



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 227 OF 2016**

**JOHN KAMAU NDERE.....APPELLANT**

**VERSUS**

**NDETIKA RURAL SACCO SOCIETY LTD.....1<sup>ST</sup> RESPONDENT**

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

*(Being an Appeal from the Ruling, decision and decree of the*

*Honorable Senior Principal Magistrates Kikuyu D. N. Mulekyo (Mrs.)*

*given on 24<sup>th</sup> Day of July 2012 in PMCC No. 285 of 2006)*

**JUDGMENT**

The Appellant herein was the Plaintiff in the Principal Magistrates Civil Suit Number 285/2006 while the Respondents were the defendants. In his Plaintiff dated the 13<sup>th</sup> day of December, 2006 and filed on 14<sup>th</sup> December 2006 he claimed General damages for false arrest and detention, malicious prosecution, special damages of Kshs. 130,000 plus costs of the suit and interest.

In his plaintiff, the Appellant contended that on or about the 18<sup>th</sup> day of March 2006, the first Respondent filed a Criminal complaint against him which culminated into his prosecution in Criminal Case Number 414/2006, in the Principal Magistrate's Court at Kikuyu in which he was charged with the offence of stealing by servant contrary to Section 281 of the Penal Code. A copy of the charge sheet which, was produced as an exhibit in the trial court shows that he was charged with theft of pieces of timber and a water tank from the 1<sup>st</sup> Respondent all valued at Kshs. 35,000. The said theft was said to have taken place on the 6<sup>th</sup> day of March, 2006 at Nderi Village, in Kiambu District within Central Province (then).

He averred that he was arrested on the 11<sup>th</sup> day of April, 2006 and arraigned in court on the 13<sup>th</sup> day of April 2006 but he pleaded not guilty to the charge and was released on bond after having been detained at Kikuyu Police Station for the period between 11<sup>th</sup> – 13<sup>th</sup> March as aforesaid. He pleaded that at the time of his arrest, several of his business associates, customers, relatives and friends were present and they passed derogatory remarks about him following his arrest.

He contended that his trial that lasted for 5 days ended up with his acquittal under Section 210 of the Criminal Procedure Code as there was no sufficient evidence to put him on his defence.

He averred that he was maliciously prosecuted as a result of which, he suffered loss of esteem in the eyes of his business colleagues, friends and relatives and also suffered great mental anguish. That his arrest and detention were illegal.

The Respondents filed their respective defences in which they denied the Appellant's allegations. On the part of the first Respondent, it was averred that it made a complaint with the police of the theft of its property and the police, after investigations, arrested the Appellant and arraigned him in court. That the said report was bonafide and without any malice whatsoever.

On the part of the 2<sup>nd</sup> Respondent, it was contended that the arrest and prosecution of the Appellant was undertaken pursuant to reasonable and probable cause in execution of a statutory duty after a complaint was lodged and a probable Criminal offence punishable in law established. The particulars of the statutory duty are set out in paragraph 5 of the 2<sup>nd</sup> Respondents statement of defence. The 2<sup>nd</sup> Respondents contended that though the Appellant was acquitted, the acquittal does not entitle him to a cause of action on malicious prosecution. The

particulars of loss and damages were denied and the Appellant was put to strict proof.

Both the respondents urged the court to dismiss the Appellant's claim.

A reply to defence was filed in which, the Appellant joins issues with the defences filed by both the Respondents and reiterated the contents of his plaint.

During the hearing before the Lower Court, the Plaintiff testified as PW1. He told the court that he was a member of Ndetika Rural Sacco since the year 2001. He was the chairman for 3 months before the management alleged that he had stolen timber and a water tank. That he was charged in criminal case number 414 of 2006 but he was acquitted at the conclusion of the trial under section 210 of the Criminal Procedure Code. That following the institution of the Criminal case, he was suspended in an Annual General Meeting during which meeting 3000 documents were published to the members which contained fake allegations against him. It was his evidence that he was arrested on 11<sup>th</sup> April, 2006 and arraigned in court on the 13/4/2006 during which time he remained in custody.

He averred that after his arrest, he could no longer carry on his business of office stationery and office supplies as his reputation was dented.

Humphrey Mbugua Thairu gave evidence as PW2. In the year 2005, he was the chair of Ndetika Rural Sacco but he ceased being the chair on 14/1/2006 but he remained a member thereafter. He handed over to John Ndere and among the things that he handed over was the money that belonged to the society. He told the court that he was aware that the Appellant was charged with the theft of a water tank and timber belonging to the society. According to him, Ndetika Sacco did not have a tank or timber. He stated that the Appellant is well known to him and he is so much respected among the members of their church which they attend. In his view, the Appellant lost his popularity among the members of the public and he also held him in lesser esteem.

