



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL NO 26 OF 2010

JUDAH NDAMBUKI KITUKU.....APPELLANT

VERSUS

LEORNARD MUTUKU SESI.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

[Being an appeal from the judgment and decree of the Chief Magistrate's Court Machakos

delivered on the 23rd February, 2010 in CMCC No 164 of 2005 by S.M Mungai, SPM]

JUDGMENT

Introduction

1. This is an appeal from a judgment and decree of the Chief Magistrate's Court Machakos (Hon. S.M Mungai, SPM) delivered on 23rd February, 2010 in CMCC No 164 of 2005 where he dismissed a suit for damages for malicious prosecution. The facts are that the appellant herein claimed to be the owner of stall/plot no 13 at Tala market where the 1st Respondent carried on business of a butchery. The appellant is the son of the original owner of the plot while the 1st Respondent claims to have bought it from the mother and step brother of the appellant. On or about the 15/09/2004 the appellant was reported at Tala Police Station as having assaulted the 1st Respondent for painting on the appellant's shop contrary to his instructions. The appellant herein was charged with the offence of creating disturbance in criminal case No. 1058/2004 at Kangundo Law Courts where (3) witnesses testified against the accused. The appellant was acquitted under section 210 of the Criminal Procedure Code whereupon the State appealed in Misc. Application No 76 of 2004, but the same was dismissed.

The Plaintiff

2. By a Plaintiff filed on 30/3/2005 whereby the plaintiff claimed that his character was tainted by being arrested, imprisoned and prosecuted and being depicted as a criminal. The particulars of the special damages were:

a) Advocate fees in conducting defence Ksh.21,400

b) Transport fare to court and back Ksh.8,910

Inclusive of subsistent allowance

c) Disbursement on proceedings and judgment Ksh.31,710

3. The prayers in the Plaintiff are as follows:

a) Special damages Ksh.31,710

b) General damages for arrest, false imprisonment and malicious prosecution and character assassination.

c) Cost of the suit

d) Interest on a, b and c above.

The Defence

4. The Respondent herein filed its defence on 9/5/2005 denying ever making a report tainted with malice and/or falsehood and put the defendant/Appellant to strict proof on the special damages.

5. The Respondent in his defence averred that the acquittal by a court of law in respect of a criminal charge is not a good basis for laying a civil suit for malicious prosecution. He also denied allegations of tainting the character of the plaintiff.

6. During the hearing at the trial court the appellant did not produce any witnesses but the Respondent testified with one Gregory Wambua Mutisya who corroborated his evidence. Judgment had been prayed for against the 2nd Respondent, the Attorney General who had failed to enter appearance having been served and upon grant leave of court prayed for vide Chamber Summons dated 22/5/2006, judgment entered on 30/6/2006

Plaintiff's Submission

7. The plaintiff submitted the issue for determination to be as follows:

1. *Was prosecution instituted by the respondent or by someone whose acts he is responsible.*
2. *Was prosecution terminated in the Plaintiff/Appellant's favour*
3. *Was prosecution instituted without reasonable and probable cause*
4. *Was it acted by malice.*

8. It was the plaintiff/Appellant's submission that the prosecution was the one who instituted criminal proceedings against him which he was acquitted of the charge levelled upon him as there was no reasonable or probable cause or prosecuting him.

9. The plaintiff/appellant submitted that the hatred and malice was because he had refused to sell his father's plot to the respondent and that DW2's statement was hearsay as he was not at the scene and his evidence at the criminal case was dismissed as baseless.

10. As per general damages for defamation the plaintiff/appellant prayed for Ksh.250,000/=. He also submitted that he had proved special damages of Ksh.31,710/= by production of receipts totalling to the same. He cited the case of **Murunga v. Attorney General** [1979] KLR.

Defendants/Respondent's submissions

11. It was the defendants/respondents submission that the plaintiff/appellant's prosecution was not malicious in that there was evidence that created disturbance on the material day and that the findings of the trial court at Kangundo cannot bind this court.

