



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL NO. 156 OF 2016**

**NICOLAS AMUHAYA SHISUNDI.....APPELLANT**

**VERSUS**

**EQUITY BANK.....1<sup>ST</sup> RESPONDENT**

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

*(Being an appeal from the judgment and decree of the Chief Magistrate T.W. Cherere*

*in Eldoret CMCC No. 444 of 2014)*

**JUDGMENT**

1. The appellant (**NICOLAS AMUHAYA SHISUNDI**) had filed a suit against EQUITY BANK (1<sup>st</sup> appellant) alleging that it or its agent falsely made a complaint at the Eldoret police station that he had presented fake currency at their **Eldoret Market branch**. He was arraigned in court and charged via **Eldoret criminal case no.139 of 2012**,

2. Eventually the appellant was acquitted on 17.9.2013 under section 215 of the **Criminal Procedure Code**. He had incurred expenses in the criminal case and the loss of **Ksh 90,000/=** and **Ksh 20,000/=** towards transport and subsistence expenses. He prayed for judgment to be entered jointly and severally for:

a) General damages for malicious prosecution and wrongful confinement.

b) Special damages of Ksh 155,000/-

c) Costs of the suit plus interest.

3. The Respondent denied liability, contending that the appellant was not entitled to the damages he sought nor was he maliciously prosecuted.

4. The court in its judgment for **31.10.2016** dismissed the appellant's case with costs to the defendants.

5. Aggrieved by this decision he appealed on grounds that;

***1) The trial magistrate erred by failing to appreciate the fact that was a civil case and the standard of prove was on a balance of probability***

***2) The trial magistrate erred by failing to evaluate all the issues raised in the plaint to wit the conduct of the defendants cashier when she was handed over the dollar by the plaintiff***

***3) The trial magistrate erred in failing to appreciate the fact that the conduct of the respondent then the defendant's agents and actions were sufficient to contribute to malice.***

***4) The learned trial magistrate failed to appreciate that the 2<sup>nd</sup> defendant's agent investigations were not thorough since they did not get to recover the fake dollars from the appellant, but from the bank employees.***

5) *The trial magistrate erred in law and in fact by expecting the appellant to strictly prove special damages of Ksh 155,000/= (read one hundred and fifty five thousand shillings only) when the same could clearly be proved from the proceedings and or pleadings.*

6) *The trial magistrate erred in disregarding the evidence of the plaintiffs witness regarding the nature of the notes given to the plaintiff and the ones produced in court by the bank.*

7) *The trial magistrate erred in disregarding weighty issues raised in the plaintiff's submissions dated 7.9.2016*

6. The parties canvassed the appeal by way of written submissions.

#### **Appellant's submissions**

7. The appellant submitted that the trial court failed to determine the claim on a balance of probability pointing out that the money was not tested in his presence, and that was wanting. It was contended that the police failed to investigate the case properly, only believing what the bank employees had to say. The appellant maintained that he had US dollars which was equivalent to ksh 155,000/= and the same was never given to him. The court was referred to *Chripus Karanja Njogu v. A.G & Anor [2008] eKLR* where the plaintiff was maliciously prosecuted and he was awarded general and exemplary damages for the same.

8. Counsel for the 1<sup>st</sup> respondent argued that the appellant had not shown how the trial court erred, saying that his independent witness in the criminal case had testified that he did not see the exchange at the bank and that the 1<sup>st</sup> respondent was not malicious in prosecuting the appellant. That the appellant did not prove his case for malicious prosecution, thus could not be awarded damages and for the special damages claim he did not produce receipts for the transport expenses incurred and the legal fees expenses.

9. It was submitted that the claim for the sum of **Ksh 155,000/=** was not particularized in the plaint, it was a special claim and ought to have been specifically and specially proved as was held in *Hahn v. Singh* (1985) KLR 716 and in *Coast Bus Services v. Sisco E. Murunga Danyi & 2 Ors*, Civil Appeal no.192 of 1992.

10. To prove a claim in malicious prosecution the court was referred to a court of appeal decision in *Robert Okeri Ombeka v. Central Bank of Kenya* [2015] eKLR where the threshold claim for malicious prosecution was set as:

*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 favor.*

*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.*

It was on account of the afore-going that counsel maintained that the arrest, confinement and prosecution of the appellant was not done in malice.

11. It was argued that the acquittal was only because the court found that the appellant did not know he was having fake currency. Further that the 1<sup>st</sup> respondent had a duty to intercept any transaction regarding illegal currency. In *Nzoia Sugar Company v. Fungututi* (1988) KLR 399 the Court Of Appeal held that,

***“Acquittal person 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.”***

12. This court was urged not to set aside the findings of the trial court since the appellant did not discharge the burden of proof as required in section 107-109 of the Evidence Act. Finally the appeal be dismissed with costs.

13. In regard to ground 1,2,3, and 4 of the appeal 2<sup>nd</sup> appellant's counsel urged the trial court in her judgment elaborated on circumstance that a case in malicious prosecution can succeed and was referred to *Murunga v. A.G* (supra). These principles should be proved on a balance of probabilities. See also *Mbowe v. East Menjo District Administration* [1972] EA 352.

14. In the criminal case he was put on his defence since the court found he had a case to answer. The case in *Kagame v. A.G* (1969) EA 643 set the test for reasonable and probable cause. The appellant failed to show the prosecution was actuated by malice, In *Stephen Gachau Githaiga & Anor v. A.G* [2015] eKLR the court opined that to prosecute one is not per se tortious but only in situations where the prosecutor acted dishonestly and unreasonable and must be proved by prosecution.

