REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 49 OF 2016

ELPHAS MWITI.....APPELLANT

VERSUS

KENYA POWER & LIGHTING COMPANY LTD....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

(Appeal against judgment and decree in Nyeri Chief Magistrates' Court Civil Case No. 49 of 2016 (Hon. John Onyiego, Chief Magistrate (as he then was)) delivered on 24th August, 2016)

JUDGMENT

The appellant instituted a civil suit against the respondents for malicious prosecution in the magistrates' court on 9th October, 2008; he sought for general, special and exemplary damages, costs of the suit and interest thereof.

According to the appellant's plaint, the basis of his suit was that on 29th June, 2005, the 1st respondent's agents or employees lodged a complaint against him at Timau police station to the effect that he had fraudulently consumed the 1st respondent's electricity. Acting on this report, the police caused the appellant to be unlawfully arrested and detained at Timau police station before he was subsequently arraigned in court on 1st July, 2005 and charged with the offence of fraudulent consumption of electrical energy contrary to section 97(1) of the Electric Power Act, 1997 in **Nanyuki Chief Magistrates' Court Criminal Case No. 1519 of 2005**.

It was the appellant's averment that he was subsequently prosecuted by the police yet they did not conduct any or any proper or sufficient investigations. As a result of the prosecution he lost business revenue to the tune of Kshs 5000/= per day; he also claimed that he was humiliated and his reputation damaged. He averred that he was 'acquitted' in **Nyeri High Court Criminal Appeal No. 48 of 2007**.

His claim against the respondents was therefore for general damages for unlawful arrest, confinement and malicious prosecution, loss of reputation and business revenue.

The respondents, on the other hand, denied the appellant's claim and filed their respective statements of defence in that regard. The 2nd respondent, in particular, contented in the alternative that if at all there was any arrest, detention or prosecution, these actions were undertaken on the basis that there was a probable and reasonable cause and, in any event, in execution of the statutory duties of the 2nd respondent; accordingly, the 2nd respondents actions were lawful, procedural and within the limits of the relevant legal provisions.

The 2nd respondent further contended that the appellant was, in any event convicted, and therefore there was a reasonable and probable cause that an offence for which he was tried had been committed and as such his prosecution was not malicious.

At the conclusion of the trial the learned magistrate held that the appellant had not proved his case on a balance of probabilities and therefore dismissed it with costs to the respondents. It is against this decision that the appellant has now appealed to this Honourable Court. In the memorandum of appeal which he filed on 15th of September, 2016, the appellant raised the following grounds of appeal:

1. The learned magistrate erred in fact and in law in dismissing the appellant's suit.

2. The learned magistrate misdirected himself both in law and in fact in his finding that the appellant was not entitled to any damages.

3. The learned magistrate erred in law and in fact in not taking into account the weight and the relevance of the evidence submitted by the appellant.

4. The learned magistrate erred in law and in fact in failing to consider the merits of the appellant's suit.

5. The learned magistrate failed to take into account that the appellant's suit met the threshold for a claim for damages for malicious prosecution.

6. The learned magistrate erred in fact in failing to take into account the legal authorities cited on behalf of the appellant with regard to malicious prosecution.

In conclusion, the appellant sought for an order to have the judgment delivered by the magistrates' court set aside and his claim as prayed for in the plaint be allowed. He also sought for costs of the appeal.

This being the first appeal, it is necessary that the court, as the first appellate court, considers the evidence on record afresh, evaluate it and come to its own conclusions. It is important to remember, however, that even as this court is entitled to make its own conclusions, it is only the trial court that had the advantage of seeing and hearing the witnesses. (**Selle & Another versus Associated Motor Boat Co. Ltd & Others (1968) E.A. 123**).

