



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 55 OF 2015

HON. ATTORNEY GENERAL.....1ST APPELLANT

INSPECTOR GENERAL OF POLICE.....2ND APPELLANT

PRINCIPAL SECRETARY MINISTRY OF INTERIOR &

COORDINATION OF NATIONAL GOVERNMENT.....3RD APPELLANT

V E R S U S

JOSEPHAT MAINA KARUORO.....RESPONDENT

J U D G M E N T

1. The appellant was dissatisfied with the judgment of Embu Civil suit No. 21 of 2014 and lodged this appeal. The respondent successfully sued the appellants in the said suit for general and special damages for malicious prosecution and false arrest as well as for breach of his constitutional rights for being detained for over 24 hours. He was awarded damages of Kshs.2,400,000/= plus costs and interests.

1. The memorandum of appeal contains several grounds as follows:-

(a) That the learned magistrate erred in awarding damages for malicious prosecution without proof of malice.

(b) That the damages of Kshs.2,400,000/= awarded was erroneous and exaggerated.

(c) That the plaintiff did not plead or give any particulars of malice.

(d) That the magistrate disregarded the pleadings of the appellants, their evidence and submissions in his judgment.

(e) That the magistrate erred in finding that the prosecution was instituted without a reasonable and probable cause.

(f) That the magistrate erred in finding contrary to the evidence that the respondent proved his case on the balance of probabilities.

(g) That the magistrate erred in awarding costs to the respondent.

3. The appellant submitted that a complaint was raised with the police and investigated. The police were satisfied that there was sufficient evidence to prefer criminal charges against the respondent. Subsequently the respondent was convicted of some of the criminal charges.

4. The appellant relied on the case of **KAGANE & OTHERS VS THE ATTORNEY GENERAL [1969] EA 643** which sets out the ingredients to be proved in a case of damages for malicious prosecution. It was held that such prosecution must have been instituted by a police officer; terminated in the plaintiffs favour; instituted without reasonable and probable cause and was actuated by malice.

5. The test is whether the material would have satisfied a cautious or a prudent prosecutor that it was sufficient to prefer criminal charges against the plaintiff.

6. In proof of malice, the appellant relied in the case of **KATTEREGA VS ATTORNEY GENERAL [1973] EA 289**. The court held that particulars of malice must be proved. It is the appellant's submission that no evidence was adduced in this regard and that malice was not pleaded.

7. The appellant further submitted that the respondent was not entitled to costs considering the stage at which the proceedings were

terminated, his conduct, and the circumstances that led to the prosecution.

8. It was further submitted that the appellant's evidence and submissions were completely disregarded in the judgment.

9. The appellant urges the court to consider whether the quashing of proceedings on appeal entitles a plaintiff to damages for malicious prosecution.

10. The respondent in his submissions argued that he was entitled to general damages and special damages. He said sufficient evidence was adduced to prove all the tenets of malicious prosecution. It is the appellants who did not adduce any evidence in support of their case.

11. The respondent relied on two High Court cases in support of his submissions.

i. Embu HCCC No. 136 of 2011 MICHAEL KAGOME MAINA VS AG where the court awarded Kshs.6,000,000/=.

ii. HCCC No. 235 of 2008 SAMMY KIPROTICH TANGUS VS AG where Kshs.3,000,000/= was awarded for malicious prosecution.

12. Relying on the two decisions in regard to quantum, the respondent argued that the respondent was awarded only Kshs.2,400,000/= damages plus costs which was reasonable.

13. It is further submitted that under Section 27 of the Civil Procedure Act, costs follow the event. The respondent having been successful in the suit was entitled to costs.

14. The respondent states that the defence was full of mere denials and that no decisions to guide the court were given by the appellant. It is further submitted that the evidence of PW7 in the criminal case supported the respondent's finding that the prosecution was malicious. The respondent referred to the evidence of PW7 when he stated that the P3 forms were with the complainant.

15. It was contended that the respondent was confined in police custody for nine (9) days. He was arraigned in court when his wife filed an application for *habeas corpus*.

16. The respondent argues that although he was convicted of two counts, the High Court quashed the convictions.

17. The duty of the first appellate court was explained in the case of *MWANGI VS WAMBUGU, [1984] KLR 453* as follows:-

"A Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

18. The issues raised in this appeal have been identified as follows:-

(a) Whether the respondent discharged the burden of proof of malicious prosecution.

