



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL NO. 148 OF 2011**

**JOEL MUDAVADI.....APPELLANT**

**VERSUS**

**EAGLE HARDWARE DEALERS LIMITED.....1<sup>ST</sup> RESPONDENT**

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

(Being an Appeal from the Judgment and Decree of Hon. D. K. Kemei, Principal Magistrate, delivered on 26 July 2011 in Eldoret CMCC No. 330 of 2010)

**JUDGMENT**

[1] This is an appeal arising from the Judgment and Decree of the Principal Magistrate, **Hon. D.K. Kemei**, in **Eldoret Chief Magistrate's Civil Case No. 330 of 2010: Joel Mudavadi Kayubi vs. Eagle Hardware Dealers Limited & Another**. The Appellant had sued the Respondents before the lower court claiming General Damages, Special Damages and Aggravated Damages as well as Costs and Interest, for malicious prosecution and false imprisonment.

[2] It was the contention of the Appellant before the lower court that, while going about his duties as a hand-cart pusher in Eldoret Town on the **4 May 2009**, he was arrested by police officers from Eldoret Central Police Station at the instance of the 1<sup>st</sup> Respondent on allegations that he had attempted to obtain goods by false pretences from the 1<sup>st</sup> Respondent's hardware shop; and that he was put in custody before being arraigned before Eldoret Chief Magistrate's Court on **5 May 2009** to answer charges of making a document without authority contrary to **Section 357(a)** of the **Penal Code, Chapter 63** of the **Laws of Kenya**; uttering a document with intent to defraud contrary to **Section 357(b)** of the **Penal Code**; and an attempt to obtain goods by false pretences contrary to **Section 313** of the **Penal Code**. It was further the assertion of the Appellant that though he was thereafter prosecuted for the aforementioned offences, he was acquitted for lack of a *prima facie* case on **7 September 2009**.

[3] Accordingly, he filed the lower court suit alleging malice and lack of reasonable or probable cause for his arrest, detention and prosecution. His suit was however dismissed by the lower court on **26 July 2011**. Here is the view taken by the Learned Trial Magistrate of the Appellant's suit:

**"Although the plaintiff was acquitted of the charges it did not transpire that the charges were absolutely baseless but rather that one more suspect had not been roped into the criminal proceedings and hence the prosecution's case was lost on that technicality. Indeed the banker's cheque and LPO still remain fake and at no time even after the finalization of that case were those documents established to be genuine. Again the purported Kapsabet Teachers Training College was found not to exist. There was therefore a real risk in losing its goods had the first defendant not acted in good. Consequently I find there was no malice at all on the part of the defendants in prosecuting the plaintiff vide Cr. 2749/09..."**

[4] Being aggrieved by the decision of the lower court, the Appellant lodged this appeal on **22 August 2011** through the law firm of **M/s Wambua Kigamwa & Company Advocates**, citing the following grounds:

[a] That the Learned Magistrate erred in law and fact in failing to find that the Respondents were actuated by malice and lacked a reasonable and probable cause to falsely arrest and prosecute him for the offence of making a document without authority contrary to **Section 357(a)** of the **Penal Code**;

[b] That the Learned Magistrate erred in law and fact in failing to find that the Respondents were actuated by malice and lacked a reasonable and probable cause to falsely arrest and prosecute him for the offence of uttering a document with intent to defraud contrary to **Section 357(b)** of the **Penal Code**;

[c] That the Learned Magistrate erred in law and fact in failing to find that the Respondents were actuated by malice and lacked a reasonable and probable cause to falsely arrest and prosecute him for the offence of attempting to obtain goods by false pretences contrary to **Section 313 of the Penal Code**;

[d] That the Learned Magistrate erred in law and fact in contradicting the findings in the criminal trial as made by the Criminal Court;

[e] That the Learned Magistrate erred in law and fact in arriving at an inordinately low award of damages which is a wholly erroneous estimate of the actual damages.

[5] Accordingly, it was the Appellant's prayer that the Judgment and Decree of the trial court be set aside and be substituted with a Judgment allowing his suit and that a reassessment of damages be done by this Court. The Appellant also prayed for the costs of the lower court suit and this appeal. The appeal was handled by **Hon. D.O. Ogembo, J.**, who issued directions on **27 June 2017** that the appeal be canvassed by way of written submissions. Compliance was thereafter confirmed and the appeal fixed for Judgment on **5 December 2017**. However, owing to the transfer of the Learned Judge away from this station, this file has since been allocated to me for the purpose of preparing and delivering the Judgment herein.