In his testimony, the appellant stated that on 27th of June 2005, the 1st defendant or its representatives or agents came to his workshop where he operated a welding and carpentry business. He was away at the material time but one of his workers called back to the workshop. Upon his return, he found officers from the 1st respondent company and the police who arrested him and took him to Timau police station. He was initially detained but was released on a cash bail. Subsequently, he was charged in court with the offence of fraudulent use of electricity.

As part of the proceedings during the criminal trial, the trial court visited the appellant's workshop where the 1st respondent demonstrated an illegal or fraudulent consumption of electricity. The appellant was convicted upon the conclusion of the trial and he was fined Kshs. 10,000/= or in default to serve 3 months imprisonment.

The appellant appealed against the conviction and sentence in Nyeri High Court Criminal Appeal No. 48 of 2007. His appeal was successful and this Court (Sergon, J) quashed the conviction and set aside the sentence.

In answer to questions put to him during cross-examination, the appellant testified that at one point, the 1st defendant disconnected power from his business. The premises in which they conducted their business had two electricity meters; one meter served a residential house while the other was meant for his workshop. He admitted that this latter meter, which was the meter, in issue 'had issues'. According to him, this meter which he identified as meter No. 020225376 read 0 units as at 3rd March, 2003. It still read nil units as at 7th May, 2003. However as at 3rd February, 2006 it read that 559 units of electricity had been consumed.

Martin Mwiti Mwaniki (PW2) and **Erastus Mwaniki (PW3)** testified in support of the appellant's case and stated that they were present when the appellant was arrested by police officers. **Mwaniki (PW2),** in particular, confirmed that the 1st respondent's officers disconnected some cables at the appellant's workshop.

The 1st respondent's representative, **Kangethe Mwangi (DW1)** testified that on 29th of June, 2005, the 1st respondent undertook to an operation of inspection of consumption of electricity in Timau town area. The 1st respondent had received information from informers that there was fraudulent consumption of power in that area. When they visited the appellant's premises, they found two electricity metres for the respective accounts No. 2232386-01 and No. 20225376. The particular meter that was connected to the workshop was running but not recording the units of electricity consumed. Since 3rd March, 2003 when it was installed until 2006 it was reading nil units had been consumed. The default arose from illegal connection of cables which the 1st respondent's technicians disconnected.

When they visited the workshop they only found the workers who identified the appellant as its owner. It is then that he was arrested and charged. This witness confirmed that the court visited the scene and the 1st respondent's technicians demonstrated to the court how electricity was being consumed fraudulently. According to him, the 1 respondent had a valid complaint against the appellant and it is for this reason that they lodged it with the police.

The law on a claim for damages for malicious prosecution is a path that is well-trodden. According to **Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION) paragraph 627** malicious prosecution has been defined as an abuse of the process of the court by wrongfully setting the law in motion on a criminal charge. (See ***Mohamed Amin v Jogendra Kumar Bannerjee*** **[1947] AC 322 at 330, PC, per Sir John Beaumont**).

And in paragraph 637 of the same volume of **Halsbury's Laws of England,** elements of a claim for malicious prosecution have been spelt out**.** In order for one to succeed in a claim for damages for malicious prosecution a claimant must prove:

1. The prosecution by the defendant of a criminal charge against the claimant before a tribunal into whose proceedings the criminal courts are competent to inquire;

2. That the proceedings complained of terminated in the claimant's favour;

3. That the defendant instituted or carried on the proceedings maliciously;

4. That there was an absence of reasonable and probable cause for the proceedings; and, where damages are claimed as in the appellant's case,

5. That the claimant has suffered damage.

These ingredients have been reiterated by the House of Lords in *Gregory* ***v Portsmouth City Council [2000] 1 AC 419 at 426, [2000] 1 All ER 560 at 565, HL, per Lord Steyn***).

That appellant was charged and prosecuted for a criminal offence before a court of competent jurisdiction is not an issue in this appeal and was not an issue in the court below. The appellant himself made reference to the criminal case and the court in which he was charged although it appears that he did not exhibit the original criminal proceedings and the trial court's decision. Since nothing really turned on the omission to exhibit these documents and, since it was common ground that the appellant was charged and convicted before he challenged his appeal in this Court, I have no reason to regurgitate those issues at this stage. Suffice it to say that the first element of the claim of malicious prosecution was established.

