



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. 18 OF 2017

CONSOLIDATED WITH

CIVIL APPEALS NOS. 20, 26, & 27 OF 2017

BETWEEN

FIDELITY SHIELD INSURANCE COMPANY LIMITED1ST APPELLANT

CO-OPERATIVE BANK OF KENYA LIMITED2ND APPELLANT

AND

PAMELA ATIENO WAGA1ST RESPONDENT

GEORGE OLOLA2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS3RD RESPONDENT

(Being appeals from the original Judgment and Decree of Hon. J. M. Njoroge, CM dated 21st March 2017 at the Chief Magistrates Court at Kisii in Civil Case No. 292 of 2012 and the original Judgment and Decree of Hon. J. M. Njoroge, CM dated 21st March 2017 at the Chief Magistrates Court at Kisii in Civil Case No. 293 of 2012)

JUDGMENT

Introduction

1. These appeals have been consolidated because the respective judgments arise from the same cause of action. The 1st and 2nd respondents were the plaintiffs in ***Kisii CMCC No. 292 of 2012*** and ***No. 293 of 2012*** respectively. They sued the appellants and 3rd respondent claiming damages for malicious prosecution. They were each awarded Kshs. 2,000,000/- and Kshs. 150,000/- as general and special damages respectively. It is the respective judgments that have precipitated the respective appeals by the appellants.

2. Before I proceed with the task ahead, it is important to recall the duty of the first appellate court. It is that the court should examine and evaluate the evidence on record and reach an independent conclusion bearing in mind that it did not have the opportunity to hear or see the witnesses testify (see ***Selle and Another v Associated Motor Boat Company Ltd [1968] EA 123***). Although the appellants filed a detailed memorandum of appeal, the main issue in this appeal is whether the 1st and 2nd respondents proved their respective cases on the balance of probabilities at the trial court.

The Pleadings

3. The 1st and 2nd respondents' claims as set out in their respective complaints was that on 24th June 2005, the 2nd appellant's branch manager falsely and maliciously reported to the 1st appellant and police, represented by the 3rd respondent, that they were out to defraud the 1st appellant of Kshs. 4,000,000/- on account of an insurance claim. They pleaded that as a result of the report, they were arrested by police officers from Migori Police Station, locked up in the cells for 6 days and later charged and prosecuted in ***Rongo Magistrate Criminal Case No. 1683 of 2005***. for various counts of forgery, conspiracy to defraud, uttering false documents, uttering a document with intent to defraud and false swearing which were all related to the insurance claim. They were acquitted on 31st October 2011 under **section 210** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***.

4. The 1st appellant denied the 1st and 2nd respondents' claim. It took the position that the 1st and 2nd respondents were prosecuted by the 3rd respondent after an investigation established that there was reasonable and probable cause. It averred that the respondents were arrested with one **Dismas Bundara Waga** who was presumed to be dead for purposes of depositing a cheque issued by it and who had informed officers of the 2nd appellant that the cheque was in respect of an insurance claim for a building that had burnt down which statement was not true hence they were prosecuted. It stated that its role was limited to recording statements, providing documents and testifying in court.

5. The 2nd appellant denied any malice and that its action in reporting to the police was false and malicious as alleged. It contended that if any report was made, it was made bonafide and in the ordinary course of business. It further averred that it was routine to call the drawee of cheques in excess of Kshs. 500,000/- before processing them and in this case, the report was made to the police upon realization that there was a real likelihood of an offence being committed.

6. The 3rd respondent's position was that it acted on a complaint made to the police by the 2nd appellant and police officers relying on such information proceeded to arrest and charge the respondents with a cognizable offence.

The Evidence

7. At the hearing, the 1st and 2nd respondent testified in support of their respective claims. The criminal court file was produced by Teresina Nyomenda Omwenga (PW 2), the Executive Assistant of Rongo Law Courts. Dominic Matenge (DW 1), the 1st appellant's legal officer, Reuben Mwangi (DW 2), a private investigator, and Paul Ekutei (DW 3) from the 2nd appellant's Migori branch also testified. The parties adopted the appellants' witness testimony in each case.

8. A synopsis of facts is that 1st respondent's husband, **Dismas Bundara Waga**, had taken out a life insurance policy with the 1st appellant. The policy had been brokered by the 2nd respondent. In due course it was alleged that he 1st respondent's husband died in a road accident. After the 1st respondent lodged her claim, the 1st appellant processed it and issued a cheque for Kshs. 4 million. With cheque in hand, the 1st respondent proceeded to open an account at the 2nd appellant's Migori branch. DW 3 who attended to the 1st respondent testified that she was accompanied by **Dismas Bundara Waga** and that they presented themselves as husband and wife. They informed him that they wanted to open a joint account with the Kshs. 4 million cheque. When DW 3 inquired about the cheque, the 1st respondent told him that it was insurance payment for a burnt house at Muhuru Bay. DW 3 then made inquiries from the 1st respondent who confirmed that the payment was compensation for the 1st respondent's husband, **Dismas Bundara Waga**. Noting the contradictory explanation for the money and the fact that the name of one of the joint account holders was **Dismas Bundara Waga**, the 2nd respondent's officers decided to report the matter to the police. It is this report that triggered the police to take over the matter and launch investigations leading to the arrest, detention and prosecution of the 1st and 2nd respondents. In the meantime, after the account was opened, the cheque was stopped after the inquiries started.

