh {1985} KLR 716**. On the issues and evidence which emerged at the trial with regard to arrest, false imprisonment and malicious prosecution. Further counsel submitted that its clear from the record evidence relating to whether or not the prosecution was malicious is lacking to appropriate liability and award damages. He relied on the following elements set forth in **Zablon Mwaluma Kadori v National Cereals Produce Board HCCC No. 152 of 1997 at Mombasa and Egbom v West Nile Administration {1972} EA**.

As far as the respondent is concerned the Learned trial Magistrate considered the matter and did exercise her discretion according to Law and came to a fair decision, which this Court cannot substantively interfere and overturn it. In the circumstances counsel argued and submitted that the appeal lacks merit and ought to be dismissed.

### **Analysis and determination**

This appeal would be determined against the backdrop and exercise of jurisdiction as enunciated in the principles laid down in **Samaria & Another v Allied Industrial Ltd {2007} 2KLR, Selle & Another v Associated Motor Boat Co. Ltd & Others {1968} EA 123**. The issue for determination as distilled from the eight grounds of appeal can be reformulated and crystalized as follows:

1. **Whether the respondent was wrongfully arrested and or falsely imprisoned and further maliciously prosecuted by the appellant and if so whether the appellant can be held liable to compensate the respondent in damages.**
2. **Whether the respondent claim was proved on a balance of probabilities as against the appellant to entitle him liability and damages for wrongful arrest and or false imprisonment, damages and costs**
3. **Whether, there is sufficient evidence to interfere with the Judgment of the trial Court**

It may be convenient here to dispose of the issues cumulatively.

### **The Law**

With regard to malicious **Clerch & Lindsell on Torts 20<sup>th</sup> Edition at paragraph 30 -02** defines the tort in the following words:

*“A malicious prosecution is an abuse of the process of the Court by wrongfully setting the Law in motion on a criminal charge. To be actionable as a tort the process must have been without reasonable and probable cause, must have been instituted or carried on maliciously and must have terminated in the claimants favour. The claimant must also prove damage to succeed in a claim for damages for malicious prosecution a claimant must prove (i) The prosecution by the defendant of a criminal charge against the claimant before a tribunal whose proceedings the criminal courts are competent to inquire. (ii) That the proceedings complained of terminated in the claimants favour. (iii) That the claimant has suffered damage .....”*

Further, reasonable and probable cause has been defined as follows:

*“Reasonable and probable cause for a prosecution has been said to be an honest belief in the guilt of the accused based on a full*

*conviction, founded upon reasonable grounds, of the existence of a state of circumstances which arising then to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of an accuser, to the conclusion that the person charged was probably guilty of the crime imputed.”*

On the element of malice in relation to malicious prosecution in **Hallsburys Laws of England Vol 97 {2010} 5<sup>th</sup> Edition paragraph 639**, its defined as follows:

*“A claimant in a claim for damages for malicious prosecution or other abuse of legal proceedings has to prove malice in fact, indicating that the defendant was actuated either by spite or ill will against the claimant or by indirect or improper motives. However, there is no malice merely because the claimants conviction was a necessary, step towards the defendant’s fulfilment of some ulterior objective. The claimant has the burden of proving malice. A claimant who proves malice but not want of reasonable and probable cause still fails. Malice may be inferred from want of reasonable and probable cause but lack of reasonable and probable cause is not to be inferred from malice.”*

Its noteworthy that in addressing the same issue the case of **Mbowa v East mengo District Administration CA No. 6 of 1972**. The Court held interalia that liability for malicious action arises when the following elements are met that:

- (a). *Criminal proceedings must have been constituted against the plaintiff.*
- (b). *The defendant must have acted without reasonable or probable cause.*
- (c). *The defendant must have acted maliciously in instituting the criminal proceedings.*
- (d). *The criminal proceedings must have been terminated in the plaintiff’s favour.*

The respondent in that trial sought various reliefs relevant to the pleadings arising out of a criminal charge in **Criminal case No. 601 of 2015 at Mariakani Senior Resident Magistrate Court**. For the respondent to succeed in **SRMCC No. 12 of 2018** he was required to show that the prosecution in **Criminal Case No. 601 of 2015** was malicious, that the appellant or its servants or agents were actuated by ill-will or spite against him or an improper motive. Apart from these the respondent had a duty to discharge the burden of proof to demonstrate that the appellant had no reasonable or probable cause to lodge a complaint with the police that a theft had occurred within its premises in which he was identified as one of the key suspects. (See also the principles in **Kagane & Others v Attorney General & Another {1969} E.A. 643**).

