



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO 15 OF 2019

KENYA POWER & LIGHTING CO LTD.....APPELLANT

VERSUS

OSEKO SIMBA.....RESPONDENT

(An appeal arising out of the judgment and decree of Hon. E.A Obina Principal Magistrate Kisii CMCC NO 275 of 2015 between Oseko Simba and Kenya Power & Lighting Co Ltd)

JUDGMENT

1. The respondent was the plaintiff before the subordinate court and he filed a suit against Kenya Power & Lighting Co Ltd, the appellant herein. According to the respondent, he was arrested on 18th September 2012 at the instance of the Appellant. The respondent also sued the Attorney General as the 2nd Defendant.
2. The respondent alleged that he was kept in police custody until 24th September 2012 then arraigned before the Kisii Chief Magistrates Court Criminal Case No 1664 of 2012. The respondent was charged with the offence of personating and obtaining money by false pretense. On 15th July 2014 the respondent was discharged pursuant to section 202 of the Criminal Procedure Code.
3. According to the respondent the arrest, detention, torture and subsequent malicious prosecution was calculated to portray the respondent as a crook, conman, criminal and to scare members of the public including his friends and business associates from associating with him. The respondent sought general damages, special damages of Kshs 1,500/- and costs of the suit.
4. The appellant in its defence advanced that if the plaintiff was arrested and charged then there was a reasonable cause for arresting and charging the plaintiff. It claimed that the respondent was arrested and charged by the 2nd Defendant after thorough and independent investigations by the 2nd Defendant and that the appellant was not in control of such investigations.
5. The trial court after hearing the case to its conclusion proceeded to render its judgment in which the court held as follows;

“The plaintiff’s suit against the 1st defendant succeeds. It is the 1st defendants and/or its officers that triggered the arrest of the plaintiff, his incarceration and subsequent arraignment in court. Their actions were actuated by malice otherwise if they were genuine and bonafide, they would have attended the criminal trial.

On quantum it is my finding that an award of Kshs Five Hundred Thousand only, Kshs. 500,000/= should be adequate to compensate the plaintiff being general damages, payable to the plaintiff by the 1st defendant.

Special damages of Kshs 1,500/= have been pleaded and proved...”

6. The Appeal raises 4 grounds namely:-

1. *The Learned Magistrate erred in law and in fact in finding for the Respondent against the Appellant against the weight of evidence.*
2. *The Learned Magistrate erred in law and in fact in finding liability to be 100% in favour of the plaintiff without any basis.*
3. *The Learned Magistrate erred in law and in fact in shifting the burden of proof to defence.*
4. *The Learned Magistrate erred in law and in fact in making an award of Kshs 500,000/- in the absence of evidence to support the*

same.

7. The appellant advanced that the reason why the respondent was discharged was because of non-attendance of witnesses. They faulted the trial court's judgment claiming that the trial magistrate completely ignored the fact that the appellant had a genuine complaint. The appellant advanced that it was the sole responsibility of the DPP to weigh out the veracity of the evidence take thorough and comprehensive investigations before charging the respondent before court. The appellant relied on the cases of **Mbowa v East Mengo District Administration** and **Gitau v Attorney General** in support of its case. The appellant asserts that no evidence was adduced to demonstrate that any of its officers' acted with malice. They contend that there was no evidence to support the allegations that the prosecution was actuated by malice and founded on no reasonable and probable cause and cited the case of **Kagane v Attorney General**. They also argued that in any event, it is the police that are liable to such person (accused person) for instituting proceedings against him (see **Chispine Otieno Caleb v Attorney General [2014]**).

8. The appellant submitted that having found no fault on the police who investigated and prosecuted the respondent meant that the police were absolved of any liability with respect to issues of reasonable and probable prosecution. It was submitted that lack of evidence of malice is sufficient for the dismissal of a malicious prosecution claim. The appellant also faulted the trial court's award on general damages and proposed an award of Kshs 100,000/-.

9. The respondent submitted that it was unlawfully and maliciously arrested, detained and prosecuted at the instance of the appellant whose agents subsequently recorded statements but never attended court leading to the respondent's acquittal. On general damages it was submitted that the award of Kshs 500,000/- was proper and in tandem with awards made by courts in similar cases. The respondent cited the case of **Chispine Otieno Caleb v Attorney General [2014] eKLR** where general damages for malicious prosecution.

DETERMINATION

10. To succeed in a claim for malicious prosecution the plaintiff must prove/establish the following ingredients must be established;

i) *The defendant instituted the prosecution against the plaintiff.*

ii) *The prosecution ended in plaintiff's favour.*

iii) *The prosecution was instituted without reasonable and probable cause.*

iv) *The prosecution was actuated by malice*

11. The respondent is tasked to prove all the four elements to establish his claim of malicious prosecution. An integral part of the respondent's case depended on proof that the prosecution was instituted without reasonable and probable cause.

12. In **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."

13. In this case it has been established that the hearing against the respondent in **Kisii CMCRC NO 1664 of 2012** did not take off and the trial court discharged the respondent pursuant to **section 202 of the Criminal Procedure Code**.

14. In the civil case before the lower court the trial magistrate dismissed the suit against the 2nd Defendant. In my view this exonerated the 2nd defendant from the allegations mounted against it including institution of the criminal suit without reasonable and probable cause. Once the trial court exonerated the 2nd defendant from the tort of malicious prosecution then the respondent's case could not stand.

15. The prosecution during trial in **Kisii CMCRC NO 1664 of 2012** advanced that they had conducted their investigations and maintained that the investigating officer was in court and ready to give his testimony save that the main witnesses from the appellant did not turn up to give their testimony. In my view, malicious prosecution was not established as the prosecution had conducted its investigation, collected exhibits and preferred charges against the accused. The fact that the prosecution witnesses failed to testify is not sufficient to establish the element of malice.

16. In **Susan Muthu Muia v Joseph Makau Mutua [2018] eKLR** the court held that;

"63. The trial Magistrate came to the conclusion that he found no fault on the part of the police who investigated and prosecuted the respondent. Thus he absolved the police of any liability with respect to issues of "reasonable and probable prosecution" in the circumstances he could not in the same breath make a finding in favor of the respondent who had not established this vital ingredient of malicious prosecution."

17. In this case having established that the prosecution had instituted the case against the respondent with reasonable and probable cause, the tort of malicious prosecution was thus not proved.

18. In the circumstance, having considered the evidence before the court and the fact that the respondent did not appeal on the trial court's finding on malicious prosecution in regard to the 2nd defendant, I find that the appeal is meritorious, I set aside the judgment of the lower court dated the 15/1/2019 and decree of 15/1/2019. The suit against the appellant in the lower court is dismissed with costs, the appellant is also awarded costs of the appeal.

Dated, signed and delivered at KISII this 18th day of December 2020.

R.E. OUGO

JUDGE

In the presence of:

Appellant Absent

Respondent Absent

Ms. Rael Court Assistant