(b) Whether the respondent was entitled to an award of damages and the quantum thereof.

(c) Whether the respondent was entitled to costs.

(d) Who shall bear the costs of this appeal.

19. The evidence of the respondent was that on 23/03/2004 he was arrested by one PC Nicholas Kisavi and taken to Nairobi United Insurance office. He was brought back to Embu and remanded at Embu police station for 9 days before being subjected to an identification parade where the lady witness failed to identify him. He was charged in court on 1/04/2004 with eleven (11) counts in Embu Criminal Case No. 917 of 2014.

20. The respondent was later convicted of two counts and acquitted of all the others. He produced the proceedings in the criminal case in evidence as well as receipts for legal fees and court attendances amounting to Kshs.400,000/=.

21. The appellant did not call any witnesses during the hearing of the case.

22. It was argued by the respondent in his submissions that his evidence was not controverted by the appellants and as such the appellants could not validly argue that the case was not proved. The appellants argued that the respondent did not adduce any evidence of malice on part of the appellants to justify an award of damages for malicious prosecution.

23. *The law of malicious prosecution has been discussed and principles set out in several decisions.*

24. In the case of **WEST NILE DISTRICT ADMINISTRATION VS DRITTO [1969] EA 324** that a person instituting legal proceedings for malicious prosecution must prove the following:-

(a) *That the police were agents of the defendants (in case where the AG is sued solely).*

(b) *That the police acted without reasonable and probable cause.*

(c) *That the police officers acted maliciously.*

(d) *That the proceedings were terminated in favour of the plaintiff.*

25. The trial magistrate cited the case of **MBOWA VS EAST MENGO ADMINISTRATION [1972] EA 352** where similar principles were articulated by the East Africa Court of Appeal.

26. *The appellants relied on the case of KAGANE & OTHERS VS REPUBLIC [1969] EA 643 which enumerated the same principles as in the cases of WEST NILE (supra) and that of MENGO ADMINISTRATION (supra).*

27. In regard to whether the respondent discharged the burden of proof, I wish to rely on the case cited by the appellant that of **KATERREGA VS ATTORNEY GENERAL [1973] EA 289** where it was held:-

It is well established that in a claim for damages for malicious prosecution, malice in fact must be proved showing that the person instituting the proceedings was actuated either by spite or ill-will or by indirect or improper motives.

28. The question that arises is whether the evidence on record was sufficient to prove that the agents of the 2nd appellant (the police) were actuated by malice or ill-will.

29. The respondent said that he was arrested by police and locked in custody for nine (9) days before being charged in court. Further that although he was convicted of two courts out of the ten (10) charges preferred, he was acquitted on appeal. His evidence was that he did not know the complainant and that he came to know the police officers the day they arrested him.

30. The criminal proceedings show that there was a complaint from one Janet Odera PW1 that the respondent had gone to her house, served her with several court documents for Embu CMCC No. 43 of 2004 in which suit she was named as the defendant. He had demanded Kshs.15,000/= from her in order to assist her so that her property would not be auctioned in satisfaction of the decree. The motor vehicle of PW1 had been involved in an accident and some passengers had been injured.

31. The police commenced investigations and charged the respondent with several offences. The trial resulted in conviction of the respondent in two of the ten offences and it is on appeal that the respondent was set free.

32. From the evidence, it is not in dispute that a complaint was made to the police which was investigated. The police were satisfied there was evidence to charge the respondent. There was evidence from PW6 an advocate from the firm of Charles Kariuki & Co. based in the Embu office that the respondent is the one who introduced the clients in Embu CMCC No. 43 of 2004 to the advocates office.

33. The doctor who filled the P3 form was found to be non-existent after the investigations. The respondent did not show the doctor to the police. PW2 to PW5 testified that it was the respondent who took the P3 form to be filled. The respondent was sent by PW6 to take related documents to the Meru office of Charles Kariuki & Co.

34. It is not in dispute that the respondent was convicted by the trial court. The proceedings did not end in his favour for he was convicted of two of the offences in the case. The fact that he was convicted shows that the 2nd respondent's agents had a well grounded case against the respondent. Having been acquitted on appeal cannot be said to be that the proceedings terminated in the respondent's favour.

