



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CIVIL APPEAL NO. 2 OF 2014**

**CID OFFICE MERU..... 1<sup>ST</sup> APPELLANT**

**CORPORAL M. MUTHUI.....2<sup>ND</sup> APPELLANT**

**ATTORNEY GENERAL.....3<sup>RD</sup> APPELLANT**

**-VS-**

**ESTHER KANYUA MUKIRA.... 1<sup>ST</sup> RESPONDENT**

**MARTIN KIRIMI MUKIRA.....2<sup>ND</sup> RESPONDENT**

**MORRIS MWENDA MUKIRA..3<sup>RD</sup> RESPONDENT**

**J U D G M E N T**

1. This Appeal arises from the Judgment of C.N. Ndubi (Ag. Principal Magistrate) in Nkubu *Civil Case No. 21 OF 2012*. In that case, the trial court awarded the 1<sup>st</sup> respondent general damages of Kshs.350,000/= and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents Kshs.250,000/= with costs and interest of the suit. The appellants applied to review that decision on the ground that there was an error apparent on the face of the record but it was dismissed. The appellant has now appealed to this court against that dismissal.

2. In the Memorandum of Appeal dated 31<sup>st</sup> January, 2014, the appellants raised the following grounds:-

**“a)**

7. **PW2**, Martin Kirimi Mukira and **PW3**, Maurice Mwenda Mukira told the Court that they were at **PW1's** premises where they were arrested and taken to the police station.

8. The appellants did not file any defence to the respondents' claim. After judgment was delivered in favor of the respondents on 9<sup>th</sup> January, 2013, the appellants applied for review and its setting aside. In the ruling delivered on 22<sup>nd</sup> January, 2014, the trial court dismissed the application on the basis that the appellants had been given a chance to defend the suit.

9. The issue for determination is **whether the trial court was in error in declining the appellant's application for review.**

10. In the case of ***West Nile District Administration vs. Dritto (1969) EA 324*** the conditions for the existence of malicious prosecution were listed as follows:-

- a) that the prosecution was set in motion by the defendant;
- b) that the prosecution was determined in favor of the plaintiff;
- c) that there was no reasonable cause for it; and
- d) that the prosecution was malicious.

11. The evidence and judgement in the ***Anti-Corruption Case No.2 of 2011*** shows that the prosecution of the respondents was initiated by the appellants and that it was determined in favor of the respondents. That proves the first and second ingredient of malicious prosecution, respectively.

12. The third issue is, prosecution without probable cause. This would have been best answered by the appellants by appearing at the trial and giving an explanation as to what led them to institute the charges against the respondents. They failed to file any defence or appear at the trial. The trial court had no other choice but to hold that there was no reasonable cause for the prosecution. It should be recalled that once the respondents testified that there was no probable cause for their prosecution, the evidentiary burden shifted to the appellants. Since the case closed without them calling any evidence, that burden rested and remained on them.

13. In its judgment, the trial court found that the ingredient of **"no reasonable cause"** was presumed as proved with the failure by the appellants to file any defence to the respondent's claim. In the application for review, the appellants contended that the trial court fell into error by failing to consider that the respondents had been placed on their defence. That it was therefore imperative for the trial court to examine this particular aspect and see whether it was an error on its part to consider that part in its judgment of 5<sup>th</sup> January, 2013.

14. It behoves this court to examine how the trial court dealt with this complaint which formed the basis for the appellants' complaint. At page 2 of the ruling, the trial court found that there having been no defence on record, it could not be argued that there was any reasonable cause for the prosecution of the respondents.

15. The burden of proof in civil cases at all times lies with the plaintiff. **See section 107 of the Evidence Act, Cap 80 of the Laws of Kenya.** Once a plaintiff has tendered evidence sufficient to establish his case, the evidentiary burden shifts to the defendant which he must discharge for it to shift back to the plaintiff. If the defendant does not offer any evidence in rebuttal, the evidentiary burden is said to rest with him and the plaintiff would be said to have proved his case on a balance of probability.

16. In the present case, it is not in dispute that the trial court had the proceedings of the **anti-corruption case** before it. It was clear from the said proceedings that the respondents had been placed on their defence. However, it was not the appellants case in that court that by the respondents being placed on their defence, that constituted a reasonable cause for their arrest and prosecution. The appellants had to state this in their defence and testimony before the civil court. That court cannot be expected to have inferred that defence by merely looking and analyzing the proceedings in the anti-corruption case only.

17. In view of the foregoing, the trial court cannot be faulted for finding that since there was no defence filed, there was no error on the face of the record. There is no and cannot be a rule of law that once an accused has been placed on his/her defence there is an automatic prove of a reasonable cause. The defendant must appear in the civil suit and prove that fact.

18. I find that the court properly applied its mind and considered the submissions made before it. That the findings of trial court are supported by law.

19. Accordingly, I find the appeal to be without merit and the same is hereby dismissed with costs to the respondents.

**SIGNED at Meru**

**A. MABEYA**

**JUDGE**

**DATED and DELIVERED at Meru this 25<sup>th</sup> day of October, 2018**

A. ONGI'NJO

JUDGE