



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 31 OF 2017

PAUL OTIENO ODUDO.....APPELLANT

VERSUS

MUNICIPAL COUNCIL OF KISUMU.....RESPONDENT

(Appeal against judgment and decree in Kisumu CMCC NO. 258 of 2017 delivered by Hon. R.M. Ndombi (RM) on 1st March, 2017)

JUDGMENT

1. **Paul Otieno Odudo (hereinafter referred to as appellant)** sued **Municipal Council of Kisumu (hereinafter referred to as respondent)** in the lower court claiming damages for malicious prosecution arising out of unlawful arrest on 18.11.09 and subsequent prosecution by the respondent.
2. The defendant/appellant filed a statement of Defence and denied the claim and urged the court to dismiss the respondent/plaintiff's claim with costs.
3. In a judgment delivered on 1st March, 2017, the learned trial Magistrate **found that the appellant had not proved his claim and dismissed it with costs.**

The Appeal

4. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 29.3.17 filed the Memorandum of Appeal dated 27.3.17 which he raised 10 grounds which I have summarized into 3 grounds that:-

- 1) **The Learned Magistrate erred in law and in fact in dismissing the appellant's suit without any reasonable basis**
- 2) **The Learned Magistrate erred in law and in fact in rejecting appellant's evidence**
- 3) **The Learned Magistrate erred in law and in fact in failing to award damages to the appellant**

SUBMISSIONS BY THE PARTIES

5. When the appeal came up for hearing on 23.1.17, parties agreed to dispose off the appeal by way of written submissions which they dutifully fled.

Appellant's submissions

6. Appellants submitted that his arrest on 18.11.09 and prosecution and conviction in **Winam Criminal Case, No. 214 of 2009** was malicious since he had been charged on an offence that was unknown to law. Appellant placed reliance on **HCCC NO. 782/07 Chrispine Otiemo Caleb v The Honourable Attorney General.**

Respondent's submissions

7. Respondent holds submitted that appellant did not prove that his arrest and prosecution was malicious or that he had suffered any loss. Respondent relies on the following authorities:

a. Kisii HCCC 2511/02 Japheth Angila v Connie Francis O.O.Owalla v The AG

b. Kagame & Others v AG & Another (1969) E.A 643

c. Nairobi Civil Appeal No. 73 of 2016 Hassan Magita Kiage v AG & Anor

d. Mbowa v East Meno District Administration (1972) EA 352

e. Pike v Waldrum (1952) 1 Llyd's Rep

f. Nelles v Ontarion (1989) 2CSR 170

THE EVIDENCE

8. Appellant was on 18.11.09 arrested, prosecuted and conviction for chipping sand in **Winam Criminal Case. No. 214 of 2009** and was sentenced to 30 days imprisonment. He appealed and in a judgment delivered on 7.12.09 in **High Court Criminal Appeal 169 of 2009**, the conviction was quashed and the sentence set aside on the ground that the charge was defective.

ANALYSIS AND DETERMINATION

9. This being the first appeal, it is my duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of **Selle v Associated Motor Boat Co. Ltd (1968) EA 123**.

10. The principles that govern acclaim founded on malicious prosecution were laid down by Contran, Jinthe case of **Murunga -Vs- Attorney General (1979) KLR, 138** 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.

I dealing with the appeal, I will endeavour to address each of the the principles as set out hereunder.

a. Was the prosecution instituted by the Defendant, or by someone for whose acts he is responsible?

11. The charge sheet in **Winam Criminal Case. No. 214 of 2009** evidently show that the proceedings in this case were instituted by the respondent.

b. Did the prosecution terminated in his favour of the plaintiff?

12. The proceedings were terminated in favor of the appellant on 7.12.09 when the High Court in **Criminal Appeal 169 of 2009** quashed the conviction and set aside the sentence on the ground that the charge was defective.

c. Has the plaintiff demonstrated that the prosecution was instituted without reasonable and probable cause?

