



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 19 OF 2014

(Appeal originating from the Judgment of Hon. M.Nasimiyu SRM at MERU in Civil Case Number 122 of 2009)

JULIUS KULIAL.....APPELLANT

=VERSUS=

CATHERINE NGITHI.....RESPONDENT

J U D G M E N T

INTRODUCTION

The Trial Magistrate found the Appellant herein liable for malicious arrest and prosecution of the Respondent and awarded damages of kshs 600,000 plus costs and interest.

GROUND OF APPEAL

I have perused of the Memorandum of Appeal and condense the 6 grounds of appeal as hereunder:-

1. That the Trial Magistrate erred in finding that the Respondent proved his case against the Appellant.
2. That the Appellant had no other recourse but to report the alleged theft to Police who are authorized to receive complaints.
3. That the Trial Magistrate erred in awarding damages when no malice was established.

PARTIES SUBMISSIONS

Parties herein proceeded by way of written submissions. The Appellant submitted that no malice was proved on the part of the Appellant; that no evidence was adduced before Court to establish that charges preferred against the Respondent were maliciously instituted.

Appellant submitted that the claim for defamation was disallowed and fault the Trial Magistrate for allowing the claim for arrest and malicious prosecution despite the fact that the Appellants role was limited to reporting to Police who did the arrest and prosecution.

The Appellant contend that reporting a crime to Police is not malicious perse since the Police's role is to investigate and establish whether an offence has been committed.

The Appellant argued that no malice was established to warrant award of damages.

The Appellant cited two authorities; **Chemiga Limited V. Maurice Ouma Nyundugu [2017]eKLR** and **Isaac N.Okero V. Samuel Otieno Onyango[2017]eKLR**.

RESPONDENT'S SUBMISSIONS

The Respondent urged the Court to evaluate the evidence tendered and come up with an independent finding.

The Respondent submitted that the Respondent demonstrated that she was an employee and that prior to her arrest the Appellant had attempted to woo her into a relationship, which she declined.

The 1st Defendant argued that the Appellant lodged a report at Meru Police Station and the 2nd Defendant made sure that she was charged with the offence of stealing by servant contrary to Section 281 of the Penal Code.

The Respondent contends that the Appellant was arrested before investigations were commenced; that the Appellant with the help of Administrative Police Officers caused the Respondent to be arrested before complaint was lodged.

The Respondent pointed out that the Trial Magistrate noted that the OCS instructed him to arrest the Respondent on 18th January 2008 and he was asked to investigate the next day 19th January 2008 and that the complainant recorded statement on 29th January 2008.

Further, that Police took the Respondent to Court on 21st January 2008 but were later forced to apply twice to withdraw the case because it was not properly investigated.

The Respondent urged Court to find that the arrest was wrongful and malicious.

ANALYSIS AND DETERMINATION

This being the first Appellate Court, it is tasked with the responsibility of evaluating evidence adduced before the trial Court. I am however minded of the fact that I did not have the benefit of taking evidence first hand neither did I get an opportunity to observe demeanor of witnesses.

What I consider to be in issue is whether the Appellant genuinely had reason to lodge complaint against the Respondent or the same was informed by malice against the Respondent.

On perusal of the trial Courts criminal proceedings, I note that the Respondent was acquitted of the offence charged under Section 210 of the CPC. I also note that on 5th May 2008 and 10th September 2008, the prosecution attempted to withdraw the criminal case on the ground that there was no enough evidence. The prayer was however rejected by the trial Court.

From the conduct of the criminal proceedings, it is evident that the Police and complainant hastened the arrest of the Respondent. No sufficient time was given to investigation to establish whether an offence had been committed, this is further corroborated by the prosecutions attempt to withdraw the charges.

Record show that the prosecution attempted to withdraw the criminal case twice for lack of evidence. Record further show that arrest was by Administrative Police in the presence of the Appellant. This was clearly done before formal lodging of complaint and investigation. In cross-examination, the Respondent indicated that she turned down the Appellants request for a relationship. In the presence of such allegation, it was incumbent upon the investigating officer to call for evidence to rule out malice in the allegations levelled against the Respondent. Instead the Police hastened to charge the Respondent.

The sequence of events point at malice on part of complainant and officers who decided to charge the Respondent before establishing whether an offence was committed.

From the foregoing, I find that on a balance of probability, the Respondent proved that the arrest and prosecution was informed by malice. I do not see any merit in the appeal herein.

FINAL ORDER

The appeal is dismissed with costs to the Respondent.

Judgment Dated and Signed at Nairobi this 19th day of November 2018.

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RACHEL NGETICH

HIGH COURT JUDGE

Delivered at Meru this 23rd day of November 2018.

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JUDGE

IN THE PRESENCE OF

.....COURT ASSISTANT

.....COUNSEL FOR APPELLANT

.....COUNSEL FOR RESPONDENT