



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO.9 OF 2018

BETWEEN

DICKSON OJIAMBO ODABA.....APPELLANT

AND

COMMISSIONER GENERAL

KENYA REVENUE AUTHORITY.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

(Being an Appeal from the Judgment and Decree in Busia Chief Magistrate's Court Civil Case No. 238 of 2009 by Hon. Maureen Odhiambo- Resident Magistrate).

JUDGMENT

1. The appellant herein, was the plaintiff in the Busia Chief Magistrate's Court Civil Case Number 238 of 2009. He had sued the respondents for general damages in a claim based on wrongful detention and trial. His claim was dismissed.
2. The appellant was aggrieved by the judgment which was delivered on 31st August 2018 and filed this appeal. The appellant was represented by Betty Achala instructed by the firm of Abalo & Company, Advocates. He raised the following grounds:
 - a) That the learned magistrate erred in fact and in law in failing to properly evaluate the evidence on record before arriving at her findings.
 - b) That the learned magistrate erred in fact and in law in dismissing the claim for false imprisonment after the appellant had sufficiently proved the claim.
 - c) That the learned magistrate erred in fact and in law the claim for false imprisonment by erroneously making a finding that it was time barred.
 - d) That the learned magistrate erred in fact and in law by failing to consider elements for malicious prosecution.
3. The 1st respondent was represented by M/S J.K. Lavuna, learned advocate. The appeal was opposed. It was contended that the impugned decision was correctly arrived at.
4. The second respondent did not file any grounds in opposition.
5. On 19th November 2018 this court gave directions that the appeal be disposed of by way of written submissions. The appellant and the 1st respondent filed their respective submissions and exchanged the same.
6. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.
7. On 8th October, 2006 Job Nyandiri and Charles Mongare had imported a motor vehicle cabin from Jinja in Uganda. When they reached at the Busia border, they went to the Kenya Revenue Authority (KRA) office for clearance. They found the appellant at a telephone booth. He

enquired from them what they needed. He asked them to wait and instructed them to return at 4 p.m. When they returned, he asked them to pay Kshs.7, 163/=. They paid the money and he issued them with a receipt. Shortly thereafter as they were loading the cabin, they were arrested.

8. It later transpired that the receipt the appellant had issued to them was part of receipts stolen from KRA in the year 2003. The appellant was therefore arrested and charged with the following counts before the Kisumu Chief Magistrate's Court in Criminal Case No. 848 of 2006:

Count one: Stealing goods in transit contrary to Section 279 (c) of the Penal Code;

Count two: Making a document without authority contrary to Section 357 (a) of the Penal Code;

Count three: Forgery contrary to Section 349 of the Penal Code;

Count four: Uttering a document with intent to defraud contrary to section 357 (b) of the Penal Code;

Count five: Obtaining by false pretenses contrary to Section 313 of the Penal Code; and an alternative charge of handling stolen goods contrary to Section 322 (2) of the Penal Code.

9. The prosecution case was that on 8th November, 2003, some stores including customs seals and receipt books were collected from the Kenya Revenue Authority offices in Kisumu and transported to Busia by (Daniel Kangwana Nyabokana (PW1) an employee of Kenya Revenue Authority. However, on reaching Busia, he realized that two receipt books No. 2907901-2907950 and No. 2907951-2908000 were missing. Later on 8th October, 2006, Receipt No. 2907925 was found in Busia having been allegedly issued to Job Nyandiri (PW2) and Charles Mongare (PW4) by the accused after clearing with customs.

10. When the appellant was placed on his defence, he denied any involvement in the offence.

11. After the hearing, the court acquitted him in all the five counts and the alternative charge under Section 215 of the Criminal Procedure Code.

12. This is the background that gave rise to the Busia Chief Magistrate's Court Civil Case Number 238 of 2009. The learned trial magistrate dismissed the appellant' suit. The dismissal aggrieved the appellant who filed this appeal.

13. What is false imprisonment and the elements thereof? In **Halsbury's Laws of England 4th Edition page 606** it is defined as:

Any total restraint of the liberty of the person, for however short a time, by the use or threat of force or by confinement, is an imprisonment. To compel a person to remain in a given place is an imprisonment, but merely to obstruct a person attempting to pass in a particular direction or to prevent him from moving in any direction but one is not. The gist of the action of false imprisonment is the mere imprisonment. The plaintiff need not prove that the imprisonment was unlawful or malicious, but establishes a prima facie case if he proves that he was imprisoned by the defendant; the onus lies on the defendant of proving a justification.