12. The Defendants/Respondents also submitted that the plaintiff/appellant could not have been defamed during the hearing of the criminal case, as judicial proceedings are privileged and cannot be the basis of civil action for the tort of defamation.

13. The Defendants/Respondents urged that the court dismisses the same with costs.

Judgment of the trial court

14. On 23rd February, 2010 the court made the decision dismissing the plaintiff's case against the defendant with costs. The appellant was aggrieved and he filed the appeal herein.

Memorandum of Appeal

15. The appellant herein filed the memorandum of appeal on the 16th day of March, 2010 citing the following grounds:

1. *The trial magistrate misdirected himself in law and facts when he upheld the exhibit produced by the 1st Defendant as valid (defence exhibit 1) to prove ownership of the plot and using it as basis of his judgment yet it was invalid.*
2. *The trial magistrate erred in law and facts when he went out of the preview of the subject of the suit, considering it as one for ownership of plot among other issues instead of one for malicious prosecution.*
3. *The trial magistrate erred in law and facts when he failed to consider the ingredients of a suit for malicious prosecution yet the plaintiff had established all of them and in his favour.*
4. *The trial magistrate erred in law and in facts when he dismissed the suit with costs against the appellant herein yet there was an*

existing interlocutory judgment against the 2nd Defendant.

5. The trial magistrate erred in law and facts when he heaped all blame on the 2nd Respondent herein, and went ahead and dismissed the suit with costs to the Respondent.

Appellant's submission

16. The appellant filed their submissions on 27/2/2014 urging that the judgment dated 23/2/2010 be set aside and the lower court file be sent back to the magistrate for assessment of damages and payment of cost to the appellant as prayed in the plaint and finally that the costs of this appeal be awarded to the appellant.

17. On the 1st ground of the Memorandum of Appeal, the Appellant submitted that the only document that the learned trial magistrate was to rely on guiding him in making his judgment was “any documentary evidence adduced by either the Appellant/Plaintiff proving the malicious report made to Tala police was made by the 1st Respondent or any documentary evidence adduced by the 1st Respondent proving that he never made the report and that if indeed he made the request then the same was not malicious.”

18. The Appellant also submitted the trial court misdirected itself into deciding on ownership rather than on the issue of malicious prosecution. The Appellant urged that the judgment had been entered against the 2nd defendant.

19. It was the appellant's final submission that the appeal be allowed, the Principal Magistrate's judgment dated 23/2/2010 be set aside, and the lower court file be sent back to the magistrate for assessment of damages and payment of costs to the appellant as prayed in the Plaint, and finally that the costs of this appeal be awarded to the appellant. The appellant further relied on **Josphat Macharia Ngare v. Attorney General** [2006] eKLR.

1st Respondent's submissions

20. The 1st Respondent cited **Josiah Abubo & Company Advocates v. KCB & 2 others** at Kericho 2002, (without providing the court with a copy thereof) where Kimaru J. reportedly observed as follows:

“Our criminal justice will grind to halt if court were to find complainant's liable in damages to the accused person on the facts and circumstances of the case. No well-meaning citizens seeking to have justice done where a criminal offence has been committed would dare to make a report to the police in fear that in the event that the accused person is subsequently acquitted by the court of law, would sue him and be found liable for malicious prosecution.”

21. The 1st Respondent submitted his role ended when he reported the matter to the police and he did not control the process hence forth.

22. He also submitted that the fact that the 2nd Defendant the Attorney General failed to defend the case or enter appearance has no impact on the 1st Defendant's case.

23. The 1st Respondent submits that the appeal lacks merit and should be dismissed with costs as the appellant is merely avoiding to pay costs.

Issue for determination

24. The issue for determination is whether the appellant had proved his case on malicious prosecution to the standard of balance of probability required in civil cases.

25. The matter of the default judgment entered against the Attorney General who was the 2nd defendant for failure to enter appearance and file a defence is not before this court.

Determination

26. In accordance with its first appellate duty, this court has re-evaluated the evidence adduced before the trial court. See **Peters v. Sunday Post Limited** (1958) E.A. 424 and **Selle v. Associated Motor Boat Co. Ltd.** (1968) E.A. 123.