15. The appellant had failed to prove the special damage claim. In *Capital Fish Kenya Ltd v. Kenya Power & Lighting Company Ltd* [2016] eKLR the court of appeal judges held that special damages had to be proved and pleaded.

16. The 2<sup>nd</sup> respondent however did not agree with the court when it stated that if the appellant had proved his case then he would have been awarded Ksh. 100,000/=.

## Analysis

17. The issues arise for determination whether the appellant had proved his case in the trial court on a balance of probability.

18. This is a court of appeal and has a duty to re-evaluate as well as re-examine afresh the evidence on record and come to its own conclusion, putting in mind that it did not have the opportunity to hear the witness as was held in *Selle & Anor v. Associated Motorboat Company Ltd & Ors* (1963) EA 123.

19. The appellant in his submissions maintained that he had been maliciously prosecuted after the 1<sup>st</sup> respondent reported him to the police. For a party to succeed in a case for damages for malicious prosecution the courts have always been guided by the principles set in *Murunga v. A.G* (supra) which have been elaborated above. Also in *Mbowa vs. East Menago District Administration (supra)*, the East African Court of Appeal expressed itself 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 instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than for the public benefit. It originated in the medieval writ of conspiracy which was aimed against combinations to abuse legal procedure, that is, it was aimed at the prevention or restraint of improper legal proceedings. 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. It's essential ingredients are: (1) the criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority; (2) the defendant must have acted without reasonable or probable cause i.e. there must have been no facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified; (3) the defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose; and (4), the criminal proceedings must have been terminated in the plaintiff's favour, that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge...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 them he would fail in his action. The damage that is claimed is in respect of reputation but other damages might be claimed, for example, damage to property...The damage to the plaintiff results at the stage in the criminal proceedings when the plaintiff is acquitted or, if there is an appeal, when his conviction is quashed or set aside. In other words, the damage results at a stage when the criminal proceedings came to an end in his favour, whether finally or not. The plaintiff could not possibly succeed without proving that the criminal proceedings terminated in his favour, for proving any or all of the first three essentials of malicious prosecution without the fourth which forms part of the cause of action, would not take him very far. He must prove that the court has found him not guilty of the offence charged...The law in an action for malicious prosecution has been clearly defined and in so far as the ordinary criminal prosecution is concerned the action does not lie until the plaintiff has been acquitted of the charge. In this case the respondent could have brought his action for malicious prosecution until the prosecution ended in his favour. He could not have maintained his action whilst the prosecution was pending nor could he have maintained an action after he had been convicted. His right to bring the action only accrued when he secured his acquittal of the charge on appeal, and he then had the right to bring this action for damages...Time must begin to run as from the date when the plaintiff could first successfully maintain an action. The cause of action is not complete until such a time, and in this case this was only after he was acquitted on appeal”.*

20. It is not in dispute the appellant was charged via Eldoret criminal case no. 139/2012. The charge sheet dated 10.1.2012 read that on 9.1.2012 the appellant was found in possession of 6 pieces of papers which he wanted to pass out as US dollars. The record of proceedings shows that the appellant was acquitted after he had been put on his defence. The proceedings show that it was the 1<sup>st</sup> respondent who called on the police to arrest the appellant after the manager tested the notes using UV light machine which detected it was fake. At this point, being an officer of the 1<sup>st</sup> respondent she had a duty to inform the authorities of what she had discovered.

21. The prosecution in the criminal case called witnesses and pw3 testified and confirmed to the court that the dollar presented by the appellant was of poor quality, had no security thread water marks, had no micro printing of fine printing patterns and many more features which he gave confirm that the notes presented by the appellant were fake. It was incumbent upon the prosecution to prove its case, which it did. The notes were even produced in court as exhibit.

The prosecution indeed had a reasonable and probable cause to prosecute the appellant. If the prosecution was to achieve an ulterior motive then this court would find the prosecution to have failed in delivering justice. The court in *James Karuga Kiiru v. Joseph Mwamburi & 3 Ors* it was held that to prosecute a person is not prima facie tortious but to do so dishonestly or unreasonably is. And the burden of proving that the prosecutor did not act honestly or reasonably lies on the person prosecuted.

22. The appellant cannot cling on the fact of his acquittal to say it proves he was maliciously prosecuted. In *Nzoia Sugar Company v. Fungututi* (supra) the court of appeal held that, **“acquittal of a person on a criminal charge is not sufficient basis to ground a suit for malicious prosecution.”**

23. The appellant in the appeal submissions had stated that had pleaded for damages of Ksh 900,000/=. The plaint on record does not disclose any such amount, thus this is an attempt to bring in a figure that did not exist in the initial pleadings. The prayer in the submissions were different from the prayers in the plaint.

24. In addition to the above it is well settled now that special claim has to be specifically pleaded and proved. The appellant did not produce any evidence to support his claim for Ksh 155,000/=. This was to be done during hearing at the lower court. The burden of proof rested on him as provided under section 107 of the Evidence Act.

Consequently I hold and find that the appeal lacks merit and is dismissed with costs.

**DELIVERED AND DATED THIS 15<sup>TH</sup> DAY OF MARCH 2019 AT ELDORET**

**H. A. OMONDI**

**JUDGE**