



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT CHUKA**

**HCCA NO. 13 OF 2018**

**GEOFFREY KIURA MWAMBA.....APPELLANT**

**VERSUS**

**DAVID GITARI MAGEU.....1<sup>ST</sup> RESPONDENT**

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

**ELIJAH WACHIRA.....3<sup>RD</sup> RESPONDENT**

*(Being an Appeal from judgment and decree of the Senior Principal Magistrate's Court at Chuka Civil Case No. 66 of 2012 by Hon. A.G. Kibiru on 5/10/2016.)*

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**JUDGEMENT**

1. This is an appeal by **GEOFFREY KIURA MWAMBA** (the Appellant herein) against the decision of the Subordinate Court in ***Chuka Senior Principal Magistrate's Court Civil Case No. 66 of 2012*** where the Appellant had been sued together with the Attorney General (2<sup>nd</sup> Respondent) and 3<sup>rd</sup> Respondent (Police Officer) by the 1<sup>st</sup> Respondent for malicious prosecution.

**2. Brief Background of the case at the lower Court**

The 1<sup>st</sup> Respondent herein or the Plaintiff in the said lower court claimed that the P.C Elijah Wachira (a police officer) at the behest of the Appellant instituted Criminal proceedings conducted by the 2<sup>nd</sup> Respondent (Attorney General) based on what he termed as false, outrageous and unreasonable invasion of his fundamental freedoms and human rights. He therefore sued for damages for malicious prosecution. The criminal case in question was cited as ***Chuka Principal Magistrate's Court Criminal Case No. 547 of 2011*** where the court acquitted the 1<sup>st</sup> Respondent under **Section 210 Criminal Procedure Code** for having no case to answer. In that Criminal Case, the 1<sup>st</sup> Respondent had been charged with interfering with demarcated boundary contrary to **Section 33(2) of the Lands Adjudication Act** by uprooting sticks that were meant to be beacons marking the boundary between the Appellant and the 1<sup>st</sup> Respondent. The trial court as I have observed above found that the prosecution did not establish a *prima facie* case owing to inconsistent and contradictory evidence adduced by the prosecution.

3. The 1<sup>st</sup> Respondent upon acquittal instituted civil action for malicious prosecution and the trial court found that the criminal proceedings was instituted by the Appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein and that the police proceeded with the case without establishing the weight of the evidence before commencing the said criminal proceedings. The Court also found that the conduct of the defendants (Appellant herein and 2<sup>nd</sup> and 3<sup>rd</sup> Respondents) was unreasonable, totally unjustified and actuated by malice. The trial court then proceeded and awarded the 1<sup>st</sup> Respondent Kshs.800,000/-

4. The Appellant felt aggrieved and preferred this appeal raising 4 grounds namely:-

*i. That the learned Senior Principal Magistrate erred in law and in fact in failing to appreciate the issues raised by the Appellant's defence.*

*ii. That the learned Senior Principal Magistrate erred in law and fact in holding the Appellant liable for malicious prosecution.*

*iii. That the learned Senior Principal Magistrate erred in law and fact by awarding the 1<sup>st</sup> Respondent kshs.800,000/-.*

*iv. That the judgment of the learned Senior Principal Magistrate was against the weight of the evidence and that the award of Kshs.800,000/- was excessive and unwarranted.*

#### **5. The Appellant's case**

The Appellant in his written submissions has contended that he is the registered owner of that parcel of land known as Kathwana/720 which borders the 1<sup>st</sup> Respondent's land parcel No.Kathwana/845. He further claims that he was informed by one Ndatho Kireru, the Sub Area Manager, that the 1<sup>st</sup> Respondent had uprooted the fence marking the said boundary between the two parcels and that he reported the matter to Chuka Police Station for action. It is the Appellant's contention that the criminal case against the 1<sup>st</sup> Respondent was because of a defective charge sheet. The Appellant avers that the decision on what charges to be preferred against the 1<sup>st</sup> Respondent laid with the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and not himself.

6. The Appellant contends that he dutifully gave his evidence at the criminal trial which in his view was not challenged. He submits that the 1<sup>st</sup> Respondent did not prove his case against him at the trial. He has cited the decision in Susan Mutheu Muia -vs- Joseph Makau Mutua [2018] eKLR where the court listed the elements which must be proved for a party to succeed in a claim over malicious prosecution. The elements are namely:-

*(a) The prosecution was instituted by the defendant or by someone whose acts he is responsible.*

*(b) That the prosecution was instituted without reasonable and probable cause.*

*(c) That the prosecution was actuated by malice.*

*(d) That the prosecution was terminated in Plaintiff's favour.*

7. The Appellant insists that his role ended with the report he made to the police and that it was the police who investigated the case and decided to prefer the charges. He has therefore absorbed himself from any blame.