The Respondents called one witness, namely Mark Githu Muigu who was the treasurer of the first Respondent but on 14/1/2006, he was the vice chair. He told the court that he was aware that the first Respondent made a report of stolen items which report was made by the watchman and the general manager. The watchman, a Mr. Matave reported that a water tank and timber had been stolen from the Board room at the first Respondent's premises and they confirmed that the items were missing. The guard told them that the items had been taken by the chair. They reported the matter to the police and recorded their statements. He denied that the report was activated by malice.

It was his evidence that at a meeting of full management committee on the 25<sup>th</sup> March, 2006 the Appellant admitted taking the tank and timber. He admitted to having given the tank out as scrap metal and the timber to an old woman. He averred that there was no malice in the way the case was brought against him and that the same was genuine.

In her judgment delivered on 24/7/2012, the learned magistrate dismissed the Appellant's case with costs to the Respondents. The Appellant being dissatisfied with the judgment has appealed to this court and has listed 12 grounds of Appeal in his petition of Appeal filed in court on 3<sup>rd</sup> May, 2016.

The Appeal was disposed of by way of written submissions which this court has duly considered. In his submissions, the Appellant contended that he had proved that he was maliciously prosecuted by proving all the ingredients as required by law but the trial court erred in finding that he had proved two ingredients. He averred that the trial court erred by failing to apply the principles in deciding whether the words printed and circulated by the 1<sup>st</sup> Respondent amounted to defamation yet he produced oral and documentary evidence to that effect. That the trial court failed to appreciate the judgment in Kikuyu Criminal Case no. 414/2006 wherein the Appellant was acquitted for the charges that he was accused of.

The Appellant further alleged that the trial magistrate erred in relying on the minutes produced as secondary evidence by the 1<sup>st</sup> Respondent which the Hon. Magistrate deemed as probable and reasonable cause for making the report to the police despite the fact that the said minutes were forged and not signed or dated. That the learned magistrate relied on extraneous evidence and documents that were never produced in the Criminal case to dismiss the Appellant's case.

The first Respondent filed submissions on 2<sup>nd</sup> February, 2018. It submitted that in her judgment, the learned magistrate articulated the reasoning behind the Appellant's failure in proving his case and thus dismissed the same and therefore the finding by the learned magistrate both on general and special damages was founded on evidence.

It was submitted that the Appellant has not made any attempt to specifically canvass his grounds of Appeal and therefore the Appeal should be dismissed.

On the part of the 2<sup>nd</sup> Respondent, it was submitted that the Appellant's witness was not consistent stating that his view of the Appellant was not lessened in light of the charges that he was facing with regard to the claim for malicious prosecution, the 2<sup>nd</sup> Respondent contended that the trial magistrate noted that only two ingredients of the tort of malicious prosecution were proved by the Appellant but he failed to prove the other two.

It was averred that the Appellant's contention that the trial magistrate ought not to have considered the minutes of the meeting held on 25/3/2012 for that reason that they had not been produced in the Criminal Case does not hold water as this did not mean that they were not in existence. That it was on the basis of the said minutes that the police preferred charges against the Appellant and that the Appellant's allegations that the minutes were forged are not true.

It was further submitted that the police had reasonable and probable cause to charge the Appellant and therefore the issue of malice cannot arise. That the police officers were merely performing their mandatory statutory duties. That the mere fact that the Appellant was acquitted is not a proof of his innocence and neither is it a proof of malice on the part of the police officers who arrested him and those who investigated

the offence.

On the issue of special damages, the 2<sup>nd</sup> Respondent – submitted that none were proven. On the issue of failure to enter appearance in the appeal, it was submitted that the court cannot enter summary judgment on Appeal as there is no law that provides for that.