The Courts have gone further still in the protection of substructure expectations of the fundamentals rights as required of the Constitution. It is of essence as stated in the cases of **Maundu v Kiwia & others HCCC No. 24 of 1997 {2003} 1EA 144 and Murunga v Attorney General {1979} KLR 138** that in dealing with malicious prosecution the test whether the prosecution was instituted without reasonable and probable cause is whether the material known to the prosecutor would have satisfied a prudent and cautious man that the plaintiff was probably guilty of the offence. In **Hicks v Faulkner {1878} 8 Q.B 167 Hawkins J.** stated the test to apply as:

*“An honest belief in the guilt of the accused based upon a fuel conviction founded upon reasonable grounds of the existence of a state of circumstances, which, assessing them to be true, would reasonably lead any ordinary prudence and cautious man, placed in the position of the accuser, to the concession that the person charged was probably guilty of the crime imputed. There must be: first, an honest belief of the accuser in the guilt of the accused; secondly, such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion, thirdly, such secondly, mentioned belief must be based reasonable grounds, by this I mean such grounds as would lead any fairly cautious man in the defendant’s situation so to believe; fourthly, the circumstances so believed and relied on by the accuser must be such as amount to reasonable ground for belief in the guilt of the accused.”*

A very thorough examination of the evidence at the trial as presented by (PW1) and (PW2) shows that the Criminal Case was initiated by the police following a report by the appellant who complained of a theft of a generator within the premises. The decision whether or not to arrest and prosecute the respondent falls squarely within the ambit of the National Police Service with a mandate to investigate crimes and apprehend offenders. But the true gist of the decision to initiate, and undertake criminal proceedings against any person before any Court other than a Court martial in respect of any offence alleged to have been committed is vested with the Director of public prosecutions under Article 157 (6) of the Constitution. *“In the exercise of the powers and duties of the Director of Public Prosecution are such mandate to institute, undertake take over, continue or discontinue of any proceedings is a function executed without any control or direction from any other person or authority.”* As we have already seen it is now established that the case at hand targets the decision making process of the National Police Service and the Director of Public Prosecutions. According to the respondent all these actors were responsible in one way or another to invoke the provisions of the criminal procedure code and other enabling statutes for purposes of preferring a charge of stealing contrary to Section 268 (1) of the Penal Code from which an application for withdrawal under Section 87 (a) was made with the consent of the Court.

An important question was whether that case was of targeted malice by a public officer i.e. conduct specifically intended to injure a person or persons without any reasonable probable cause? Generally, not all arrests are arbitrary, unreasonable or malicious capable of attracting damages. For the purpose of this appeal its however necessary to cite the invariable underpinning in the text – **Clerk & Lindsell on torts 13<sup>th</sup> Edition {1969} at para 1898:**

*“In this connection the Learned authors said “the question of reasonable and probable cause frequently occasions no little embarrassment in the conduct of a trial, not so much from its own inherent difficulty as from the manner in which it presents itself; since, first, it involves the proof of a negative, and second, in dealing with it, the Judge has to take on himself, a duty of exceptional nature. The plaintiff has in the first place, to give some evidence tending to establish an absence of reasonable and*

***probable cause operating on the mind of the defendant. To do this he must show the circumstances in which the prosecution was instituted. It is not enough to prove that the real facts established no criminal liability against him, unless it also appear that those facts were within the personal knowledge of the defendant. If they were not, it must be shown what was the information on which the defendant acted, which is sometimes done by putting in the depositions which were before the Magistrate.***

This type of case complained of by the respondent alleged bad faith in the sense of the exercise of state officers power to arrest and prosecute him for the offence. Was there inclusive evidence that the public officer acted knowing that he has no evidence to initiate, or undertake a prosecution against the act complained of and the decision will probably injure the respondent but went ahead to arrest and charge him, notwithstanding absence of prima facie case to mount a successful conviction.

In this respect to maintain an action for malicious prosecution, the burden to prove all the aforesaid elements rested with the respondent before being indemnified by the tortfeasor.

Special consideration needs to be given to the position of public officers as **Lord Fraser said in Wandsworth LBC v Winder {1985} AC 461:**

***“for protecting public authorities against unmeritorious or dilatory challenges to their decision have to be set against the arguments for preserving the ordinary rights of private citizens to defend themselves against unfounded claims. It seems furthermore that the mere fact of an illegal arrest and detention is not sufficient to maintain an action for malicious prosecution. The element of that action is that a judicial proceeding has begun and carried on maliciously and terminated in favour of the plaintiff.”***

Although, the case at bar involved accurate information given to the police officer within the precincts of the Law, the Court is not told that the appellant went ahead to procure the prosecution. If he is honest although unreasonably mistaken, he may not be regarded as the one responsible for the cause of action taken by the police officer and subsequent decision by the Director of public prosecution to prosecute if does not otherwise influence their aftermath decision. This was a case the appellant had reasonable belief that the respondent was the person who committed the acts which constituted a criminal offence that satisfied the requirements in both actions taken to arrest and prosecute the commission of a crime. Thus the appellant is protected if he honestly and reasonably believed that certain criminal acts were committed at his premises and that the respondent neither acting alone or with others committed the theft.

