



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. 165 OF 2015

BETWEEN

WILLIAM MICHAEL OMBATI.....APPELLANT

AND

RGB.....1ST RESPONDENT

CB.....2ND RESPONDENT

(Appeal from the original Judgment and Decree of Hon. M. Nyaga,

RM dated 20th August 2015 at the Chief Magistrates Court at Kisii in Civil Case No. 113 of 2013)

JUDGMENT

1. The appellant appeals against the judgment and decree of the subordinate court where his case for damages for unlawful arrest, wrongful confinement and malicious prosecution against the respondents was dismissed with costs.
2. It is not in dispute that the appellant was arrested on 28th March 2011 and charged on 29th March 2011 with four counts of several offences in *Kisii CM Criminal Case No. 277 of 2011*. Counts 1 and 2 were in respect of the offence of causing assault causing actual bodily harm to RGB and CB respectively contrary to **section 251** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. Count 3 and 4 were in respect of committing an indecent act with a child contrary to **section 11(1)** of the *Sexual Offence Act* and for stealing contrary to **section 275** of the *Penal Code (Chapter 63 of the Laws of Kenya)*.
3. During the hearing of the criminal case, the prosecution called 4 witnesses. After the close of the prosecution case, Counts 3 and 4 were dismissed and the appellant was put on his defence on Counts 1 and 2. The appellant gave sworn testimony and called 6 witness. By a judgment dated 29th May 2012, the appellant was acquitted under **section 215** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*.
4. Thereafter the appellant filed suit seeking damages for unlawful arrest, wrongful arrest and malicious prosecution claiming that the charges against him were actuated by spite and malice and instituted without any reasonable cause. He complained that on or about 23rd March 2011, the respondents lodged a false complaint with the Criminal Investigation Department office at Gesonso Police Station alleging that he had raped the 1st respondent, assaulted her, stolen 200 blue gum trees valued at Kshs. 10,000/-, touched her private parts and also assaulted the 2nd respondent. The appellant claimed that his arrest, arraignment and prosecution at the instance of the 1st respondent in collusion with agents of the 2nd respondent was malicious, unfounded and reckless and as a result he suffered loss and damage after the criminal proceedings culminated in his acquittal.
5. In its statement of defence, the respondents denied the appellant's allegations but asserted that if the respondents were arrested and charged, the same was lawful as were the proceedings. The respondent denied the jurisdiction of the court and stated that the plaint was fatally defective.
6. As this is a first appeal, I am called upon to examine and evaluate the evidence and reach an independent conclusion bearing in mind that I did not hear or see the witnesses testify (see *Selle and Another v Associated Motor Boat Company Ltd [1968]EA 123*). The main issue in this appeal is whether the respondent proved its case on the balance of probabilities at the trial court. The substance of the appellant's case was the claim for malicious prosecution and counsel for the appellant and respondents do not dispute the elements of the tort of malicious prosecution.

7. The ingredients for the tort of malicious prosecution have been settled in this jurisdiction in several cases among them; **Kagane and Others v Attorney General and Another [1969] EALR 643**, **Mbowa v East Mengo District Administration [1972] EA 352**, **Murunga v Attorney General [1979] KLR 138** and they are 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.

8. Before I consider the case before the trial court, I will set out, in summary, the outline of the appellant's case. The appellant (PW 1) testified that he was arrested by police officers who accompanied the 1st respondent on 23rd March 2011. He was informed that he had assaulted the respondents who are husband and wife. He was later charged in **Kisii Criminal Case No. 277 of 2011** and acquitted after a trial that lasted for 18 months. He stated that the charges against him were false.

9. The 1st respondent (DW 1) testified that on 21st March 2011 she was weeding maize in her shamba when the appellant came to the fence and started insulting her. He jumped over the fence and held her but she managed to free herself. As she ran away, the appellant picked a stick and started chasing her. When she left, he uprooted the trees she had planted. She reported the incident to the 2nd respondent, her husband, who assisted her to report the matter to Gesonso Police Station. She told the court that the police investigated the incident and charged appellant.

10. The 2nd respondent (DW 2) recalled that on the material day, he was at home when PW 1 came to report to him that she had been assaulted by PW 1. He went to the shamba and found that the appellant had uprooted the trees he had planted. As he was there, the appellant came and started chasing him. He went with his wife to report the matter at the Police Station.

11. After considering the evidence, the trial magistrate held that the appellant and respondents were neighbours who appeared to have a land dispute. He found that the appellant assaulted the respondents who then reported the matter the police for investigation. He therefore concluded that the criminal case was investigated by the police who decided to charge the appellant and that the appellant did not prove that the respondents made a reckless and false complaint against the police. The trial magistrate held that there was reasonable cause for the complaint and that the case lacked merit.

12. On the basis on the facts, I find that there is no dispute regarding the first two elements as the proceedings were instituted by the respondents who complained to the police after they reported that they were assaulted by the appellant. On the second element, it was not disputed that the appellant was charged and the proceedings terminated in his favour by an acquittal under **section 210** and **section 215** of the **Criminal Procedure Code**.

13. The thrust of the appellant's appeal hinges on whether there was reasonable and probable cause. The appellant contended that the complaint against him were false and reckless while the respondents supported the decision of the trial magistrate that there was reasonable and probable cause.

14. Was there reasonable and probable cause? According to **Halsbury's Laws of England, 4th Edition - Reissue, Vol. 45 (2)**:

[R]easonable and probable cause for a prosecution has been said to be an honest belief in the guilt of the accused person based on a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonable lead any ordinary prudent and cautious man, placed in the position of an accuser, to the conclusion that the person charged was probably guilty of the crime ...

15. The trial magistrate found that there appeared to be a land dispute between the appellant and respondents that there was an altercation between the appellant and respondents which led to them reporting to the police. In this case though, the appellant was actually put on his defence meaning that the trial court in the criminal case found that he had a case to answer. Thus it cannot be said that the charges against him were not made without reasonable and probable cause. I therefore hold that there was reasonable and probable cause established to charge and prosecute the appellant.

16. With respect to malice, the law is clear that the mere fact that a person has been acquitted of the criminal charge does not necessarily connote malice on the part of the prosecutor. Actual spite or ill will must be proved. In **Nzoia Sugar Company Ltd v Fungututi [1988] KLR 399**, the Court of Appeal held;

Acquittal per se 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. 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.

17. Malice may be implied from the lack of a reasonable and probable cause. The appellant pleaded particulars of malice that did not implicate any spite or ill-will against the respondents. The respondents, as the evidence showed, had a basis for reporting the complaint and the police investigated it and charged the appellant.

18. In **Mbowa v East Mengo District Administration (Supra)**, the court held that in order for the cause of action for malicious prosecution to

succeed, “[T]he 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.” In light of the evidence I have outlined, I find and hold that the appellant failed to prove his case.

19. The appeal is dismissed. From the evidence, the parties are neighbours and so as not to aggravate their already strained relationship, I decline to award costs.

DATED and DELIVERED at KISII this 15th day of APRIL 2019.

D.S. MAJANJA

JUDGE

Mr Sagwe instructed by S. M. Sagwe and Company Advocates for the appellant.

Mr K. Gichana instructed by Ben K. Gichana and Company Advocates for the respondents.