The court has carefully considered the grounds of Appeal and the submissions by the parties. The law surrounding the tort of malicious prosecution is well settled in this country. In the case of **Mbowa Vs East African Court of Appeal**, the court 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 public benefit. It originated in the medieval unit of conspiracy which aimed against combinations of abuse of legal procedure, that is, it was aimed at the prevention or restraint of improper legal proceedings. It occurs as a result of the abuse at the hands of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion of the truth. Its 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.”*

In the case of **Gitau Vs. the Attorney General (1990) KLR 13** Trainor J had this to say:-

*“To succeed on a claim for malicious prosecution the plaintiff must first establish that the defendant or his agent set the law in motion against him on a criminal charge. Setting the law in motion” in this context has not the meaning frequently attributed to it of having a police officer take action, such as effecting arrest. It means being actively instrumental in causing a person with some judicial authority to take action that involves the plaintiff in a criminal charge against another before a magistrate.*

*Secondly he who sets the law in motion must have done so without reasonable and probable cause... The responsibility for setting the law in motion rests entirely on the Officer-in-Charge of the police station. If the said officer believed what the witnesses told him then he was justified in acting as he did, and the court is not satisfied that the plaintiff has established that he did not believe them or alternatively, that he proceeded recklessly and indifferently as to whether there were genuine grounds for prosecuting the plaintiff or not.”*

Coming from that background, it is not disputed that the Criminal proceedings were instigated by the 1<sup>st</sup> Respondent and that the same ended in Appellant's favour. What the court will have to determine is whether the prosecution was activated by malice and whether there was a reasonable cause and/or justification to prosecute the Appellant. The first Respondent averred that there was no malice on their part when they made a complaint to the police against the Appellant. The evidence available in the Criminal Case is that the Appellant was seen carting away the items that were stolen. He sent the watchman to Kikuyu and he did not deny that he accessed the store where the items that were stolen were stored. No evidence was adduced in the Civil Case to show that the first Respondent was activated by malice when they made a report to the police about the stolen items. At no time did the Appellant tell the court that there was bad blood between him and the first defendant which could point to circumstances from which, malice can be inferred.

On whether there was a reasonable and probable cause, the court in the case of **Thomas Mutsotso Bisembe Vs. Commissioner of Police & Another (2013) eKLR** while dealing with this aspect had this to say;

*“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 complaints. 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, where the police deliberately decide not to take into account the version of the suspect and acts on a story that eventually turn out to be improbable and which no ordinary prudent and cautious man would have relied upon, that failure may constitute lack of reasonable and probable cause for the purposes of malicious 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”.*

The test of determining whether or not there was reasonable and probable cause to the Appellant's prosecution and whether it was activated by malice was laid down in the case of **Kagame & others** where the court held;

***“Whether or not there was reasonable and probable cause for the prosecution is primarily lodged on the objective basis of whether the material known to the prosecution would satisfy a prudent and cautious man that the accused, was probably guilty. Once the objective test is satisfied, it may be necessary to consider whether the prosecutor did 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 .....*”**

The facts show that no reasonable person could honestly have believed that the prosecution was at all likely to succeed then malice would have been established and malice in that case meant that the prosecution was motivated by something more than a desire to vindicate justice.

What constitutes a reasonable and probable cause was also defined in the case of **Simba V. Wambari (1987) KLR 601** as;

***“The plaintiff must prove that the setting of the law in motion by the inspector was without reasonable and probable cause. If the inspector believed what the witnesses told him then he was justified in acting as he did and I am satisfied the plaintiff has not established that he did not believe then or alternatively that he proceeded recklessly and indifferently as to whether there was genuine grounds of prosecuting the plaintiff or not”.***

Also in the case of **Samson John Nderitu Vs The Attorney General (2010) eKLR** where the court held thus;

***“It is trite and this court has judicial notice of the fact that before an accused person is taken to court, and arraigned in court for criminal prosecution, the prosecuting authority namely the police or whatever unit whose functions fall under the office of the defendant, usually carry out investigations, record statements from potential witnesses, analyze the facts to determine if the facts disclose an offence before arraigning such a person in a court of law”.***

The court has carefully perused the proceedings in criminal case number 414/2006. Nine witnesses testified in support of the prosecution’s case. The evidence of PW1, PW2 and PW3 is very critical in these proceedings. PW1 was the security guard who was guarding the premises of the 1<sup>st</sup> Respondent where the stolen items were stored. The Appellant sent him to Kikuyu allegedly for a seminar and on reaching there he was told there was no seminar. When he came back he found that some 10 timber pieces had been taken away. He had left a colleague of his in charge of security at the first Respondents premises and he is the one who told him what transpired. PW1 personally show the Appellant taking away the tank which he took on a different date.

PW2 was the person who was left in charge of the premises by PW1 when he was told to go to Kikuyu by the Appellant. It was his evidence that the Appellant carried away some pieces of timber using a donkey. The Appellant was known to him but he could not ask him why, he was carrying away the timber because he was the chairman of the first Respondent and when PW1 came back, he told him what had transpired during that time he was away.

