



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 35 OF 2016

KENYA POWER AND LIGHTING COMPANY.....APPELLANT

VERSUS

JUSTUS MUSUMBA OMUKONGO1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

(Being an appeal from the ruling in Eldoret CMCC No. 683 of 2011 delivered by Chief Magistrate Honorable C. Obulutsa on 12th

February, 2016).

JUDGMENT

The Plaintiff/1st respondent filed a suit in Eldoret CMCC No. 683 of 2011 wherein he claimed general damages for malicious prosecution. The trial court found in favour of the 2nd respondent and awarded him kshs. 500,000/- in damages, costs of the suit and interest. Being dissatisfied with the decision of the court, the defendant filed the present appeal.

The 2nd respondent filed a cross appeal.

APPELLANT'S CASE

The appellant filed its submissions on 7th September 2020.

The appellant submits that the trial magistrate erred in holding the appellant jointly and severally liable to the 1st respondent. The decision whether to institute or not to institute proceedings against the respondent is purely the duty of the office of the Director of Public Prosecution. The duty of the appellant was to make a report to the police of their items which were stolen and the police had the duty to carry out investigations and decide whether to charge or not. It was DW2's testimony that they received the report of theft from the appellant and carried out investigations and confirmed the theft had taken place. It is then that he decided to charge the 1st respondent with the offence of theft.

The appellant does not hold powers to prosecute and cannot be held jointly liable for the tort of malicious prosecution. It cited the case of **Kenya Power & Lighting Co. Ltd vs Nicholas Oduor Mwali & 2 others (2017) eKLR** on whether the reporter of a crime is liable for the tort of malicious prosecution.

The magistrate erred in law in entering judgment against the appellant and the 2nd respondent for the sum of kshs. 500,000/- without weighing the evidence of the appellant. The quantum was erroneous as it did not take into account several factors including the conduct of the parties. The appellant cited the case of **Kenya Power & Lighting Co. Ltd vs Nelson Aoko & Another (2017) eKLR** to buttress this submission.

On ground 4 the appellant submitted that the trial court erred in law and fact by failing to consider the evidence adduced and submissions filed by the appellant thus arriving at a wrong conclusion. DW1 and DW2 testified to the effect that there was indeed theft at the appellant's depot. Investigation was done and the conclusion was that the respondent was among the accused persons charged with theft. The trial court did not take these facts into consideration but merely relied on the inconsistencies witnessed in the proceedings. The appellant cited the case of **Kenya Power & Lighting Co. Ltd vs Maurice Otieno Odeyo & 2 others (2017) eKLR** to buttress this submission.

On grounds 5,6 and 7 the appellant submitted that the trial magistrate erred in holding that the essential ingredients for the tort of malicious prosecution

had been proven by the 1st respondent as against the appellant.

It is evident that there was no malice in prosecution of the 1st respondent. The appellant only acted in good faith owing to the fact that their property had been stolen. The appellant cited the case of *Nzoia Sugar Company Limited vs Fungututi (1988) KLR 399* to buttress this submission.

The appellant submitted that the ingredients to be proven in a case of malicious prosecution were stated in the case of *Kenya Power & Lighting Co. Ltd vs Florence Muasau Nthenya & Anor (2017) EKLK* where the court highlighted the principles as follows;

- a) **The plaintiff must show that prosecution was instituted by the defendant, or by someone for whose acts he is responsible,**
- b) **That the prosecution terminated in the plaintiff's favour;**
- c) **That the prosecution was instituted without reasonable and probable cause;**
- d) **That the prosecution was actuated by malice**

For one to be held liable for the tort of malicious prosecution all the four elements must be proven by the plaintiff and this was the position held in *Mbowa vs East Meno District Administration (1972) EA 352*.

The trial magistrate indicated that the first two elements were settled. The appellant maintains that it had no powers to institute criminal proceedings and to prosecute the same. All they did was make a report to the police.

The plaintiff was acquitted but not because he was not implicated in the offence but because the court held that the prosecution had not established a prima facie case. It is the appellant's contention that the prosecution was instituted with reasonable and probable cause. The question as to what amounts to reasonable and probable cause was set out in the case of *Hicks v Faulkner (1878) 8QBD 167*.