[6] I have, consequently, carefully perused and considered the Record of Appeal and the written submissions filed herein. It is indubitable therefrom that the Appellant was the Plaintiff in **Eldoret CMCC No. 330 of 2010**; or that his cause of action, in that case, was founded on malicious prosecution and false imprisonment. In the same vein, there is no dispute that the 1<sup>st</sup> Respondent was the complainant in the predicate criminal case; being **Eldoret Criminal Case No. 2749 of 2009: Republic vs. Joel Mudavadi**; which was taken up and prosecuted on behalf of the State by the Kenya Police Service in concert with the Director of Public Prosecutions. There is similarly no dispute that the proceedings were terminated in favour of the Appellant. It is noteworthy that, before the lower court, the Appellant produced as exhibits the following documents:

[a] The Charge Sheet in **Eldoret Criminal Case No. 2749 of 2009: Republic vs. Joel Mudavadi**;

[b] A certified copy of the proceedings and ruling in the Criminal Case;

[c] Notice of Intention to Sue the Attorney General, (the 2<sup>nd</sup> Respondent herein), and a response thereto;

[d] Receipt for payment made for court proceedings.

[e] A demand letter to the 1<sup>st</sup> Respondent;

[7] Hence, in his written submissions herein, Counsel for the Appellant argued that since the Defendants jointly set in motion the legal process against the Appellant in respect of the Criminal Case and played an active role in his prosecution, they are liable to him in damages for the tort of malicious prosecution and false imprisonment. To buttress his submissions, Counsel relied on **Gitau vs. Attorney General [1990] KLR 13**; **Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another**; and **Kagane vs. Attorney General [1969] EA 643**. On quantum, Counsel faulted the lower court's assessment of **Kshs. 50,000/=** and proposed an award of **Kshs. 1,000,000/=**. He relied on **Kisumu High Court Civil Appeal No. 125 of 2009: Michael Ochieng Odera vs. Attorney General** in which an award of **Kshs. 200,000/=** for malicious prosecution was enhanced to **Kshs. 500,000/=**.

[8] Counsel for the 1<sup>st</sup> Respondent, on the other hand, was of the view that the 1<sup>st</sup> Respondent cannot be held responsible for the actions of the Police granted that the Police have the discretion to charge or not to charge a suspect. In support of this proposition, Counsel relied on **Charles Mwapagha vs. Kenya Airways Ltd & Attorney General [2015] eKLR**; **Douglas Odhiambo Apel & Another vs. Telkom Kenya Limited [2014] eKLR** and **John Otieno Obuya vs. National Hospital Insurance Fund & Attorney General [2012] eKLR**. It was further the submission of Counsel for the 1<sup>st</sup> Respondent that the fact of acquittal only is not sufficient to found a claim for damages for malicious prosecution; and that the Appellant was under duty to show evidence of spite, ill-will and lack of reasonable or probable cause for his prosecution; which in the submission of Learned Counsel was not done. The case of **Kenya Power & Lighting Co. Ltd vs. Florence Musau Nthenya & Attorney General [2017] eKLR** was cited in this regard.

[9] On behalf of the 2<sup>nd</sup> Respondent, it was submitted that there was reasonable and probable cause for the arrest and prosecution of the Appellant since there was a valid complaint against him by the 1<sup>st</sup> Respondent. It was further the submission of the 2<sup>nd</sup> Respondent that the Police were only interested in pursuing justice and that investigations were conducted before the Appellant's arraignment in court, which confirmed that there was sufficient justification for his prosecution. On quantum, it was proposed that, should the Court be inclined to allow the appeal, an amount of **Kshs. 20,000/=** for false imprisonment and **Kshs. 200,000/=** for malicious prosecution would suffice.

[10] This being a first appeal, I am mindful that it is the duty of the Court to review the evidence adduced before the lower court with a view of satisfying itself that the decision was well-founded; while bearing in mind that this Court did not have the advantage of seeing or hearing the witnesses. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, this principle was aptly expressed thus:

**"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."**

[11] The evidence that was presented by the Appellant before the lower court was that on the **4 May 2009**, he was at the Eldoret Municipal Market when a certain lady requested him to ferry for her three bags of cement from **Eagle Hardware** to Iten Bus State. He explained that

was then earning a living as a hand-cart operator and would wait for customers at the entrance of the market. It was therefore his evidence that, upon agreeing on his charges at **Kshs. 150/=**, he proceeded with the said lady to **Eagle Hardware** and waited for her outside the shop as she entered the shop to purchase the goods. It was the assertion of the Appellant that as he was thus waiting, he was confronted and slapped by people who he later came to know were Police Officers. He was taken to **Eldoret Police Station** where he was detained overnight; and that it was not until the following morning that he was informed of the allegation that he had attempted to obtain goods by false pretences. It was further the evidence of the Appellant that he was charged and arraigned before the Chief Magistrate's Court at Eldoret in **Criminal Case No. 2749 of 2009** and that he was acquitted of the charges.

