



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. 76 OF 2017

BETWEEN

SOUTH NYANZA SUGAR COMPANY LIMITED.....APPELLANT

AND

PAMELA ABONGO OKELLO.....1ST RESPONDENT

OCS, AWENDO POLICE STATION..... 2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

(Appeal from the original Judgment and Decree of Hon. S. K. Onjoro, SRM

dated 21st July 2017 at the Chief Magistrates Court

at Kisii in Civil Case No. 166 of 2006)

CONSOLIDATED WITH

CIVIL APPEAL NO. 81 OF 2017

BETWEEN

PAMELA ABONGO OKELLO.....APPELLANT

AND

SOUTH NYANZA SUGAR COMPANY LIMITED.....1ST RESPONDENT

OCS, AWENDO POLICE STATION.....2ND RESPONDENT

ATTORNEY GENERAL..... 3RD RESPONDENT

(Appeal from the original Judgment and Decree of Hon. S. K. Onjoro, SRM

dated 3rd November 2017 at the Chief Magistrates Court

at Kisii in Civil Case No. 762 of 2006)

JUDGMENT

Introduction

1. Although the two appeals arise from separate judgments, they are consolidated because they involve the same parties and the same cause of action. In each case, Pamela Abongo Okello (“Pamela”) sued South Nyanza Sugar Company Limited (“SONY”) for malicious prosecution. The parties in fact agreed that the evidence taken in **CMCC No. 166 of 2016** would be adopted and applied in **CMCC No. 762 of 2006**.

2. In the **HCCA No. 76 of 2017**, the SONY appeals against the judgment and decree of the subordinate court in **CMCC No. 166 of 2016** finding it and 3rd respondent liable for malicious prosecution and awarding the respondent Kshs. 500,000/- as general damages together with costs and interest thereon.

3. In **HCCA No. 81 of 2017**, Pamela appeals against the judgment and decree of the subordinate court’s finding that **CMCC No. 762 of 2006** was claiming damages for malicious prosecution and was an abuse of the court process as that case was a complete replica of **CMCC 166 of 2006** in which she had already been compensated by a judgment in her favour in that case.

CMCC No. 166 of 2006

4. In this suit Pamela claimed that on 13th March 2002, SONY’s agents made a false and malicious report at the Awendo Police Station of and concerning her while she was working as a clerk at SONY. It was alleged that on 25th May 1998, she made a false entry in the daily purchase book which was perceived to be fraudulent false accounting and which SONY knew to be false and malicious. As a result of the complaint being laid against her, she was arrested, confined in police cells, remanded in prison and charged in **Kisumu Chief Magistrates Court Criminal Case No. 66 of 2002** with two counts of false accounting by a clerk and for stealing from SONY. After a lengthy trial lasting about 2 years, she was acquitted on both counts under **section 210** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**.

CMCC No. 762 of 2006

5. In this suit, Pamela alleged that on 2nd February 2002, SONY’s agents made a false and malicious report at the Awendo Police Station of and concerning her while she was working as a clerk at SONY. It was alleged that on 2nd October 1998, she made a false entry in the daily purchase book which was perceived to be fraudulent false accounting and which SONY knew to be false and malicious. As a result of the complaint being laid against her she was arrested, confined in police cells, remanded in prison and charged in **Kisumu Chief Magistrates Court Criminal Case No. 468 of 2002** with two counts of false accounting by a clerk and for stealing from SONY. After a lengthy trial lasting about 2 years, she was acquitted on both counts under **section 210** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**.

The Defences

6. The substance of SONY’s defence in both cases was that if it made a complaint at Awendo Police Station, such complaint was made in good faith and was not actuated by malice but based on the suspicion that Pamela committed fraudulent false accounting. It added that it was duty bound to make the complaint after suspecting her and that the police were required to carry out investigations to establish reasonable and probable cause as it was the duty of the 2nd respondent to carry out proper investigations.

7. The 2nd and 3rd respondents filed a joint defence in which they denied Pamela’s claim and added that if she was arrested, it was because she had committed an offence and there was sufficient ground for such belief and thus they arrested and charged her.

Abuse of Court Process

8. Before I deal with the substance of the Pamela’s case, I will deal with the decision by the trial magistrate that the case **CMCC No. 762 of 2006** was an abuse of the court process. Although the trial magistrate considered that the evidence was the same in both cases, he did not take into account that Pamela had been charged in two separate criminal cases which gave rise to two distinct causes of action. The judgment dismissing the case was thus made in error and is therefore set aside.

9. The issue then, is how I should deal with that case as it was not determined on its merits. Since the evidence is on record and the parties in fact adopted the entirety of evidence in both cases, I am entitled to review the evidence afresh and determine whether in fact the 1st respondent proved her case and make the necessary findings as parties did make submissions on both matters.

10. This approach is consistent with my duty as the first appellate court. I am called upon to examine and evaluate the evidence and reach an independent conclusion bearing in mind that I did not hear or see the witnesses testify (see **Selle and Another v Associated Motor Boat Company Ltd [1968]EA 123**). Although the appellant filed a detailed memorandum of appeal, the main issue in this appeal is whether the 1st respondent proved her case on the balance of probabilities at the trial court.

The Appeal

11. The thrust of the appellant’s case as set out in the memorandum of appeal dated 6th November 2017 in **HCCA No. 76 of 2017** is that Pamela did not prove the ingredients of the tort of malicious prosecution on the balance of probabilities. Both parties filed written submissions in which they agreed on the ingredients for the tort of malicious prosecution. In **Murunga v Attorney General [1979] KLR 138** 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.