One of the appellant's employees who was not to be on duty that night, had gotten in accompanied by three people who he never disclosed who they were. It is the following morning that it was known that the theft had occurred at the Eldoret depot. The 1st respondent in his cross examination, testified that he never recorded the vehicle registration which Edward Aliela had used to get in. Failure to record the registration number can only be taken to mean he was aiding in the theft. This state of circumstances constitutes reasonable cause for the institution of the prosecution.

It was upon the 1st respondent to prove that his prosecution was actuated by malice. He failed to prove the same. The trial magistrate in reaching his decision did not look into this provision but relied on the issue that the police file had been forwarded to the state counsel for advice. The appellant cited the case of *Elphas Mwitii v of Kenya Power & Lighting Co. Ltd (2018) eKLR* to support this submission.

The four elements of malicious prosecution did not unite as required and the plaintiff did not prove his case on a balance of probability.

The court is urged to allow the appeal with costs.

1st RESPONDENT'S CASE

The 1st respondent filed supplementary submissions on 19th October 2020.

He cited *Section 79G* of the *Civil Procedure Act* and submits that the cross appeal was lodged on 6th October 2020 without any good and sufficient cause for not filing the appeal within time. It was filed four years after the initial decree. There is no basis upon which the 2nd respondent failure to lodge the appeal within time can be validated. The cross appeal ought to be struck out for offending the mandatory provisions of the law.

2ND RESPONDENT'S CASE

The respondent filed submissions on 3rd November 2020.

He submitted that the ingredients for malicious prosecution were set out in the decision of *Murunga v Attorney General (1979) KLR 138* which are;

- a) **The plaintiff must show that prosecution was instituted by the defendant, or by someone for whose acts he is responsible,**
- b) **That the prosecution terminated in the plaintiff's favour;**
- c) **That the prosecution was instituted without reasonable and probable cause;**
- d) **That the prosecution was actuated by malice**

The pleadings and the testimony before the court demonstrate that the prosecution of the 1st respondent was initiated by the report made by the appellant. The trial court found that the police were moved upon a valid complaint lodged by the appellant. This was a clear demonstration that the 2nd respondent did not move on its own motion to arrest and charge the respondent but was in fact prompted by a report of the appellant that identified the 1st respondent as having played a role in the alleged reported offence.

On the second issue of whether criminal prosecution was terminated in favour of the 1st respondent, the 2nd respondent submits that although the prosecution was terminated in favour of the 1st respondent, the case was terminated as the appellant's witnesses were unable to properly ventilate their complaints and it cannot be attributed to malice on the part of the prosecution. However, it must be noted that a mere acquittal under *Section 210 of the CPC* does not in any way entitle the 1st respondent to claim damages for malicious prosecution. The trial court failed to put these factors into consideration and hence arrived at a wrong conclusion.

As to whether the prosecution was instituted without reasonable and probable cause the respondent submits that the court completely misapplied the facts as well as the evidence and arrived at a wrong conclusion. It is not in dispute that a report was made to the police by the appellant and after investigations, the 1st respondent and two other persons were availed before the court. The mere fact that the file was forwarded to prosecution counsel for advice cannot be construed as evidence that the prosecution case was in any way flawed. The fact that the 1st respondent confirmed that he failed to record vehicle details on the day of the theft and confirmed that the police conducted investigations and thus discharged their statutory duty, was enough evidence that the police believed a theft occurred and the 1st respondent played a role in it. The 2nd respondent cited the case of *Simba v Wambari (1987) KLR 601* on what constitutes reasonable cause. The 2nd respondent also cited the case of James *Karuga Kiiru vs Joseph Mwamburi & others (2001) eKLR* on the fact that lodging of a complaint does not justify the institution of a criminal prosecution.

The mere fact that witnesses were able to confirm that several transformers were missing was validation of the complaint that was lodged to the police. The acquittal does not constitute lack of probable cause; the 1st respondent had a duty to prove that indeed the police had no case against him, so as to succeed on this front.

The 1st respondent failed miserably to prove that the prosecution was actuated by malice. Based on the evidence on record it is evident that the 1st respondent was arrested after a valid report had been lodged which report was investigated and as a result established an offence of theft had been committed and thus the 1st respondent was arrested and arraigned in court. In *Susan Mutheu Muia v Joseph Makau Mutua (2018) eKLR* the court held that malice where on the part of the prosecution is not proven then a

case of malicious prosecution cannot stand. Based on the facts presented to the trial court, the court erred in finding that the prosecution of the 1st respondent was actuated by malice on the part of the police.

