



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL CASE NO. 283 OF 2009**

**PAUL WARATHO.....1<sup>ST</sup> APPELLANT**

**STEPHEN KIMANI WANJIKU.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**BATA SHOE CO. LTD.....1<sup>ST</sup> RESPONDENT**

**P.C. EDISON SIGEL.....2<sup>ND</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**(Being an appeal from the Judgment & Decree delivered on**

**21<sup>st</sup> May, 2009 by Hon. Mrs. Murage (Senior Principal**

**Magistrate) Limuru Law Courts in PMCC No.166 of 2008**

**JUDGMENT**

1. Vide a plaint dated 16<sup>th</sup> July, 2008, the appellants sued the Respondent for damages for malicious prosecution and defamation.
2. The Respondents filed statements of defence and denied the claim.
3. The trial magistrate dismissed the Appellants case with costs. The Appellants were dissatisfied with the judgment of the trial court and filed this appeal. Vide a ruling herein dated 9<sup>th</sup> June, 2016 (Mbogholi Msagha, J) the court admitted some documents which did not form part of the Lower Court proceedings. That is the Notice of intention to sue the Attorney General and a letter from the Attorney General to the Commissioner of Police.
4. The grounds of appeal are as follows:
  1. That the learned trial magistrate erred in both law and fact in failing to find that the Respondents actually instituted the prosecution against the Appellants and that the same ended in favour of the Appellants despite the weight of the evidence adduced.
  2. That the learned trial magistrate erred in both law and facts in failing to find that the prosecution instituted by the Respondents was without reasonable and probable cause and that the same was thus actuated by malice despite the nature and weight of the evidence adduced.
  3. That the learned magistrate erred in both law and fact in failing to find that the appellants case was largely unchallenged and was thus proved on a balance of probabilities despite the weight of the evidence adduced.
  4. That the learned magistrate erred in law in failing to give any probable awards for the appellants case.

**5. That the learned trial magistrate erred in both law and fact in dismissing the appellants case.**

5. The appeal was canvassed by way of written submissions which I have considered.

6. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

**“An appeal to this Court from a trial by the High 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. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.**

7. The 1<sup>st</sup> Appellant Paul Waratho was the first witness to testify in the Lower Court. His evidence was that he was working for the 1<sup>st</sup> Respondent, Bata Shoe Company Ltd (Hereinafter Bata) when he was arrested on allegations that he had stolen some shoes from the employer. That he was escorted to Tigoni Police Station and subsequently charged with a criminal offence. That the criminal case ended with his acquittal. The 1<sup>st</sup> Appellant produced the proceedings and judgment of the criminal case. He stated that he worked at the sealing section and stated that the shoes in question were recovered from the dispatch section with a different seal. He further testified that he was not asked any questions and that no investigations were carried out.

8. The 2<sup>nd</sup> Appellant Stephen Kimani Wanjiku, a fellow employee of Bata Shoe Company Ltd gave similar evidence regarding his arrest. His evidence was that the shoes in question were found in the section where he worked at the warehouse as a checker. He described his work as, together with others, checking the sealed cartons containing shoes. He blamed the Respondent for malicious prosecution.

9. The proceedings of the criminal case reflect that 47 pairs of excess shoes in total were found packed in the cartons which contained 20 pairs of shoes instead of 18. The Appellants were acquitted under Section 210 Criminal Penal Code in the criminal case on the grounds that no *prima facie* case had been made by the prosecution.

10. Two witnesses testified for the 1<sup>st</sup> Respondent. The evidence of DW1 Fanuel Oyombe, an employee of Bata testified on the discovery of the theft and stated that the 1<sup>st</sup> Appellant was a sealer and the 2<sup>nd</sup> Appellant was a checker. He blamed the sealer for not confirming the numbers of shoes in the cartons and the checker for not checking the shoes. Peter Malobi Obasa (DW2) a security officer with Bata testified on how he checked the cartons and found the excess pairs of shoes hence the arrest of those involved and the carrying out of investigations by the police. He also identified the 1<sup>st</sup> Appellant as a sealer and the 2<sup>nd</sup> Appellant as a checker.

11. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent did not call any witnesses

12. The principles that govern a claim founded on malicious prosecution were set out by the Court of Appeal in **Robert Okeri Ombeka v Central Bank of Kenya [2015] eKLR** while quoting the case of **Murunga v Attorney General [1979] KLR** as follows:

**“a) The Plaintiff must show that the prosecution was instituted by the Defendant, or by someone for whose acts he is responsible.**

**b) The Plaintiff must show that the prosecution terminated in his favour.**

**c) The Plaintiff must demonstrate that the prosecution was instituted without reasonable and probable cause.**

**d) He must also show that the prosecution was actuated by malice.”**

13. From the foregoing, it is abundantly clear that the Respondents instituted the prosecution against the Appellants. The prosecution ended in the acquittal of the Appellants. That was also the holding of the trial magistrate.