On the second element, it is not in dispute that the appellant was convicted by the trial court. His appeal against the conviction was allowed and the conviction quashed. Despite his initial conviction, it can safely be concluded that the criminal proceedings against him were ultimately terminated in his favour. Indeed it has been held that where there has been a successful appeal from a conviction, this is a sufficient termination of the proceedings in the claimant's favour. (**See *Herniman v Smith* [1938] AC 305, [1938] 1 All ER 1, HL)**. However, it has equally been held that although a conviction may be reversed, it might be evidence on which a judge may find that there was reasonable and probable cause for the prosecution. **(See *Reynolds v Kennedy* (1748) 1 Wils 232, as explained in *Sutton v Johnstone* (1785) 1 Term Rep 493 at 505-506 per Eyre B)**. At this point it is sufficient to acknowledge that the appellant satisfied the second ingredient of his claim the moment his conviction was overturned on appeal. Whether the quashing of his conviction had any other connotations as far as proof of his claim is concerned is an issue that will be determined in due course.

The primary contention, in my humble view, revolves around the third and fourth ingredients. Of course the last ingredient is also in issue but the determination of whether damages are payable, the nature and their extent, is a question that largely depends on the resolution of the two immediate preceding elements.

Though distinct and separate, the third and fourth elements are to a limited extent intertwined for the simple reason that malice may be inferred from want of reasonable and probable cause; however, the converse is not necessarily true, want of reasonable and probable cause cannot be inferred from malice. **(See *Glinski v McIver* [1962] AC 726 at 744, [1962] 1 All ER 696 at 700, HL**, per Viscount Simonds). According to Rudd, J in **Kagane versus Attorney General (1969) E.A. 643 at page 646,** there would be too much risk of injustice if the converse applied since a malicious person may yet have reasonable and probable cause for instituting a prosecution, and so malice is no evidence at all of absence of reasonable and probable cause and ought to be completely disregarded when considering the question as to whether there was reasonable and probable cause for the prosecution.

In ***Hicks versus Faulkner (1878) 8QBD 167*** at page 171 which was approved in ***Hernimam versus Smith (1938) A.C. 305***, Hawkins, J defined 'reasonable and probable cause' as:

> **"…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, 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".**

Taking cue from this case, Rudd, J held in ***Kagane versus Attorney General*** (ibid) that apart from those cases where the basis for the prosecution is alleged to be wholly fabricated and in which the sole issue is whether the prosecution case was so fabricated or not, the question as to whether there was reasonable and probable cause for the prosecution is to be primarily judged on the basis of an objective test. The learned judge explained this to mean that:

> **"…to constitute reasonable and probable cause the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material consisted of facts discovered by the prosecutor or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty. If in so far as that material is based upon information, the information must be reasonably credible, such that an ordinary reasonable prudent and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for the prosecution."**

The facts with which the prosecutor was presented in the case against the appellant were simply these: the appellant had been consuming the first respondent's electricity for a considerable period of time, to be specific, between 2003 and 2006, yet the electricity meter which had been installed at his workshop for the sole purpose of tracking the amount of power he consumed was not recording any units; the appellant himself admitted that the meter had what he described as 'issues'; despite his admission, there is no evidence that the appellant brought to the attention of the 1st respondent these 'issues'; he was quite happy to continue consuming the 1st respondent's electricity without paying for it. By his own admission also, the appellant was running a welding and carpentry enterprise which, by their very nature, must have been consuming a considerable amount of power yet all he paid for the entire period that the electricity meter had 'issues' was the standing charges.