27. It is not in dispute that parties herein disagreed on an issue leading to the Respondent making a complaint at Tala police station and the appellant charged in Kangundo SRMCR No. 1058 of 2004 whereupon he was acquitted. The Attorney General made an application to appeal out of time but the application was dismissed.

28. The appellant filed a suit at the Chief Magistrate's Court civil suit No 164 of 2005 for malicious prosecution where judgment was entered against the 2nd Defendant as they failed to enter appearance on 30/6/2006.

Test for malicious prosecution

29. The test for malicious prosecution is the institution of a prosecution without reasonable and probable cause as observed by Cotran, J. in

Murunga v. R (1979) KLR 138, following **Kagane v Attorney General** (1969) EA 643 that –

“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 (1878) 8 Q.B.D. 167 adopted).”

30. It is clear that the 1st respondent had a reasonable cause to complain to the police over the alleged interference with his possession of the land subject of the suit over which both parties claimed ownership. The evidence in chief of the plaintiff before the trial court on 27.9.07 points to such a dispute and reasonable cause to complain as follows:

“I knew the defendant. I knew him on 1/4/1989 when I rented him a butchery. Between 14/9/04 and 23/9/04. I recall on 15/9/04 I had painted the house and I waited for the defendant who came and I told him not to paint any names on the shop wall. He got annoyed. We exchanged bitterly. On 23/9/04 the police came and arrested me and escorted me to Tala Police Post...”

31. On cross-examination the appellant clearly conceded to circumstances that would raise a reasonable ground for complaint by the 1st respondent as follows:

“It’s not true the defendant rented the property from my father and later we sold it to him. I see this sale agreement dated 8/4/00. It is today I have seen it DMFI (1). I live in that plot. I was painting the premises defendant was operating a butchery. I did not seek his authority yes.... and paint. It should not be written on. He should have put a sign board. If he painted a picture of a cow he would damage the paint. At that time a case arose out of it. Yes we did not exchange word. We spoke. I did not threaten to kill him.”

32. The 1st respondent’s version of the events, as material, was as follows:

“I know the plaintiff Judah Ndambuki. He is a neighbour at tala town. On 15.9.04 I was at my business remises. The plaintiff came around 2.30pm – 3.00pm. He started abusing me telling me he was going to rape me with my wife. He said he would make sure he had raped both of us. He was knocking me on the chest with his fingers. I moved further inside the premise. He followed me. I decided to avoid further loss and decided to report the matter to the police at Tala. The plaintiff also told me he would make sure he had killed me...”

I had bought a plot of his father from his brothers and his mother. It is plot NO. 13 Tala Market. He found me on the same plot where I run my business...”

33. The appellant failed to prove on a balance of probability that the 1st respondent had no reasonable cause to make the complaint which was the subject of the criminal proceedings against the appellant which resulted in the malicious prosecution claim upon dismissal of charge and acquittal of the appellant. The appellant as the suitor had the burden of proof under sections 107 and 108 of the Evidence Act to prove the fact in issue in the case that the 1st respondent had **maliciously** set in motion the process leading his prosecution.

34. As I understand the issue, malice as an ingredient of the tort of malicious prosecution would exist only where the defendant had no reasonable basis to complain setting in motion the criminal prosecution for which the plaintiff is upon trial acquitted. It is not unreasonable for a person in possession of premises over which he claims ownership rights to complain against a person who interferes or seeks to interfere with his possession and or ownership of the premises and in a manner likely to cause a breach of the peace. The evidence of the 1st respondent in the trial court presented such a person in the plaintiff. I do not find any merit in the appellant’s suit for malicious prosecution against the defendants.

35. There is no requirement that all the complaints made to the police must eventually lead to a successful prosecution of the persons against whom they are made lest it becomes a case for malicious prosecution. Only a reasonable cause to complain need be disclosed. I would respectfully agree with the statement of Kimaru J. as reported in **Josiah Abubo & Company Advocates v. KCB & 2 others**, supra. Such a posturing would discourage persons who suffer various criminal wrongs at the hands of others from ever pursuing justice by lodging a complaint with the police. I would add that such a position would also unconstitutionally impede the individual’s right to access to justice under Article 48 of the Constitution.