The Judgment

9. After analyzing the evidence, the trial magistrate upheld the 1st appellant's case. He held that the appellants set the case against the 1st respondent in motion and that the case was determined in her favour. He found that there was no reasonable and probable cause as the 1st appellant was acquitted after the prosecution failed to establish a prima facie case. Finally, the trial court held that malice could be inferred from the fact that the case was never investigated, crucial witnesses were not called to testify, documents were not produced in court and that the whole process was clouded with ill will, spite and improper motive and purpose.

10. As regards the 2nd respondent, the trial magistrate held that the 2nd appellant's manager set the process of charging the 2nd respondent in motion by calling the police and that the prosecution was determined in his favour when he was acquitted. The trial magistrate held that lack of reasonable and probable cause was established by the failure of the key prosecution witnesses to testify and for failure to produce key documents.

Grounds of appeal

11. The sum of the appellants' case is that the 1st and 2nd respondents did not prove the ingredients of the tort of malicious prosecution on the balance of probabilities. All the parties filed extensive written submissions to support their respective positions. The common thread running through the submissions was that there was no contest regarding the ingredients for the tort of malicious prosecution. They cited various decision but I would be content to cite the case of **Murunga v Attorney General [1979] KLR 138** where the Court of Appeal set out those elements as follows;

- a) The plaintiff must show that 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.

Who instituted the criminal proceedings against the 1st and 2nd appellants

12. In determining this issue, it is important to recall that there were two distinct causes of action relating to the 1st and 2nd respondent. As regards the question whether the proceedings were instituted by the appellants, the uncontested evidence is that the 2nd appellant's manager

reported the matter to the police when he became suspicious that the 1st respondent's statement about the insurance monies conflicted with the information given by the 1st appellant. The position taken by the 1st appellant is that it never called the police and was merely requested to provide documentation when the investigation began. Likewise, the 2nd appellant takes the position that its officers never reported the 2nd respondent.

13. In ***Gitau v Attorney General [1990] KLR 13***, the court held that:

To succeed in a claim for malicious prosecution the plaintiff must first establish that the defendant or his agent set the law in motion against him on a criminal charge. "Setting the law in motion" in this context has not the meaning frequently attributed to it of having a police officer take action, such as effecting arrest. It means being actively instrumental in causing a person with some judicial authority to take action that involves the plaintiff in a criminal charge against another before a magistrate.

14. To my mind, the tort of malicious prosecution being a tort of intent, the first element was satisfied when the 2nd appellant lodged the report against the 1st appellant and the matter was laid at the door of the court by the 3rd respondent. It had nothing to do with the complaint against the 2nd respondent. In this case, the 1st appellant did not have any role to play in laying the complaint against the 1st or 2nd respondents.

Criminal proceedings were terminated in the 1st and 2nd respondent favour

15. This element is not in dispute as the proceedings in ***Rongo Magistrate Criminal Case No. 1683 of 2005*** were terminated in the respondents' favour as they were both acquitted on 31st October 2011 under **section 210** of the ***Criminal Procedure Code***

Reasonable and probable cause

16. The substantial matter for determination before this court is whether the respondent established the prosecution was instituted without reasonable and probable cause. The test to be applied on this issue was stated in ***Kagane v Attorney General [1969] EA 643*** as follows:

Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded on reasonable grounds of existence of a state of circumstances which assuming them to be true, would lead to an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty.

17. The test is to be applied based on the evidence that was available at the time the respondents were charged. In both judgments, the trial magistrate focused on the outcome of the judgment and what counsel for the 2nd appellant termed as an, "incomplete prosecution" in determining the lack of reasonable and probable cause. I will quote the judgment in ***CMCC No. 293 of 2012*** which emphasizes this point. He stated as follows:

The court shall now consider going by the above definition whether the defendants had reasonable and probable cause to institute proceedings. In the criminal trial the court gave reasons for the acquittal of the accused persons. The prosecution failed to produce vital documents in support of their case which included a copy of the accident register from Macalder Police Station, no OB extract of the accident report and post mortem report. The court observed that, "It's therefore my opinion that non production of these documents as exhibits renders the prosecution case incomplete". The prosecution failed to avail crucial witnesses including the investigating officer. The court was left to made a negative inference that the case was never investigated. The court issued summons but noted that unwillingness on the part of the police to avail the witnesses who were not available included the medical doctor who treated the deceased and also performed the post mortem. The doctor was stood down and never concluded his evidence. However, the present instant the doctor did testify and confirmed to have treated and or performed the post-mortem on the body of the deceased. The trial court noted that the document was never called as a witness. In the end, the plaintiff together with her co-accused were acquitted under section 210 of the CPC after the prosecution failed to establish a prima facie case against them The court concludes that there was not reasonable and probable cause in instituting criminal proceedings against the plaintiff.