The 2nd respondent submits that *Section 79G of the Civil Procedure Act* is silent on the procedure for filing a cross appeal. Based on this ground it was incumbent on the 2nd respondent to file an appeal as provided for. Although there is no set procedure for filing a cross appeal, reference is made to the said cross appeal in *Order 42 Rule 32 of the CPC*.

It is evident from the cited provision that it envisioned a party can file a cross appeal to the high court. The argument by the 1st respondent that the 2nd respondent was required to file an appeal is baseless and without merit. This is based on the facts that the courts have recognized this right by various decisions as seen in the case of *Charles Onchari Ogoti v Safaricom Limited & Another (2020) eKLR* where the court dismissed the 1st respondent's cross appeal on merit.

The 2nd respondent urges the court to be guided by article 159 of the constitution when exercising its judicial authority. Both the appeal and cross appeal raise issues on the trial court's application of the facts in finding that

the 1st respondent had proven his case of malicious prosecution.

The learned magistrate misdirected himself in applying the facts before the court and indeed erred in awarding the 1st respondent kshs. 500,000/- based on unsubstantiated facts and in not meeting the threshold of proving malicious prosecution.

Also, the fact that the trial court made reference to the 1st respondent time in custody as justification for the award, in that he was tortured. At no time were these allegations raised by the 1st respondent in his testimony or his pleadings and as such the respondent wonders why the trial court adjudicated on these issues outside of the facts adduced.

The trial court failed to meet the threshold of malicious prosecution as no malice was ever demonstrated. The 2nd respondent urges the court to set aside the decision of the lower court.

ISSUES FOR DETERMINATION

- a) Whether the cross appeal should be dismissed.
- b) Whether the trial court erred in finding that the 1st respondent proved malicious prosecution.

WHETHER THE CROSS APPEAL SHOULD BE DISMISSED

I have perused the file and I have not found a cross appeal or a supplementary record of appeal as referred to by the 1st respondent. I therefore disregard it and proceed to address the main appeal.

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE 1ST RESPONDENT PROVED MALICIOUS PROSECUTION

The appeal is based on the grounds that the trial court erred in finding that the 1st respondent proved all the ingredients required to establish that the appellant and the 2nd respondent were jointly and severally liable for the tort of malicious prosecution.

This being a first appeal, this court is enjoined to re-evaluate and re-analyse the evidence tendered in the lower court so as to arrive at its own conclusions. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence adduced in the subordinate court both on points of law and facts and come up with its own findings and conclusions. As was held in Stanley Maore -vs- Geoffrey Mwenda - Nyeri Civil Appeal No. 147 of 2002

“the duty of the Appellate court is to re-evaluate the evidence, assess it and make its own conclusions...”

The elements required for a plaintiff to establish that there was malicious prosecution were clearly set out in Murunga v Attorney General (1979) KLR 138 which are;

- a) The plaintiff must show that prosecution was instituted by the defendant, or by someone for whose acts he is responsible,
- b) That the prosecution terminated in the plaintiff's favour;
- c) That the prosecution was instituted without reasonable and probable cause;
- d) That the prosecution was actuated by malice.

In order to determine whether the trial court erred, this court shall examine the evidence adduced in the lower court and determine if the elements for malicious prosecution were established on balance of probabilities.

Whether the prosecution was instituted by the defendant/appellant

From the testimony of PW1, it is evident that he was on duty on 27th April 2010 as a watchman. On that material date it is not disputed that transformers were stolen from the premises. The appellant reported the same to the police. The appellant does not have the power to institute criminal prosecution against the 1st Respondent; that was the duty of the police. The appellant merely made a report to the police and it was upto the police to carry out investigations and decide whether to charge or not. In Standard Chartered bank Kenya Ltd Vs Intercom Services Ltd & 5 others, Civil Appeal No. 37 of 2003 (2004) eKLR the court held;

“Where the complainant reports a commission of crime to the police and the police upon independent investigations initiate a prosecution; the reporter is not liable for the tort of malicious prosecution unless the report is made falsely and maliciously.”