Such a state of the Law is reflected in yet another decision of the Court in **Koech v African Highlands & Produce Company Ltd & Another {2006} 2 EALR 148:**

***“The police carried out their own investigations and were satisfied that there were sufficient grounds upon which a charge of theft by servant could be preferred against the plaintiff. The first defendant carried out its own investigations regarding the disappearance of its property, just like any prudent person or company would in the circumstances but those investigations had nothing to do with the investigations by the second defendant through the police and the resultant decision to charge the plaintiff with the said offence.”***

It should also be shown that the investigations and prosecution was conducted substantially in accordance with the principles of the constitution and criminal procedure Law, then such a charge is not to be invalidated on grounds of malicious prosecution, though there may be an acquittal in favour of the accused person. The Court in **James Karuga Kiiru v Joseph Wambura & Others {2001} eKLR** stated as follows:

***“However, the mere fact that a complaint is lodged does not justify the constitution of a criminal prosecution. The Law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any other prosecution arm of the government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. On the other hand it would be obviously absurd to make a defend are liable because matters of which he was not aware put a different complexion upon facts, which in themselves appeared a good case for prosecution. But neglect to make a reasonable use of the sources of information available before instituting proceedings would be evidence of want of reasonable and probable cause and also malice. It is not required of any prosecution that he must have tested every possible relevant factor before he takes action. His duty is not ascertain whether there is a defence, but whether there is a reasonable and probable case for the prosecution. Circumstances may exist in which it is right before charging a man with misconduct to ask for an explanation but no general rule can be laid down.”***

This criterion of inevitability to charge or not to charge the respondent is dependent on the material availed to the prosecution. The critical question presented by this tort from the onset is whether the respondent demonstrated that the prosecutor in both actions to prosecute and later discontinue the proceedings he acted without reasonable and probable cause. In effect, when the respondent asserted that the appellant acted without reasonable and probable cause, in all those two fronts of action, the circumstances in which this decision was made did not seem to involve the appellant. Again because those conditions are framed in terms of malice, belief about probable guilt, they are conditions that sufficiently encompass the functions and discretion of the prosecutor in the decision making process as provided under Article 157 (6) and (8) of the Constitution.

In the impugned Judgment the Learned trial Magistrate conclusion was based on what she found to have been the appellant's complaint to the police about the alleged theft of a generator. On the question of whether or not the appellant was the one who initiated the proceedings sufficed to constitute reasonable and probable cause to charge the respondent was in my view founded on the evidence availed to the prosecution. What happened in this case at the very least, appellant was never given a chance to take the witness box to vouch to the contents of the report made to the police against the respondent.

In principle given the burden for proof in criminal cases is vested with the prosecution to prove the charge beyond a reasonable doubt therefore the inquiry on arrest, false imprisonment and malicious prosecution would not be considered complete without a deliberate move to join the Director of Prosecution as a party to the claim. It is a vital link between the lawfulness of the decision to arrest, detain and charge the respondent in which the element of reasonable and probable cause is dependent upon for the failure or success in an action for malicious prosecution.

The application of this four prong tier test as defined in **Gitau v Attorney General {1990} KLR 13, Murunga v Attorney General {1979} KLR 138 and Mbowa cases (supra)** is sufficiently connected with involvement of the state and the complainant who initiated the first report made to the police against the defendant before a criminal investigation's commenced. In **Miazo v Kveelo estate {2009} S.C.J. the Supreme Court of Canada** held:

***“Malice requires a plaintiff to prove that the prosecutor willfully perverted or abused the office of the Director of Public Prosecution under Article 157 of the Constitution or the process of criminal justice.”***

A practical difficulty arises, however on the instrumental setting of the Law by the Learned trial Magistrate in her findings in the challenged decision by the appellant.

In my view on the facts of this case, there is no basis on which the trial Court could have determined liability and award of damages against the appellant. I do not believe for a moment that in the case at bar the appellant in reporting a theft to the police against the suspects who included the respondent was in fact carrying a quasi-judicial function similar to those conferred by the constitution upon the police and prosecutors. The Learned trial Magistrate therefore erred to mirror the legal issues involved in the case and went ahead to hold the appellant liable for the tort of malicious prosecution.