18. I find that the trial magistrate fell into error when he focused on the prosecution's failure to call evidence and produce documents at the criminal trial rather than the material that was available to the prosecutor at the time the 1st and 2nd respondents were charged. It is instructive to note that after 2nd appellant's officers alerted the police on possible fraud, the police swung into action and investigated the matter. The criminal proceedings show that the prosecution called 10 credible witnesses. The testimony of DW 3 set out a basis for reasonable suspicion. It is this evidence that the trial magistrate did not interrogate the evidence in light of the test in ***Kagane v Attorney General (Supra)***.

19. It may well be true as Mr Marwa, counsel for the 1st and 2nd respondents argues, that ***Dismas Bundara Waga*** was the 1st respondent's brother in law who had remarried the 1st respondent bore the same name as the deceased and that the claim was genuine. But the test for the tort of malicious prosecution is whether there was reasonable suspicion at the time the complaint was laid and on my part and having evaluated the evidence, I find that reasonable and probable cause was disclosed by the following facts. First, 1st respondent and her husband, ***Dismas Bundara Waga***, went to the bank to open a joint account alleging that it was compensation for a burnt house which was not true. Second, the 1st appellant confirmed to the 2nd appellant that the money was for compensation for death of ***Dismas Bundara Waga***. These circumstances entitled the 2nd appellant to make a report and for the police to investigate. The police thereafter investigated the matter independently and proceeded to charge the 1st and 2nd respondent.

Proof of malice

20. The mere fact that a person has been acquitted of criminal charges does not necessarily connote malice on the part of the prosecutor. Actual spite or ill will must be proved. The Court of Appeal 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.

21. Malice may be implied from the lack of a reasonable and probable cause but in this case, the 1st and 2nd respondents did not prove lack of reasonable cause as I have held elsewhere in the judgment. In respect of both appellants and in line with the *Nzoia Sugar Company Limited (Supra)*, the 1st and 2nd respondents did not point to anyone from either appellant who had malice spite or ill against the them. DW 3's action was motivated by the fact that the 1st respondent and her husband gave reasons for the cheque that was inconsistent with the reason confirmed by the 1st appellant. The police then took action, investigated the matter and prosecuted the 1st and 2nd respondents. All the 1st appellant did was to provide the documents and witnesses.

22. The trial magistrate also erred in relying on the manner in which the proceedings were conducted in implying malice against the 1st and 2nd appellants when they had no control over those proceedings. They only provided witnesses and documents after the police had investigated the matter and made a decision to the 1st and 2nd respondents. I therefore find and hold that the 1st and 2nd respondents did not establish the element of malice.

Whether malicious prosecution proved

23. In *Mbowa v East Meno District Administration* [1972] EA 352, the court held that in order for the cause of action for malicious prosecution to succeed, “[T]he 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.”

24. It is clear from the evidence that the 1st appellant never made any complaint to the police. It merely responded to an inquiry by the 2nd appellant and furnished all the documentary evidence to the police to enable it conduct the investigation and charge the 1st and 2nd respondents. It could incur any for malicious prosecution. The 1st and 2nd respondents did not prove that the police and 2nd appellant acted without reasonable and probable cause and with malice. The totality of my analysis is that the 1st and 2nd respondents case against the appellant could not support a finding of malicious prosecution.

Damages

25. The appellants complained that the award of Kshs. 2, 000,000/- as damages was excessive. It is not clear on what basis the trial magistrate reached the conclusion that the award was reasonable. I would only point out that this award was out of sync with awards in similar cases decided by the superior courts for example:

§ In *Lucas Omoto Wamari v Attorney General and Another* CA Civil Appeal No. 2013 of 2014 [2017]eKLR, the Court of Appeal awarded Kshs. 500,000/- as general damages for malicious prosecution in 2017.

§ In *Stephen Gachau Githaiga and Another v Attorney General* NYR HCCA No. 27 of 2014 [2005]eKLR the court awarded Kshs. 300,000/- as general damages in 2015.

26. In the event the 1st and 2nd respondents were successful in their respective claims, I would award them Kshs. 400,000/- as general damages.

Disposition

27. I allow the appeal and order that the judgment and decree of the subordinate court in *Kisii CMCC No. 292 of 2012* and *No. 293 of 2012* be and are hereby set aside and substituted with an order dismissing each suit with costs to the appellant.

28. Each appellant is awarded costs of this appeal each appeal assessed at Kshs. 150,000/- exclusive of court fees as against the 1st and 2nd respondents severally.

DATED and DELIVERED at KISII this 21st day of DECEMBER 2018.

D.S. MAJANJA

JUDGE

Mr Wainaina instructed by Kinyua Mwaniki and Wainaina Advocates for the 1st appellant.

Ms Achieng instructed by Mulondo Oundo Muriuki and Company Advocates for 1st respondent.

Mr Marwa instructed by Kerario Marwa and Company Advocated for the 1st and 2nd respondent.

Ms Chepkurui, Litigation Counsel, instructed by the Office of the Attorney General for the 3rd Respondent.