In the premises, the first element was not proved to the trial court and the learned magistrate by holding otherwise, erred in law. The appellant did not institute the prosecution by making the report. The prosecution was instituted by the police upon investigating the complaint.

Whether the prosecution terminated in the plaintiff's favour.

It is not in dispute that the criminal trial terminated in the 1st respondent's favour as he was acquitted. However, this element alone does not constitute sufficient basis for a suit of malicious prosecution. In Nzoia Sugar Co. Ltd v. Fungututi C.A. No. 7 of 1987 (Kisumu) (Platt, Apaloo JJA, and Masime Ag. JA) the court of appeal held;

“It is trite law that acquittal, per se, on a criminal case 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.”

Whether the prosecution was instituted without reasonable cause.

In Kagene v. AG & Anor. (1969) EA 643 it was held that the test for reasonable and probable cause was objective, as follows:

“Held: (i) whether there was reasonable and probable cause for the prosecution is primarily to be judged on the objective basis of whether the material known to the prosecutor would satisfy a prudent and cautious man that the accused was probably guilty (Hicks v. Faulkner (1) adopted;

(ii) the fact that the prosecution was instituted on the advice of State Counsel did not itself constitute reasonable and

probable cause. The material must be fairly put to counsel and the prosecutor must still believe in his case;

(iii) once the objective test is satisfied, it may be necessary to consider whether the prosecutor did not honestly believe in the guilt of the accused; but this subjective test should be applied only where there is evidence directly tending to show that the prosecutor did not believe in the truth of his case (*Glinski v. Mcver* (3) adopted);

(iv) on the facts, no reasonable person could honestly have believed that the prosecution was at all likely to succeed; and the second defendant was actuated by malice.

In *Kasio Matuku & Kenya Post Office Savings Bank v James Kipkemboi Cheruiyot; Inspector General of Police & Attorney General (Interested Parties)* [2019] eKLR the court held;

The test for reasonable and probable cause is dependent on “the material known by the prosecution” being suit as “would have satisfied a prudent and cautious man that the plaintiff was probably guilty of the offence.”

The 1st respondent was a guard on duty on the night that the property was stolen from the appellant’s premises. Further, he admitted that he did not record the registration number of the vehicle that entered the premises with one Edgar Aliela who was an employee of the appellant. I find that a reasonable person, given the circumstances, would suspect that the 1st respondent by failing to record the registration number of the vehicle that entered the premises, was aiding the theft.

Whether the prosecution was actuated by malice

In *Kagene v. AG & Anor. (supra)* the court held;

(ii) the fact that the prosecution was instituted on the advice of State Counsel did not itself constitute reasonable and probable cause. The material must be fairly put to counsel and the prosecutor must still believe in his case;

The forwarding of the file by the DCIO to the state counsel for advice does not impute any malice.

At page 991, Ibid, the learned authors of *Clerk and Lindsell* discuss *Malice* as follows:

“Improper motives:-

Malice in this context has the special meaning common to other torts and covers not only spite or ill-will but also improper motive. The proper motive for a prosecution is, of course, a desire to secure the ends of justice. If a claimant satisfies a jury, either negatively that this was not the true or predominant motive of the defendant or affirmatively that

something else was, he proves his case on the point. Mere absence of proper motive is generally evidenced by the absence of reasonable and probable cause. The jury, however, are not bound to infer malice from unreasonableness and in considering what is unreasonable they are not bound to take the ruling of the judge.”

Malice is demonstrated when an action is undertaken without an honest or sincere or genuine or truthful pursuit of interests of justice in a prosecution. The 1st respondent did not prove that there was malice. Further, in the presence of reasonable and probable cause I find that there was no malice in instituting the proceedings by either the appellant or the second respondent.

In *Mbowa vs East Menjo District Administration (1972) EA 352* it was established clearly that all the four elements must unite in order for the tort of malicious prosecution to be proven.

It is evident that all the four elements does not unite and the trial court erred in its decision. In the premises the decision of the lower court is set aside. The appeal succeeds with costs to the appellant.

S.M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 15th day of December, 2020.

In the presence of:-

Ms Magut for the appellant

Firm of Mwinamo for the respondent (absent)

Ms Gladys - Court assistant