It is noted that one of his witnesses testified that the 1st respondent's technicians disconnected certain cables that had illegally been connected. These are the same cables that the 1st respondents witness must have been referring to when he testified that the 1st respondent's technicians disconnected certain illegally connected wires.

Faced with these facts wouldn't 'an ordinary prudent and cautious man' honestly believe that the appellant was guilty of an offence under section 97(1) of the Electricity Act 1997(repealed). I suppose he would. That section states as follows:

> **Any person who willfully or fraudulently injures or permits to be injured any works of the licensee, or alters the index of any meter for ascertaining the value of supply, or fraudulently abstracts, consumes or uses the electrical energy of the licensee, shall be guilty of an offence and(without prejudice to any other right or remedy for the protection of the licensee) liable to a fine not exceeding ten thousand shillings or to imprisonment for a period not exceeding one year, or both such fine and such imprisonment.**

Subsection (2) of section 97 is equally pertinent since it elaborates on what fraudulent use of power entails as to constitute an offence under section 92(1). It says:

> **The existence of artificial or unlawful means for causing such alteration or prevention (when such meter is under the custody or control of the consumer), or for abstracting, consuming or using the electrical energy of the licensee, shall be prima facie evidence that such alteration, prevention, abstraction or consumption, as the case may be, has been fraudulently, knowingly and willfully caused or permitted by the consumer.**

In my humble view the facts which constituted the offence with which the appellant was charged are squarely covered by these provisions of the law.

It must be remembered that the appellant was initially convicted and that it is only upon appeal that his conviction was quashed; the success of his appeal did not necessarily mean that there was no reasonable and probable cause for his conviction. As noted in ***Reynolds v Kennedy* (1748) 1 Wils 232, as explained in *Sutton v Johnstone* (1785) 1 Term Rep 493 at 505-506 per Eyre B** an initial conviction, although reversed on appeal, may be evidence on which a judge can possibly find that there was reasonable and probable cause for the prosecution.

In conclusion therefore I agree with the learned magistrate that based on the facts brought to the prosecutor's attention, there was reasonable and probable cause to believe in the guilt of the appellant.

As far as the question of malice is concerned, it is incumbent upon a claimant in a claim for damages for malicious prosecution to prove malice in fact and to demonstrate that the defendant was actuated either by spite or ill-will against him, or by indirect or improper motives. For instance malice was held to exist in ***Haddrick v Heslop and Raine* (1848) 12 QB 267 at 276** where the prosecution was for the purpose of 'stopping the plaintiff's mouth' (per Coleridge J); and in ***Stevens v Midland Counties Rly Co* (1854) 10 Exch 352** where the defendant's object was to punish someone in order to deter others.

Based on the facts laid before the prosecutor, there is no evidence that in initiating the prosecution of the appellant for the offence of fraudulent use of energy contrary to section 97 (1) of the then Electricity Act, 1997, he was actuated by malice or that his prosecution was informed by motive or motives other than the desire to bring the appellant to justice. The first respondent had a valid complainant upon which the 2nd respondent acted. The appellant was charged and tried for the offence which the respondents, and in particular the 2nd respondent believed, the appellant was guilty of. There was no evidence of bad faith on the part of the prosecutor; nor was there anything untoward in the manner he prosecuted the appellant. There was no evidence, for instance, of a desire on his part to concoct evidence or to secure a conviction at any cost. Contrary to the appellant's allegations, all I gather from the record is that the prosecutor's predominant, if not the only motive, was to subject the appellant to due process of the law.

I need not delve into the question of damages having concluded, as I have, that the appellant failed to prove that his criminal trial was instituted or carried on maliciously; and, that there was no reasonable and probable cause for the proceedings.

In the ultimate I agree with the respondents that there is no merit in this appeal; I am, therefore, inclined to uphold the judgment of the lower court and dismiss this appeal. It is hereby dismissed with costs to the respondents. It is so ordered.

Signed, dated and delivered this 20th day of April, 2018

Ngaah Jairus

JUDGE