[12] The Appellant called, as his witness before the lower court, **Jared Agonga Owsashika (PW2)**, the Clan Elder of Kamukunji area where he was then residing. **PW2** told the lower court that the Appellant was well known to him, being the son of his neighbour. He added that he was a person of good conduct and that he was pushing trolleys at a fee at the Eldoret main market. He further stated that he was surprised to learn that the Appellant had been arrested by the Police in connection with a fake cheque.

[13] On behalf of the 1<sup>st</sup> Respondent, **Cleophas Etemesi (DW1)**, an employee of the 1<sup>st</sup> Respondent's, testified that he was on duty at the counter of the 1<sup>st</sup> Respondent's shop when the Appellant presented a banker's cheque for **Kshs. 704,180/=** along with an LPO for the purchase of hardware goods; and that the Appellant gave an indication that he had a lorry on standby to collect the goods. **DW1** further stated that on scrutinizing the documents, he noted that the LPO was purportedly issued by **Kapsabet Teachers Training College**; and that, on giving the documents to his boss, **Narendra Patel (DW2)**, **DW2** advised that the cheque be verified by **KCB Bank**. It turned out that the cheque was a forgery and so the Appellant was arrested and charged.

[14] **DW2** confirmed that, while on duty in the 1<sup>st</sup> Respondent's shop on **4 May 2009**, he was shown a cheque and an LPO that was purportedly issued by **Kapsabet Teachers Training College**. Out of caution, he called **KCB Bank** to confirm the authenticity of the cheque but was informed that the cheque did not emanate from the Bank. He then sent one of his employees to physically take the cheque to the bank's Uganda Road Branch for verification and the result was that the cheque had not been issued by **KCB Bank**. Upon learning that the cheque was a forgery, he called in the Police who arrested the presenter of the documents, a person he came to know as **Joel Mudavadi Kayubi**, the Appellant herein. He also mentioned that the Appellant had come with a lorry **Registration No. KAB 238S** ready to ferry the goods; and that the lorry was consequently driven to **Eldoret Police Station** pending investigations. He further confirmed that, after the Appellant was charged and arraigned before Eldoret Chief Magistrate's Court, he attended court and testified as one of the Prosecution witnesses.

[15] **DW3** before the lower court was **Cpl. Jacob Mongare**. He testified that he was on duty at **Eldoret Police Station** on **4 May 2009** when he received information from **KCB Bank, Uganda Road Branch**, in respect of a forged banker's cheque that had been presented to **Eagle Hardware** for the purchase of building materials. He then proceeded to **Eagle Hardware** in the company of a fellow police officer, where the suspect was shown to him by **Narendra Patel (DW2)**. He was also given the cheque in question along with an LPO allegedly issued by **Kapsabet Teachers Training College**. **DW3** also testified that they found **Motor Vehicle Registration No. KAB 238Z** parked outside the 1<sup>st</sup> Respondent's shop; and that the driver confirmed that he had been hired by the Appellant to ferry some goods for him the 1<sup>st</sup> Respondent's hardware shop.

[16] It was also the evidence of **DW1** that, upon investigating the matter, they ascertained that **Kapsabet Teachers Training College** was a non-existent entity. He added that, having ascertained that the cheque was a forgery, he had sufficient cause to charge the Appellant with the offences of making a document without authority, uttering a false document and attempting to obtain goods by false pretences; which charges the Appellant was subsequently acquitted of under **Section 210** of the **Criminal Procedure Code**.

[17] There can be no doubt that the lower court properly addressed its mind to the issues in controversy in the matter before it; and, after a summary of the evidence, the court set out the essential ingredients that needed to be proved by the Appellant, namely:

- [a] That the criminal proceedings had been instituted or continued by the Defendants;
- [b] That the Defendants acted without any reasonable or probable cause;
- [c] That the Defendants acted maliciously; and
- [d] That the proceedings were terminated in favour of the Appellant.

[18] The Learned Trial Magistrate relied on **Simba vs. Wambari [1981] eKLR** in which **Mbaluto, J.** for a consideration of the key ingredients to look out for in an action for the tort of malicious prosecution.

[19] Thus, from the foregoing summary of evidence, there is no dispute that the Appellant was arrested on **4 May 2009** at the instance of **DW2** on behalf of the 1<sup>st</sup> Respondent. He was arrested at the 1<sup>st</sup> Respondent's hardware shop; taken to **Eldoret Police Station**; and he admitted unreservedly that that was the case. The evidence availed before the lower court confirmed that the Appellant was charged with the offences of making a document without authority, uttering a false document and attempting to obtain goods by false pretences, contrary to **Sections 357(a) and (b) and 313** of the **Penal Code**; which the Appellant was subsequently acquitted of under **Section 210** of the **Criminal Procedure Code**.