14. The elements of this tort are enumerated by **Harper & James, The Law of Torts, 3rd Edition at page 226** as follows:

i) There must be detention, i.e unlawful restraint of a person's liberty or freedom of movement.

ii) That the detention needs not be forceful. Threats of force by conduct or words coupled with the apparent ability to carry out such threats are sufficient.

iii) Detention must be total, i.e. it must be within boundaries. The restraint must be total rather than a mere obstruction of the right to go where the plaintiff pleases. Imprisonment is something more than a mere loss of freedom to go where one pleases; it includes the notion of restraint within some limits defined by a will or power exterior to our own.

iv) Detention must be for an appreciable time, however short.

v) The detention must be unlawful and must have been against the plaintiffs will

vi) Malice is not an ingredient in the tort of false arrest

15. In the case of **Daniel Waweru Njoroge & 17 Others v Attorney General [2015] eKLR**, the court stated;

The commonly accepted definition of false imprisonment defines the tort as;-

i) The unlawful restraint of another

ii) Against their will, and

iii) Without legal justification

Proving the first element of false imprisonment involves looking at the facts whether there was any force or threat of some kind used in restraining the accusing party. It is important to note that actual force is not necessary. Proving the second element of false imprisonment involves applying ‘reasonable person’ standard. Thus, the court will determine whether a reasonable person in the same factual situation would believe that they have been detained against their will. The final element of false imprisonment involves determining whether there is a legal basis for the detention. Many legal bases for detention do exist such as a lawful arrest by law enforcement. Determining whether probable or a legal basis for the detention exists is the key in false arrest cases.

16. In the instant case, the confinement of the appellant cannot be termed as false imprisonment. There was a genuine complaint of possible criminal activity that had been linked to him. There was a legal justification by the respondents. The learned trial magistrate arrived at the correct finding.

17. Turning on the claim of malicious prosecution, we need to first of all appreciate what it is and what the appellant was expected to prove. **Black’s Law Dictionary 10th Edition** defines it as:

The institution of a criminal or civil proceeding for an improper purpose and without probable cause. The tort requires an adversary to prove four elements: (1) the initiation or continuation of a lawsuit; (2) lack of probable cause; (3) malice; and (4) favorable termination of the lawsuit.

18. It is not every acquittal in a criminal case that will be a basis for a claim for malicious prosecution. If this was the position, then we would unnecessarily be fettering the prosecutor from discharging his duty of protecting the society from criminal elements for fear of claims for malicious prosecutions where the cases end in favour of accused persons. In the **Law of Torts (22nd Edition) Ratanlal & Dhirajlal** at page 269 have described malicious prosecution as follows:

MALICIOUS prosecution is malicious institution against another of unsuccessful criminal, or bankruptcy or liquidation proceedings without reasonable or probable cause. This tort balances two competing principles namely the freedom that every person should have in bringing criminals to justice and the need for restraining false accusations against innocent person. The foundation of the action lies in abuse of the process of the Court by wrongfully setting the law in motion and it is designed to discourage the perversion of the machinery of justice for an improper purpose.

There must be a balance between freedom of the prosecutor to perform the duty prosecuting criminal offenders and the protection of an individual from false accusations. This resonates with the pronouncement of the Court of Appeal in the case of **Commissioner of Customs & Excise vs. Hasmukh Shamji Halai & 3 others [2018] eKLR** where it observed:

It would be a sad day, and a dangerous precedent in our criminal justice system, if we celebrated the acquittal of an accused due to the absence of witnesses and documents, regardless of the reasons for their absence, and equating the acquittal to proof of innocence. Acquittal in a criminal trial, for whatever reasons, is one of the necessary elements for proof in a suit for malicious prosecution.

19. In the case of **Kagane & Others vs. The Attorney General & Another [1969] E.A 643 RUDD J.** stated:

The test whether the prosecution was instituted without reasonable and probable cause is whether the material known to the prosecution would have satisfied a prudent and cautious man that the Plaintiff was probably guilty of the offence.

In the instant case, the appellant was linked to the issuance of a receipt which was previously “lost” and was not in circulation. The stamp impression found on the receipt was also established to have been different from the one the KRA was at the time using. This coupled with the evidence on record would have satisfied a prudent and cautious man that he was probably guilty of the offence. I must add, without appearing to be sitting on appeal on the criminal matter, that he was lucky that the prosecution did not appeal the decision by the learned trial magistrate to acquit him.

20. It is my considered opinion therefore, that the learned trial magistrate properly appreciated the law before dismissing the claim for malicious prosecution. Consequently, I must dismiss the appeal with costs.

DELIVERED and SIGNED at BUSIA this 18th day of December, 2019

KIARIE WAWERU KIARIE

JUDGE