The appellant sought to have the award set aside on grounds that the respondent did not discharge the burden of proof on a balance of probabilities. In the case of **Brite Stone Pte Ltd v Smith & Associates Far east Ltd {2007} 4 SLR 855** it was held:

***“The Court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him. Since the terms proved, disproved and not proved are statutory definitions contained in the Evidence act Cap 97 {1997} Rev Ed “The term proof whenever it appears in the E.A and unless the context otherwise suggests, means the burden to satisfy the Court of the existence or non-existence of some fact, that is the legal burden of proof.”***

In our Section 107 (1) of the Evidence Act it is provided as follows:

***“Whoever desires any Court to give Judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exists.”***

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

According to **Gopal Chaturved:**

***“Field’s commentary on Law of evidence Vol 4 12<sup>th</sup> Ed 2008 Report at P413 opined “Evidence may be given of two sets of facts (1) of facts in issue (2) of facts relevant to the facts in issue. The litigant must remember that his case at the trial will be restricted to evidence which bears directly on the matters in issue and to matters which lead up to and explain that evidence. What are points in issue can be ascertained from the pleadings or whatever process takes the place of pleadings.”***

In our civil justice system pleadings continue to play an intergral part in every cause of action. Whatever the merits of a decision its recognized that the plaintiff must discharge the evidential burden of proof. As the Supreme Court in **Raila Amolo Odinga & Another v IEBC & 2 others {2017} eKLR** it was held:

***“Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and remains construe through a trial with the plaintiff, however depending on the effectiveness with which he or she discharges thus, the evidential burden keeps shifting and its position at anytime is determined by answering the question as to who could lose if no further evidence were introduced ..... in other words, while the petitioner bears an evidentiary burden to adduce factual evidence to prove his/ her allegations of breach, then the burden shifts and it behooves the respondents to adduce evidence to prove compliance with the Law.”***

The next general point related to the standard of proof is to describe the manner in which the parties go about proving the existence or non-existence of the facts in issue. I feel fortified by the following passage in the **Judgment of Re B – Children {2009} 1 AC 1**, the principle on which the Court act is that:

***“If a legal rule requires a fact to be proved (a fact in issue) a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The Law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is referred and the fact is treated as not having happened if he does discharge it, a value of one is retained and the fact is treated as having happened.”***

Applying the test to the facts in the present appeal the issue turns on the question of proof of the elements of arrest, false imprisonment and malicious prosecution stated to have been initiated by the appellant. When all was said and done the true explanation of malicious prosecution of the respondent was left wholly in the realm of conjecture. It is plain to the Court that the vital questions of the criminal proceedings having been instituted by the appellant maliciously and without reasonable and probable cause was never discharged by the respondent. In terms of Section 87 (a) of the Criminal Procedure Code a discharge order does not terminate the charge against the respondent with finality. Hence the Director of Public Prosecutions has the residual power to re-open the case against the respondent in the event circumstances dictate for such a decision. If this view is right it is not open for the Learned trial Magistrate to find that the prosecution was determined in favour of the respondent and there was no reasonable cause to charge him for the offence of stealing. Though the issues raised on appeal are purely ones of facts but on a second evaluation I am satisfied that the Learned trial Magistrate findings of facts cannot be supported on the evidence before her on the matter. This is not a case of credibility and demeanor of witnesses who gave evidence at the trial. It's a matter of the standard of failure of persuasion on a balance of probabilities on what certainly happened on the criminal complaint and eventual withdrawal by the Director of Public Prosecution. The preliminary question whether there was evidence on which the tribunal or Court could properly find the respondent responsible for the theft of the generator in the wider sense was never dealt with or heard on the merits.

To use the words of the **Court in Burundi, Marube v Joseph Onkoba Nyamuro {1982-88} IKAR 108:**

***“A Court of Appeal will not normally interfere with a finding of fact by the trial Court unless it is based on no evidence, or on a misapprehension of the evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.”***

I therefore hold the view that the degree or quantum of proof required of the Learned trial Magistrate was never satisfied in the civil case in question to which the Judgment relates to give a decision on a balance of probabilities. That means the Learned trial Magistrate erred in Law and fact in arriving at an erroneous decision on the claim between the respondent and the appellant as a tortfeasor.

That being the view I take of the appeal, I must move and interfere with the decision and the appeal is hereby allowed with costs to the appellant.

Those shall remain to be the orders of the Court until stated otherwise.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 23<sup>RD</sup> DAY OF OCTOBER 2020**

.....

**R. NYAKUNDI**

**JUDGE**

**In the presence of**

1. Ms. Mulwa holding brief for Wachenje Mariga advocates for the appellant