35. It was held in the **KAGANE case** that even if the prosecution ends in favour of the plaintiff, the burden of proving malice and lack of probable and reasonable cause on part of the police had to be discharged.

36. However, it is established law as to what the respondent was required to prove in his case.

37. Section 107 of the Evidence Act places the burden of proof on the person who alleges the existence of certain fact, that is, the respondent in this case.

38. Section 107 provides:-

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

39. In the petition of **RAILA ODINGA & 5 OTHERS VS INDEPENDENT ELECTORAL BOUNDARIES COMMISSION & 3 OTHERS [2013] eKLR** where the Supreme Court of Kenya cited dicta in a Nigerian case as follows:-

He who asserts is required to prove such fact by adducing credible evidence. If a party fails to do so, its case will fail. On the other hand if he party succeeds in adducing evidence to prove the pleaded fact it is said to have discharged the burden of proof that rests on it. The burden is then said to have shifted to the party's adversary to prove that the fact established by the evidence adduced could not on the preponderance of the evidence result in the court giving judgment in favour of the party.

40. The Supreme Court confirmed that the failure by the party who has instituted the suit to prove his case cannot be saved by the failure by the defendant to give evidence. It is not an automatic right for a favourable judgment part of the plaintiff in a case where the defendant has not given the burden of proof remains an obligation of the plaintiff to prove the facts whose existence he/she alleges.

41. In this case the investigator processed the complaint he received and reached a decision to charge the respondent with criminal offences. In his assessment, the complaint was merited. The issue is whether the police can be said to have charged the respondent without a reasonable and probable cause.

42. It was held in the case of **PENUEL OMARE SULEIMAN VS JUDICIAL SERVICE COMMISSION & ANOTHER [2012] eKLR** that:-

In the instant case, the plaintiff alleges that the defendants were malicious in prosecuting him vide Migori Cr. Case No. 243 of 1998. Though it is true that that case was decided in favour of the plaintiff, there is no evidence on record to show that there was any spite or ill-will or improper motive in instituting the said criminal case. What is on record is that the plaintiff was suspected of having stolen certain amounts of money on diverse dates from his employer and as a result thereof a report was made to the police and subsequently the plaintiff was arrested and charged. In my humble view, there was reasonable or probable cause for the prosecution and even if the plaintiff proved that there was no such probable or reasonable cause, he would not have proved malice without the ingredients of spite, ill-will or improper motive. So, in this case, I find that no malice was proved by the plaintiff as against the defendants. The plaintiff's claim under this head must therefore fail.

43. In my view "reasonable and probable cause" was clearly explained that even if the case ended in favour of the plaintiff, evidence of ill-will or spite must be adduced to demonstrate that the prosecution was malicious. In this case, the respondent said he came to know the police officer who was arrested him on the date of arrest and that he did not know the complaint.

44. There was no possibility that the investigating officer had any reason to maliciously institute the criminal proceedings. I come to the conclusion that the criminal charges were instituted in the course of the duties of the 2nd appellant setting the legal process in motion.

45. The respondent had an obligation to prove that the prosecutor did not honestly believe in his guilt when he instituted the charges. This is the objective test to be applied in proof of a probable and reasonable cause. In my view this burden was not discharged.

46. It is my considered opinion that the respondent did not prove that the 2nd appellant's action was actuated by improper motive.

47. In the judgment, the learned magistrate did not take into consideration the submissions of the appellant. He did not cite a single authority on the subject of malicious prosecution and/or reasonable and probable cause contained in the submissions. These authorities would have been a good guide in the judgment had the been utilized.

48. It is my finding that the learned magistrate misdirected himself in finding that the respondent had proved his case on the balance of probabilities. I find that the case was not proved and the respondent was not entitled to any damages.

49. The said judgment and any consequential orders are hereby set aside. The respondent's case CMCC No. 21 of 2014 stands dismissed with costs.

50. Each party will met their costs of this appeal.

51. I hereby find the appeal merited and allow it accordingly.

52. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 30TH DAY OF JULY, 2018.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Ndorongo for Respondent

Mr. Siro for the Appellant