PW3 admitted that he was within the first Respondent’s premises on the 6<sup>th</sup> day of March 2006 cutting trees. According to PW1, PW3 is the person who bought the tank from the Appellant. Though PW 3 was declared a hostile witness, in his statement that was produced in evidence, he admitted that he brought the tank from the Appellant herein but alleged that he was made to sign the statement by the police. He, however, did not allude to any duress or undue influence that the police used for him to sign the statement. It is therefore not likely that he was forced to sign the statement as alleged.

In her judgment in the Criminal trial, the learned magistrate put a lot of emphasis on contradictory evidence by the prosecution witness. In my view, the said contradictions are not material considering the evidence of PW1 and PW2 on the circumstances surrounding the alleged theft of the tank and the timber.

The Appellant has taken issues with the trial courts reliance on the minutes of the meeting that was held on 25<sup>th</sup> March, 2006. He has contended that the learned magistrate erred in relying on those minutes produced as secondary evidence and deeming them as having formed a basis for a reasonable and probable cause for the arrest and prosecution of the Appellant. He has argued that the trial magistrate relied on extraneous evidence and documents that were never produced in the criminal trial and thus dismissed the Appellant’s Civil Case.

The court has perused the said minutes which were produced as defence exhibit number 1. The record of proceedings show that counsel for the Appellant did not object to their production. The same are duly signed by the Vice Chairman, the Hon. Secretary and a member, contrary to what is submitted in this Appeal. The Appellant has nowhere in the proceedings alluded to the fact that the minutes were forged. The Appellant was in attendance and he was given a chance to defend himself. He admitted having opened the Boardroom which position tallies with the evidence of PW2 who was left in charge by the PW1. He had no reason to give why he opened the Boardroom where the stolen items were stored. He admitted to having taken the timber and the tank. Though the minutes are not original, the same were certified by the Principal Magistrate Kikuyu on the 3<sup>rd</sup> November 2016.

It is not clear why the said minutes were not produced in the Criminal Case yet the record shows that the subject meeting had taken place before the proceedings in the Criminal trial commenced. It is also not clear whether the same were brought to the attention of the investigating officers but the fact that they have not been referred to in the Criminal case, would mean that they were not. The logical inference therefore would be that, the minutes could not have formed the basis of a reasonable and probable cause for the prosecution of the Appellant. However as this court has observed elsewhere in this judgment, even without taking into account the minutes aforesaid and considering the evidence of PW1, PW2 and PW3, it is my considered view that there was a reasonable and probable cause to prosecute the Appellant and there was no malice in the said prosecution and the making of the complaint to the police. In any event, no malice has either been proved or alluded to, by the Appellant.

With regard to the tort of defamation,, a defamatory statement was defined in the case of **Odonkara Vs. Astles (1970) EA 374** as follows;

**“A statement is defamatory of a person of whom it is published if it is calculated to lower him in the estimation of ordinary, just and reasonable men”.**

The wrong of defamation consists in the publication of a false and defamatory statement concerning another person without lawful justification. The elements of the tort are well set out in the case of **J. Kudwoli Vs. Eureka Educational and Teaching Consultants & 2 Others HCCC. No. 126/1990** which are:-

- 1) The matter of which the plaintiff complains was published by the defendant.
- 2) The publication concerned or referred to the plaintiff.
- 3) That it was defamatory in character.
- 4) That it was published maliciously.
- 5) That, in slander, subject to certain exceptions, that the plaintiff has suffered special damage.

The same principles were reiterated in the case of **Wycliffe A. Swanya Vs. Toyota East Africa Limited & Francis Massai Nairobi CA. No. 70/2008.**

Applying the above principles in the case herein, it is not in dispute that the complaint was made by the 1<sup>st</sup> Respondent and that it concerned the Appellant. This court has already made a finding that there was no malice on either the part of the police or the first Respondent and looking at the evidence on record the complaint made to the police was not defamatory of the Appellant. The fact that the Appellant was acquitted in the criminal case is not enough to sustain a cause of action in either defamation or malicious prosecution. The court finds that the tort of defamation was also not proved on a balance of probability.

Having evaluated the evidence of the learned magistrate and the criminal proceedings, I find no reason to interfere with her finding.

The Appeal has no merits and the same is hereby dismissed with costs to the Respondents.

It is so ordered.

Dated, delivered and signed at Nairobi this 14<sup>th</sup> day of March, 2019

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**L NJUGUNA**

**JUDGE**

***In the Presence of***

.....***For the Appellant***

.....***For the 1<sup>st</sup> Respondent***

.....***For the 2<sup>nd</sup> Respondent***