



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CIVIL APPEAL NO. 38 OF 2017
CONSOLIDATED WITH
CIVIL APPEAL NO. 42 OF 2017
CORAM: D. S. MAJANJA J.

BETWEEN

ATTORNEY GENERAL.....1ST APPELLANT

PC RONALD MUKANGAI.....2ND APPELLANT

MIKUMBUNE FARMERS

COFFEE SOCIETY LIMITED.....3RD APPELLANT

AND

JOSEPH MARANGU.....RESPONDENT

(Appeal from the original Judgment and Decree of Hon.S. Abuya,

SRM dated 24th April 2017 at the Chief Magistrates Court

at Meru in Civil Case No. 127 of 2010)

JUDGMENT

1. The appellants, who were defendants before the subordinate court, appeal against the judgment and decree of the subordinate court. They were found liable for malicious prosecution. The court awarded the respondent Kshs. 350,000/- as general damages. I consolidated the two appeals filed by the appellants as they contest the same judgment. The thrust of their respective appeals is that the respondent failed to prove the tort of malicious prosecution.

2. In order to determine the issue raised by the appellants, I am guided by the principle that as this is a first appeal, it is my duty to reconsider the evidence, evaluate it and reach my own conclusion bearing in mind that it is the trial court that saw and heard the witnesses testify and was able to assess their demeanour (see *Selle v Associated Motor Boat Co. [1968] EA 123*). Further, an appellate court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles (see *EphantusMwangi and Another v Duncan MwangiWambugu [1982 – 88] 1 KAR 278*).

3. The respondent (PW 1) testified that he was arrested on 24th January 2006 and taken to Nkubu Police Station, held in custody for one day and then charged at the Nkubu Senior Resident Magistrate's Court in **Criminal Case No. 400 of 2006** for the offence of stealing one blue gum tree, an offence for which he was subsequently acquitted. He complained that the chairman of the 3rd respondent ("the Co-operative") by the name Makaju is the one who laid the complaint against him by accusing him of stealing trees he had planted along the boundary which he shared with the Co-operative. Since he had harvested the timber, it was confiscated by the police and never returned. He also suffered loss of the tress he had cut and which he could not sell. He could not understand why a complaint against him was made yet there was a clear boundary between their respective parcels. The respondent's witness, Peter Muriithi (PW 2), is the person who valued the wood that had

been cut.

4. Shadrack Muthuri M'Mungania (DW 1), the secretary of the Co-operative, adopted his statement in which he stated that one of the factories forming part of the Co-operative, Kandigi Coffee Factory, was situated on the land next to the respondent's. He testified that the blue gum tree subject of the criminal charge was on the side of the factory land and not the respondent's land and that a complaint was lodged with the police when the tree was cut. He denied that he had any differences with the respondent.

5. The 2nd appellant (DW 2) recalled that he arrested the respondent after a member of the Co-operative called the police station and reported that someone had cut down a tree belonging to it. He booked the report in the Occurrence Book and then proceeded to the scene where he found the blue gum tree had been cut. He was taken to the respondent's house and arrested him. He recalled that he admitted that he was the one who had cut the tree. He was taken to the police station but was released on cash bail. After investigations, he decided to charge the respondent. He told the court that he had not known the respondent prior to the incident.

6. It is not in dispute that the respondent was arrested with the offence of stealing contrary to **section 275** of the **Penal Code (Chapter 63 of the Laws of Kenya)** in **Meru Chief Magistrates Court Criminal Case No. 400 of 2006**. The charge stated that on 22nd January 2006 at Kandigi Village, Mikumbune Location, Meru Central District within Eastern Province, the respondent stole one blue gum tree valued at Kshs. 6,000/- the property of Kandigi Coffee Society Group. The respondent was acquitted on 2nd December 2009 under **section 210** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** after the court concluded that he had no case to answer.

7. The ingredients for the tort of malicious prosecution have been settled in this jurisdiction in several cases among them; **Kagane and Others v Attorney General and Another [1969] EALR 643, Mbowa v East Menjo District Administration [1972] EA 352, Murunga v Attorney General [1979] KLR 138** and they are 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) That the prosecution terminated in the plaintiff's favour.
- c) That the prosecution was instituted without reasonable and probable cause.
- d) That the prosecution was actuated by malice.

8. These elements were summarized by the East Africa Court of Appeal in **Mbowa v East Menjo District Administration (Supra)** 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.

9. The evidence shows that an officer of the Co-operative Society is the one who made a report to the police who then investigated the matter and made a decision to charge the respondent. As to the second element, the respondent was charged and acquitted under **section 210** of the **Criminal Procedure Code** as he was not put on his defence.

10. The trial magistrate held that the prosecution was instituted without any reasonable and probable cause on the ground that the evidence presented at the trial, which was contained in the prosecution statement, could not support a case as the trial magistrate found that the offence was not established and that the tree was not stolen and neither did it belong to the Co-operative nor the respondent. In such circumstances she held that, "a prudent and cautious man who was faced with this witness statements could not have believed the plaintiff was probably guilty."

11. Was there reasonable and probable cause? According to **Halsbury's Laws of England, 4th Edition - Reissue, Vol. 45 (2)**.

[R]easonable and probable cause for a prosecution has been said to be an honest belief in the guilt of the accused person based on a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of an accuser, to the conclusion that the person charged was probably guilty of the crime ...

12. To my mind it is easy to see that there were two contentions as to the ownership of the gum tree. The respondent claimed that the tree was his and that is why he cut it and the Co-operative claimed that the tree was on its land. The trial magistrate after hearing the matter held that in fact, both parties were wrong and the tree was on a road reserve. In these circumstances would the appellants be condemned when both parties misapprehended the facts and reached a different conclusion on the same facts. In my view, there was a reasonable and probable cause to charge the respondent.

13. The law is clear that the mere fact that a person has been acquitted of the criminal charge does not necessarily connote malice on the part of the prosecutor. While it was correct to state that lack of reasonable and probable cause may be evidence of malice, actual spite or ill will must be proved. In **Nzoia Sugar Company Ltd v Fungututi [1988] KLR 399**, the Court of Appeal held;

Acquittal per se on a criminal charge is not sufficient basis to ground 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 one of its servants that can be attributed to the company.

14. Since the Co-operative is an artificial person, malice had to be imputed from its employees or agents. From the evidence, it is not clear which of the Co-operative's officers had a malicious intent in filing the complaint. Likewise, the 2nd appellant, a police officer, took the complaint and investigated it. He did not know the respondent before the case and not an iota of spite of ill-will was suggested against him and I find none.

15. The totality of my evaluation of the evidence is that I find and hold that the respondent failed to prove all the essential elements of the tort of malicious prosecution.

16. This appeal is allowed and the judgment of the subordinate court is substituted with one dismissing the suit. I will not mulct the respondent with costs of this appeal or of the subordinate court. Both parties, it appears, were laying claim to a tree that did not belong to either of them. They are neighbours and it would be in the interests of justice to let each party shoulder their respective costs.

SIGNED AT KISII

D. S. MAJANJA

JUDGE

DATED and DELIVERED at MERU this 21st day of June 2018.

A. MABEYA

JUDGE

Mr Kimathi instructed by the Office of the Attorney General for the 1st and 2nd appellants.

Ms Ntarangwi instructed by J.K. Ntarangwi & Company Advocates for the 3rd appellant.

Ms Githaka instructed by Mwangi E. G. & Company Advocates for the respondent.