#### **8. The 1<sup>st</sup> Respondent's Case**

The 1<sup>st</sup> Respondent in his written submissions has contended that the suit at the lower court arose as a result of Criminal Case No.547 of 2011 in which he and co-accused were acquitted owing to a defective charge sheet. He has further submitted that the Land Registrar summoned him on 11<sup>th</sup> August, 2012 following a boundary dispute with the Appellant and that it was the Appellant who was found by the District Surveyor to have encroached onto his land.

9. The 1<sup>st</sup> Respondent contend that the trial traumatized him and made him use resources to engage an advocate to defend him. He has termed this appeal as a way of frustrating from realizing the amount awarded to him adding that this appeal is in bad faith. He cites instances of bad faith as follows:-

*a) That the Deputy Land Registrar testified on an issue that was not in dispute which was the ownership of the parcel of land.*

*b) That the police officer preferred charges under Section 33(2) of Land Adjudication Act which was non existent and hence defect in the charge sheet.*

*c) That the Appellant claimed he was tipped off by a Sub Area Manager whom he did not call as a witness.*

#### **9. Analysis and determination**

There are two main issues in this appeal which are namely:-

(a) Whether the 1<sup>st</sup> Respondent proved his case to the required threshold

(b) If so, whether the award of Kshs.800,000/- was excessive.

#### **10. (a) Whether the 1<sup>st</sup> Respondent's case on malicious prosecution was established and proved to the required standard.**

It is necessary to point out the necessary ingredients for the court to ascertain that a cause has been properly made out for a case on malicious prosecution. What are these elements? In Mbowa -vs- East Mengo District (1972) EA and Murunga -vs- Attorney General [1979] KLR 138, the elements listed as follows namely:-

*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 and*

**d) That the prosecution actuated by malice.**

The court in Mbowa (supra) observed as follows:-

**" 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."**

11. In view of the above decisions, it is my considered view that for a party to succeed in a case of malicious prosecution he should prove that there is was no reasonable cause for his prosecution, and that despite that the defendant actively engineered his prosecution nevertheless for ulterior and malicious purposes. In the case of Stephen Gachau Githaiga and Another -vs- Attorney General [2015] eKLR, Hon. Justice Mativo made the following observations:-

**" Malicious prosecution is an intentional tort designed to provide redress for losses flowing from unjustified prosecution. Under the 1<sup>st</sup> element of the test for malicious prosecution, the Plaintiff must prove that the prosecution at issue was initiated by the defendant..... malicious prosecution as the label implies is an intentional tort that requires proof that the defendant's conduct in setting the criminal process in motion was fueled by malice. The malice requirement is the key to striking the balance that the tort was designed to maintain between society's interest in the effective administration of criminal justice and the need to compensate individuals who have been wrongly prosecuted for a primary purpose other than that of carrying the law into effect."**

12. There is no dispute that the Appellant was the complainant in the impugned criminal case against the 1<sup>st</sup> respondent (Criminal Case No. 547 of 2011 at Chuka Senior Principal Magistrate's Court). He was also the defendant in the suit for malicious prosecution which is the subject in this appeal. By virtue of being the complainant, it is definite that he made the complaint which led to the arrest and prosecution of the 1<sup>st</sup> Respondent. The element in so far as malicious prosecution is concerned was thus established.

13. On the 2<sup>nd</sup> element of prosecution having been terminated in favour of the Plaintiff, again it is not disputed that that the 1<sup>st</sup> Respondent was acquitted under **Section 210** after the trial court found that no prima facie case had been established.