14. On whether there was reasonable and probable cause to mount the prosecution against the Appellants, it is not in dispute that the theft occurred at the premises of Bata. The 1<sup>st</sup> and 2<sup>nd</sup> Appellants evidence is that they worked at the said factory as a sealer and a checker respectively. Both the 1<sup>st</sup> and 2<sup>nd</sup> Appellant in their evidence stated that the shoes in question were recovered in the dispatch section which means the cartons of shoes in question had passed through the sections where the 1<sup>st</sup> and 2<sup>nd</sup> Appellants worked and apparently without the detection of the theft.

15. As observed by the trial magistrate, the excess pairs of shoes in the cartons in question were not there by error. The big number of shoes involving 47 pairs shows that the extra shoes were deliberately stuffed into the cartons. It was theft. There was therefore good reason for Bata to make the report of theft to the police and for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent to carry out investigations in the matter. No malice can be inferred from the actions of the Respondents. There was a valid complaint. As stated in the case of **Socfinaf Kenya Ltd v Peter Guchu Kuria H.C. Civil Appeal No. 595 of 2000, at Nairobi eKLR:**

**“That a suspect who was acquitted of a criminal case is not sufficient 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.”**

16. The proceedings from the criminal case reflect that eight people were charged. It also comes out from the said proceedings that the exact number of pairs of shoes in each carton was to be checked before being sealed and dispatched to the customer and that the workers involved in the process were arrested together with the driver and the loader of the motor vehicle that was to transport the shoes.

17. In the ruling in the criminal case, the trial magistrate pointed out the lack of evidence on the exact role played by each of the eight accused persons, the none securing of the exhibits and the loopholes in the processes at Bata factory. All the accused persons were acquitted under Section 210 of the Criminal Penal Code. However, the said criminal proceedings reflect that a total of seven prosecution witnesses testified including the workers at Bata factory and the investigating officer. Five of the witnesses who testified confirmed having recorded statements. This goes further to show that investigations were carried out. There is no evidence of malice. The acquittal of criminal charges does not necessary connote malice on the part of the prosecution. There was reasonable and probable cause to mount the prosecution.

18. The Respondents' witnesses testified during the trial herein before the Lower Court. The evidence of the 1<sup>st</sup> Respondents witnesses which has been analyzed above gives the reasons why the Appellants were arrested. The Lower Court proceedings clearly reflect that the evidence of all the witnesses from both the Appellants side and the 1<sup>st</sup> Respondent's side was challenged by way of cross-examination. The cross-examination of the Appellants confirmed that the theft was discovered at the dispatch point after the cartons had passed through the checking and sealing. The evidence of the 1<sup>st</sup> Respondent's two witnesses confirmed that the discovery of the theft took place at the door where the goods were being released and confirmed that the said cartons of shoes had passed through the checking and sealing where the Appellants and others worked. In my view the trial magistrate arrived at the correct conclusion. The Appellants failed to prove their case on a balance of probability. The trial magistrate was right in dismissing the same.

19. There was failure by the trial magistrate to assess the general damages that she could have awarded if the Appellants' case had succeeded. Looking at the circumstances of the case and the submissions on quantum made in the Lower Court, I would have awarded Ksh.500,000/= as general damages to each Appellant.

20. The failure by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to call witnesses during the trial in the Lower Court does not equate to the success of the Appellants case. In the case of **Charterhouse Bank Limited (Under Statutory Management) v Franck N. Kamau [2015] eKLR**, the Court of Appeal while relying on the case of **CMC Aviation Ltd v Crusair Ltd (No 1) (1987) KLR 103** stated as follows:

**“The suggestion, however, implicit in some of the decisions quoted above, that in all and sundry civil cases the failure by the Defendant to adduce evidence in support of his defence means that the Plaintiff's case is proved on a balance of probabilities cannot possibly be correct. It is also obvious to us that in some of those decisions the question whether the Plaintiff has, in the absence of evidence from the defendant, proved his case on a balance of probabilities, was conflated and confused with the distinct issue of the effect of the Defendant's failure to testify when he had filed a defence and counterclaim. While the defendant's failure to testify has fatal consequences for the counterclaim because the onus is on him to prove it on a balance of probabilities, it does not necessarily have the same consequence for the defence where the onus is on the Plaintiff to prove his claim on a balance of probabilities.”**

21. The burden of proof lay with the Appellants. I find no merits in the appeal and dismiss the same with costs.

**Date, signed and delivered at Nairobi this 21<sup>st</sup> day of Feb, 2018**

**B. THURANIRAJADEN**

**JUDGE**