



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO.657 OF 2004

FRANCIS MUTUA GICHUNGE.....1ST APPELLANT
SAMUEL KARANJA KAGOMBE.....2ND APPELLANT
JOHN CHEGE NDIRANGU.....3RD APPELLANT
AGNES WANGARI GATUKA.....4TH APPELLANT
KIARIE NGURU.....5TH APPELLANT
JOSEPH NGURU GATUKA.....6TH APPELLANT
STEPHEN GICHUNGE NG'ANG'A.....7TH APPELLANT
GABRIEL GATHUKA KAGWANJA.....8TH APPELLANT
ISAACK KURIA NGABIA.....9TH APPELLANT

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT
FRANCIS SANG.....2ND RESPONDENT
JAMES KINYUA3RD RESPONDENT
MORRIS AMATA.....4TH RESPONDENT
WEKESA NYARWENI5TH RESPONDENT
DUNSON ASOTSI DIRU6TH RESPONDENT
RICHARD MATHENGE.....7TH RESPONDENT

(Being an appeal from the judgment of Hon.Mrs. H. Omondi delivered on 6th August, 2004 at Nairobi in CMCC No.1376 of 2004)

JUDGMENT

The appellants herein brought a suit against the respondents in the lower court claiming damages for unlawful unrest, wrongful confinement and malicious prosecution. In addition they claimed exemplary damages, special damages, costs and interest. It was their evidence in the lower court that the respondents, jointly and severally were liable to them for their arrest on suspicion that they had committed a criminal offence, to wit arson, which was never established and therefore the respondents were liable for what they went through.

The respondents denied the appellants' allegations and after a full trial the lower court dismissed the appellants' suit for reasons contained in the judgment delivered on 6th August, 2004. The appellants were aggrieved by the said dismissal and lodged this appeal by way of Memorandum of Appeal dated and filed on 3rd September, 2004.

The thrust of the appeal as captured in the lengthy Memorandum of Appeal was that, the trial court was wrong to have set a degree of proof beyond that which is expected in ordinary civil cases, and that it should have found in favour of the appellants as they had established all ingredients of unlawful arrest, wrongful detention and malicious prosecution.

The evidence was also said to be uncontroverted and therefore the court was faulted for relying heavily on the evidence of the sole defence witness. The lower court was also faulted for not awarding special damages claimed in the plaint. There were other issues raised against the entire trial, including the fact that the lower court failed to correctly and accurately record the proceedings.

As the 1st appellate court, it is my duty to evaluate the evidence adduced in the trial court before coming to an independent conclusion. Several authorities were cited by both counsel before the trial court and also in the present appeal.

Several facts stand out which are not in dispute. The appellants were arrested on suspicion of committing a criminal offence of arson and arraigned before a magistrate's court at Thika. At some point the criminal case was terminated and there is undisputed evidence that, at as that termination not a single witness had been called.

The appellants had a duty to prove before the trial court that the proceedings were terminated in their favour, that the said proceedings were instituted by the respondents and carried out maliciously, and that there was absence of reasonable and probable cause for mounting the said proceedings. Finally, the appellants had a duty to prove what damage each had suffered.

The charge sheet on the record which was produced by the defence as exhibit 4 confirms that indeed the appellants were accused persons in the Criminal Cases No. 2118 of 2002 and 2986 of 2002. It is also not in dispute that the charges against the appellants were terminated before the hearing started. That is to say, the cases never went to full hearing.

In dismissing the appellant's suit in lower court, the trial court observed as follows,

"I agree with Mr. Bore that the arrest was as provided for under Section 29 of the Criminal Procedure Code and Section 72 (1) of the Constitution. The prosecution to be malicious, it must be shown that the prosecution was instituted without reasonable and probable cause and actuated by malice. This has not been established. (See Murunga vs. AG (1979) KLR 138.

Consequently my finding is that plaintiffs have failed to prove their case and the suit fails and is dismissed with costs."

There is no dispute that the case against the appellants was terminated before any witnesses were called. The question that arises is whether or not there was any prosecution whatsoever against the appellants. Prosecution has been defined in Black's Law Dictionary 10th Edition page 1467 as follows,

"To commence and carry out (a legal action)", to institute and pursue a criminal action against (a person)", " To engage in; carry on....."

The first limb of the above definitions cannot stand alone to constitute prosecution. Therefore, a charge against any person alone cannot constitute prosecution. Such a charge must be followed by the calling of witnesses, even if it means one witness, to constitute prosecution. To hold otherwise, would be against the tenor, context and spirit of the above definitions.

If the above statement is correct, and I believe it is, then the foundation of the appellants' suit in the lower court cannot sustain any action against the respondents. Even if the prosecution proceeded, the appellants were bound to prove that there was no reasonable or probable cause to initiate the same. Viewed from the context of the statements produced in evidence by the respondents as exhibit 6, and also investigation diary produced as exhibit 1, there was reasonable and probable cause to initiate the charges against the appellants.

The trial court cited the case of **Herniman vs. Smith (1938) CA at page 305** where it was stated,

"I would define reasonable and probable cause to be an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds of the existence of a state of circumstances which assuming them to be true reasonably lead any prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime."

In their pleadings the appellants alleged that the respondents should be held liable for unlawful confinement and be made to compensate them for the same. Notwithstanding the entries made in the investigation diary produced by the defence as exhibit 1, the appellants produced exhibit 1A and 1B comprising of the charge sheet relating to Criminal Case No. 956 of 2003. The charge sheet contains the names of all the appellants herein, who were charged with the offence of arson contrary to section 332 A of the Penal Code and the date of the alleged offence was said to be 19th July, 2002.

The charge sheet shows that the appellants were arrested on 8th of January, 2003. The proceedings however show that they were presented before the court on 12th February, 2003. The charge sheet further shows that the appellants were in custody. No reasons have been presented either in the proceedings before the lower court, or in the trial before the magistrate leading to the present appeal, why there was so much delay in presenting the appellants to court.

In their evidence before the trial court, the appellants told the court that after their respective arrests they were held in custody for between

three and four days. Although this appears to contradict the contents of the charge sheet I have cited above, that evidence was not dislodged by the sole defence witness who was called to give evidence for the respondents. I am persuaded that, notwithstanding the failure of the appellants to justify their claim for unlawful unrest and malicious prosecution, they nevertheless proved that the respondents were liable for their unlawful confinement. However, I have seen no evidence of torture alleged by some of them.

On that evidence, I find that the trial court should have found the respondents jointly and severally liable to the appellants, and awarded general damages for unlawful confinement. Freedom of an individual is sacrosanct, and where a suspect is arrested for whatever reason, he or she must be taken to court as early as practicable. This was not the case in this case. In my judgment I award each of the appellants Kshs. 100,000/= general damages for unlawful confinement.

The appellants pleaded Kshs. 500,000/= special damages paid for legal fees. They produced exhibit 3 being the receipt issued against that payment. I have already determined that there was reasonable and probable cause to arrest and charge the appellants. They must have hired an advocate to defend them following the said arrest and charge. I see no justification to hold the respondents liable to meet the said expense in the circumstances. The trial court cannot be faulted for not making an award in their favour.

Accordingly, this appeal is allowed in part. I uphold the finding of the trial court in the dismissal of the appellants claim for malicious prosecution but enter judgment in favour of each appellant in the sum of Kshs. 100,000/= general damages against the respondents jointly and severally.

Having partially succeeded in this appeal, the appellants shall be entitled to half the costs and interest at court rates.

Dated, signed and delivered at Nairobi this 30th Day of July, 2019.

A. MBOGHOLI MSAGHA

JUDGE