14. The big question in this matter is whether there was malice or whether there was no reasonable/probable cause for the 1<sup>st</sup> Respondent to make a complaint to the police. The issue of whether there was a malice is directly intertwined with the issue of probable cause. While it is true that the 1<sup>st</sup> Respondent herein was acquitted, that in itself does not necessary imply that there was malice from those who took part in his prosecution. In the case of Nzoia Sugar Co. Ltd -vs- Fungutuli [1988] eKLR, the Court of Appeal observed as follows:-

**" It is trite learning that acquittal, perse, on a criminal charge is not sufficient basis to grant 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 on its servants that can be attributed to the company."**

The same reasoning is also deciphered in the case of Robert Okeri Ombaka- vs- Central Bank of Kenya [2015] eKLR where the Court of Appeal made the following comments:-

**" In this appeal there is no evidence that the Respondent made a "false" report or that the report was actuated by malice or that his prosecution was brought" without reasonable cause. That a suspect was acquitted of a criminal case is not a ground for filing a civil suit to claim damages for malicious prosecution or false imprisonment. Evidence of spite ill will lack of reasonable and probable cause must be established."**

15. Going back to the present appeal, this being a first appeal, this court as an appellate court is obligated to re-evaluate and re-analyse the evidence tendered at the trial court and come up with own conclusion in order to determine if the trial court arrived at the right decision. From the facts/evidence tendered at the trial court in the criminal case No. Chuka Senior Principal Magistrate's Court Criminal Case No.547 of 2011, it is apparent that the boundary beacons on the plots of the Appellant and that of the 1<sup>st</sup> Respondent were destroyed. There was an eye witness (PW2) to that fact. Another witness (PW3) a Land Adjudication officer confirmed that the complainant owned the parcel of land in issue. This shows that he was in a position to complain if he felt that someone had encroached or interfered with the boundary. The investigating officer (PW4) told the trial court that he visited the scene and collected the exhibits of destroyed fence and took them to the police station. The complainant had told the trial court that he attempted to take the same exhibits to the chief but did not find him. I have also noted from the 1<sup>st</sup> Respondent's submissions that he concedes that he was summoned to the office of the Land Registrar over the same boundary dispute. This in my view indicates that owing to that dispute the Appellant's fence was probably destroyed and in my view that formed land basis for him to complaint to the police. He had a reasonable and probable cause to complaint to the police and the police on finding the evidence of destroyed fence had a reasonable basis to prefer charges against the 1<sup>st</sup> Respondent herein who had a dispute over the boundary with the Appellant. The fact that there was a defect in the charge sheet in my view does not indicate that there was malice on the part of the police, much less on the part of the Appellant who had absolutely no role in drafting the charge that that was presented in court. The police and byextension the Attorney General, then in charge of prosecution in Kenya had reasonable and probable cause to prefer charges against the 1<sup>st</sup> Respondent and the fact that the trial court later found there were inconsistencies and contradictions in the evidence presented did not mean that there was spite, or ill will in the decision to charge him with a criminal offence. In the case of Stephen Gachau Githaiga & Another -vs- Attorney General [2015] eKLR the court observed as follows:-

**" Reasonable and probable cause has been defined to mean existence of facts which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified. As was said in Kagame's Case (1969) EA 643 reasonable and probable case is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of circumstances which assuming them to be true, would reasonably lead an ordinary prudent and cautious man**

*placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed....."*

16. I am satisfied based on the evidence tendered at the trial in the criminal case, that the evidence and the circumstances obtaining would have led a prudent person to take the same action the Appellant and the police took. The 1<sup>st</sup> Respondent failed to establish any malice against either the Appellant or the police in his prosecution. The learned trial magistrate fell into error to impute or infer that because the charge sheet presented was defective, the prosecution of the 1<sup>st</sup> Respondent was unreasonable and unjustified. With respect to the finding of the trial court, it is erroneous to equate the defect in the charge sheet with malice on the part of the Appellant and the police. The police could have made a genuine mistake by citing a non-existent provision but that in my view was just an error free from malice. The 1<sup>st</sup> Respondent as I have observed above failed to establish the element of malice and connect it to the complaint made by the Appellant. The Appellant in my view had a genuine or probable cause to complaint but had nothing to do with the nature of the charges(s) to be preferred against the 1<sup>st</sup> Respondent.

17. Having found that the 1<sup>st</sup> Respondent's case did not meet the requisite threshold of proof, obviously the 2<sup>nd</sup> issue of quantum should not even have arisen.

In the premises, I find merit in this appeal. The same is allowed. The judgment of the lower court is hereby reversed but I will not make any order as to costs in order to promote reconciliation and good neighbourliness between the Appellant and the 1<sup>st</sup> Respondent so each party shall meet own costs.

**Dated, signed and delivered at Chuka this 30<sup>th</sup> day of September 2019.**

**R. K. LIMO**

**JUDGE**

**30/9/2019**

Judgment dated, signed and delivered in the open court in presence of Murithi holding brief for Kariuki B.G. for Appellant and 1<sup>st</sup> Respondent in person.

**R. K. LIMO**

**JUDGE**

**30/9/2019**