36. On a balance of probability noting the admission by the appellant that the two had “*exchanged bitterly*”, I find it more probable than not that the appellant had behaved in a manner likely to cause a breach of the peace in trying to assert his authority, as owner - as shown by his painting the building without reference to the tenant - of the plot to which the 1st respondent claimed to have bought from the appellant’s brothers and his mother. In the circumstances, I find that the 1st respondent was entitled to lodge a complaint with the police.

Judgment of the trial court to be upheld

37. The next step in the first appellate court analysis is to see whether the conclusion of the trial court should be upheld or set aside. In view of this court’s finding above, it is considered that the trial court considered the matter admirably, as follows:

“I have carefully considered the pleadings, the evidence produced by the litigants and the submissions which tendered. Though none cited any authorities to guide the court in arriving at the verdict, it is trite law as established by the authorities that to prove malicious prosecution the plaintiff must establish the following issues:

1. That the prosecution was instituted by the Defendant directly or indirectly.
2. That the same terminated in his favour the (plaintiff)
3. That the prosecution was actuated by malice

(See **Murunga v. AG (1979) KLR 138**)

The first two tests are not in dispute and any favour the plaintiff contends that the defendant had no reasonable and probable cause to institute the prosecution. The defendant contested that and averred that the plaintiff abused and threatened him on his own plot and in his shop and the matter was investigated by the police who proceeded to charge the plaintiff.

The defendant tendered a sale agreement to show that he had purchased the plot on which the shop the plaintiff was claiming to be his, stood. The plaintiff did not debut the agreement. On his part he never tendered document to confirm that indeed the shop belonged to him. He also never produced an agreement which he averred exists related to the plot though he claimed to have it.

The forth test on whether the prosecution was actuated by malice is closely tied to the third one. The court did not have the benefit of hearing the evidence of the police witness who instituted the charge against the plaintiff since the AG (1st Defendant) never entered appearance. A perusal of the proceedings in the case of Kangundo reveal that the court did not take cognisance of an existing dispute between the litigants in this case over the plot of Kangundo and it proceeded to suggest that could have been the cause of their disagreement.

The court cited the said PC Mutai (PW5) for shoddy and incomplete investigations and failure to call all the material witnesses. The court therefore heaped blame on the police officers for the way the case was conducted leading to the acquittal of the plaintiff.

Those observations confirm that indeed the defendant has reasonable grounds to level the complaint against the plaintiff, the plot dispute confirms that.

The police summoned witnesses, recorded statements and concluded that there was sufficient evidence to charge the plaintiff. The defendant had no control on how they proceeded to institute the charge, how the investigations were conducted etc. the blame if any, lies square on the police.

I therefore proceed to find that the plaintiff has failed on a balance of probabilities to prove the claim against the defendant and I must proceed and dismiss the case with costs to him.

S.M. Mungai

Senior Principal Magistrate”

38. I respectfully agree, and I affirm the decision of the trial court in the matter.

Error on the face of the decree

39. There appears to be an error in the formal decree extracted at the end of the suit on 22nd May 2010 as it indicates that “*the plaintiff’s case against the defendants be and is hereby dismissed with cost to the defendants*” while as shown above the trial court only dealt with the suit against the 1st respondent whose suit was still pending, judgment for the special damages of 37,710/- having already been obtained against the 2nd defendant on 30/6/06. However, nothing in this appeal turns on that anomaly.

Orders

40. Accordingly, for the reasons set out above, this court makes orders as follows:

1. The appeal is dismissed.
2. Each party shall bear its own costs of the appeal.
3. The appellant shall pay to the respondent the costs in the trial court.

Order accordingly.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 23RD DAY OF JANUARY 2019

G.V. ODUNGA

JUDGE

Appearances:

M/S J.A. Makau & Co. Advocates for the Appellant.

M/S Muema & Associates Advocates for the 1st Respondent.