[20] It was therefore inescapable for the Learned Trial Magistrate to conclude that the criminal proceedings in **Eldoret Chief Magistrate's Criminal Case No. 2749 of 2009** had been instituted and prosecuted by the Police and the Director of Public Prosecutions at the instance of the 1<sup>st</sup> Respondent; and that the said proceedings were terminated in favour of the Appellant on **7 September 2009**. Accordingly, the only issue for this court to consider is whether the lower court was justified in coming to the conclusion that the Appellant had failed to show that the Defendants acted maliciously and without any reasonable or probable cause.

[21] There was credible evidence adduced before the lower court by **Cleophas Etemesi (DW1)** that the documents in question were presented by the Appellant; and that the Appellant gave an indication that he had a lorry on standby to collect the goods. **DW1** scrutinized the documents and noted that the LPO was purportedly issued by **Kapsabet Teachers Training College**; and that, on giving the documents to his boss, **Narendra Patel (DW2)**, **DW2** advised that the cheque be verified by **KCB Bank**. **DW2** corroborated the evidence of **DW1** and testified that **KCB** confirmed that the cheque was a forgery; and that it was for this reason that the Police were called in. Both **DW1** and **DW2** told the lower court that the Appellant had come with a lorry **Registration No. KAB 238S** ready to ferry the goods; and that the lorry was driven to **Eldoret Police Station** pending investigations.

[22] In addition to the evidence of **DW1** and **DW2**, the Prosecution called **Cpl. Jacob Mongare** as **DW3** before the lower court. He confirmed that this particular complaint was made to **Eldoret Police Station** on **4 May 2009**; and that he was one of the officers assigned to respond thereto. **DW3** further testified that he confirmed the matter with **KCB Uganda Road Branch** before proceeding to **Eagle Hardware** where he was given the cheque in question along with an LPO allegedly issued by **Kapsabet Teachers Training College**. **DW3** also testified that they found **Motor Vehicle Registration No. KAB 238Z** parked outside the 1<sup>st</sup> Respondent's shop; and that the driver confirmed to him that he had been hired by the Appellant.

[23] It bears repeating that it was the evidence of **DW3** that, upon investigating the matter, they ascertained that **Kapsabet Teachers Training College** was a non-existent entity; and having ascertained that the cheque was a forgery, he caused the Appellant to be charged with the offences of making a document without authority, uttering a false document and attempting to obtain goods by false pretences.

[24] In the circumstances, it cannot be said that there was no reasonable basis or probable cause for the action taken against the Appellant by the Police and the Office of the Director of Public Prosecutions. Indeed, from the Ruling dated **7 September 2009** by **Hon. Mmasi, SRM**, it is manifest that the trial court in the Criminal Case did not absolve the Appellant from blame. It instead faulted the Prosecution for failure to arrest all the suspects in the matter. In the premises, the decision taken by the lower court to dismiss the Appellant's case was, in my view, properly made.

[25] On quantum, I have considered the submissions made before the lower court and the submissions made before this Court. The lower court proposed an award of **Kshs. 50,000/=**, had the Appellant made out a good case on liability. I have considered the comparable authorities cited by Learned Counsel. In **Michael Ochieng Odera vs. Attorney General**, an award of **Kshs. 200,000/=** was enhanced by **Hon. Aroni, J.** to **Kshs. 500,000/=**. In **Charles Mwapagha vs. Kenya Airways Limited & Another** (supra) in which an award of **Kshs. 1,000,000/=** was made for false imprisonment, the Plaintiff had been detained for 8 days, without any justifiable cause, before his arraignment in court. It is therefore distinguishable from the facts of this case. And, in **Douglas Odhiambo Apel & Another vs. Telkom Kenya Limited**, the Court of Appeal, in a decision rendered on **24 January 2014**, was of the view that **Kshs. 50,000/=** would have sufficed to each of the two Appellants as General Damages for malicious prosecution. In the premises, I would have found the global sum of **Kshs. 100,000/=** a reasonable award for false imprisonment and malicious prosecution had the Appellant succeeded in his claim.

[26] In the result, I am unable to find fault with the Judgment and Decree of the Learned Trial Magistrate dated **26 July 2011**. It is consequently my finding that the appeal lacks merit; and is hereby dismissed. Granted the nature of the appeal, I would order that each party shall bear own costs thereof.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 30<sup>TH</sup> DAY OF APRIL, 2019**

**OLGA SEWE**

**JUDGE**