13. I have considered the holding in **Kagane v Attorney General & Another (1969) EA 643** where the court held: -

“...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 the 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.”

14. The fact that appellant was charged on a defective charge in my view demonstrates that the facts of the criminal case were incapable of satisfying an ordinary, reasonable, prudent and cautious man to the extent of believing that the accused was probably guilty of chipping sand when no such offence exists in the law.

d. Was the prosecution actuated by malice?

15. Having found that there was no probable cause to arrest and charged the plaintiff I have come to the conclusion that the proceedings were actuated by malice and not by a honest aspiration to do justice.

GENERAL DAMAGES

16. Appellant served 20 days imprisonment on conviction on a defective charged. No doubt he suffered damages. In the submissions filed before the trial court, appellant asked for Kshs. 1,000,000/-. He cited Kisii HCCC 2511/02 Japheth Angila v Connie Francis O.O.Owalla v The AG where plaintiff was awarded Kshs. 800,000/- for arrest and prosecution on charges that were later withdrawn. Respondent had offered Kshs. 100,000/- and had cited no authority.

17. The trial court had assessed damages at Kshs. 500,000/-. It is now well-established that an appellate court will interfere with a trial court's award of damages only where it can be demonstrated that in assessing the same the court took into account a matter that it ought not to have taken into account, or that it failed to take into account a matter that it ought to have, or that the award is so high or so low as to amount to a wholly erroneous estimate of the same.

18. It has not been shown demonstrably that the trial court acted on wrong principles in its assessment of damages at Kshs. 500,000/-.

AGGRAVATED DAMAGES

19. While citing the case of Rookes-Vs-Bannard (1964)1ALLER, 367, Maraga, J (as he then was) in Abdulhamid Ebrahim Ahmed-Vs-Municipal Council of Mombasa (2004)eKLR, HC. AT MOMBASA, CIVIL SUIT NO. 290 OF 2000 stated that “

aggravated damages are awarded in actions where the damages are at large, that is to say where the damages are not limited to the pecuniary loss that can be specifically proved. They are awarded in actions of defamation, intimidation, false imprisonment, malicious prosecution, trespass to land, person or goods, conspiracy and infringement of copyright. Such damages are part of or, included in, the sum awarded as general damages and are therefore at large. As such they need not be specifically pleaded or included in the prayer for relief.”

The court went further to say;

“However where the Plaintiff relies on any facts or matters to support his claim for aggravated damages, it is desirable that he should plead those facts or matters. The matters the court should take into account in awarding such damages include the defendant's motives, conduct and manner of committing the tort. The court should consider whether the defendant acted with malevolence or spite or behaved in a high-handed malicious, insulting or aggressive manner. The court may also consider the Defendant's conduct up to the conclusion of the trial including what he or his counsel may have said at the trial. If any of the Defendant's acts will have worsened the Plaintiff's damage by injuring his feelings of dignity and pride that may also be considered in awarding damages. Aggravated damages are therefore compensatory in nature. Exemplary damages on the other hand are damages that are punitive. They are awarded to punish the defendant and vindicate the strength of the law”

20. The facts of the instant case do not demonstrate that the officers of the respondent acted in a manner to embarrass the plaintiff nor did their actions manifest high-handedness.

Special Damages

21. Plaintiff pleaded for special damages in the sum of Kshs.30,000/- but failed to tender evidence in support thereof.

DISPOSITION

22. In the end and for the reasons given on the assessment above, the appeal is allowed. The judgment of the trial court is set aside and substituted with an award to the appellant of general damages in the sum of Ksh. 500,000/-. The appellant shall have costs of this appeal and the proceedings in the lower court.

DATED, DELIVERED AND SIGNED THIS 19th DAY OF April 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistants - Carolyne and Aura

Appellant - Mr. Kirenga

Respondent - Ms. Othong Holding Brief for Asunah