12. I have no doubt that the first and second elements of the tort were duly satisfied. The second element, that is, Pamela was acquitted is not in doubt. As regards the question whether the proceedings were instituted by or at its behest, SONY contends that the criminal proceedings were commenced at the behest of the police after interrogating Pamela. The position taken by Pamela is that it is the agents of SONY who made a report to the police resulting in her being charged. 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.

13. It was not denied that SONY laid a complaint before the police at Awendo which led to the criminal proceedings being pursued against Pamela. To mind, the tort of malicious prosecution being a tort of intent, the first element was satisfied when SONY lodged the complaint and the matter was laid at the door of the court by the 2nd respondent represented by the 3rd respondent.

14. The substantial matter for determination before this court is whether Pamela established the prosecution was instituted without reasonable and probable cause and whether it was actuated by malice.

15. Pamela (PW 1) testified that, "*the allegations levelled against were not correct. I blame my former employee and AG for my predicament. They never sent an apology to me*" In cross-examination she stated that she was being charged with a fraud that took place in 1998 while she was an employee of the appellant.

16. The witness from SONY, David Orogio Mogira (DW 1), testified that Pamela's work as a clerk was wanting and that she was given several warning letters dated 31st July 2017 and 15th February 2001 before being terminated on 27th June 2001. He admitted that a report was made to Awendo Police Station on her complicity in the fraud and the police took her statement before charging her. He told the court that SONY gave the police all the documentation to enable the police prosecute the case.

17. On the issue whether there was reasonable and probable cause, the trial magistrate, taking guidance from ***Kagane v Attorney General [1969] EA 643***, was of the view that the appellant did not produce any documents to lead the court to believe that, "*there existed a state of circumstances which assuming them to be true, would lead to an ordinary a prudent and cautious man place in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed.*"

18. The trial magistrate found that DW 1 did not give any basis for why the 1st respondent was charged, that it did not furnish any documents that supported the charge at the criminal trial in order to *convince* the court that there was a reasonable and probable cause. The trial magistrate also held that failure by SONY to call any evidence on how the decision to prosecute was arrived at, the court was left to conclude that there was no reasonable and probable cause for institution of the proceedings.

19. I would point out that the trial magistrate erred in holding that the appellant and 3rd respondent failed to *convince* the court that there was reasonable and probable cause by failing to provide the documents necessary to establish their case. The burden of proof lay squarely on the 1st respondent to prove that there was no reasonable and probable cause on the balance of probabilities. In ***James Karuga Kiiru v Joseph Mwamburi and 3 Others Nairobi CA Civil Appeal No. 171 of 2000 [2001] eKLR***, the Court of Appeal held that:

To prosecute a person is not prima facie tortious, but to do so dishonestly or unreasonably is. And the burden of proving that the prosecutor did not act honestly or reasonably lies on the person prosecuted.

20. There is no presumption in favour of a plaintiff that the prosecutor acted without reasonable cause thereby casting the burden on the prosecutor to disprove that there was no reasonable and probable cause. In this case, therefore it was Pamela to provide evidence to show that there was no reasonable and probable cause and once the evidential basis had been laid, the burden would shift to SONY and the 2nd respondent to show that in fact there was reasonable and probable cause.

21. The trial magistrate also relied on dicta in ***Trust Bank Limited v Paramount Universal Bank Limited and 2 Others [2009] eKLR*** where the court held that:

It is trite law that where a party fails to call any evidence in support of his case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings.

I agree with the aforesaid statement of law but I would add that the fact that a party has not called put forth evidence does not relieve the plaintiff from proving its case. Under **sections 107 and 108 of the Evidence Act (Chapter 80 of the Laws of Kenya)**, the person who alleges is under a duty to prove all allegations as contained in his claim against the respondent on a balance of probability. In ***Kirugi and Another v Kabiya and 3 Others [1987] KLR 347***, the Court of Appeal held that, "*The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof.*"

22. My own re-appraisal of the evidence and in particular the testimony of PW 1 does not set out any grounds upon which the court can confidently conclude that there was no reasonable and probable cause. PW 1 produced the proceedings in the criminal case. The trial magistrate did not review the proceedings or comment on them to determine whether in fact there was a reasonable and probable cause. I am accordingly constrained to find and hold that Pamela did not establish reasonable and probable cause.

23. On the issue of malice, the trial magistrate found that malice was proved as follows:

The 1st defendant's witness also admitted that the plaintiff was prosecuted in 3 different courts but would not give a basis as to why (sic); this court can therefore only conclude that the same was actuated by malice and as such this court finds that the plaintiff has established a prima facie case of malicious prosecution.

24. The law is settled 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. Actual spite or ill will must be proved as was held by 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.

25. Malice may be implied from the lack of a reasonable and probable cause but in this case, Pamela did not prove lack of reasonable and probable cause as I have held elsewhere in the judgment. As regards proof of malice, the court in ***Gitau v East African Power and Lighting Company Limited* [1986] KLR 365** held that:

In a claim alleging malice the facts constituting malice ought to be particularized as per Order V rule 8(1) Civil Procedure Rules. In order for a claim of malicious prosecution to succeed, the plaintiff must not only show that he was prosecuted but that he was prosecuted upon the instigation of the defendant and that there existed malice and which malice he must prove. In this instant the plaintiff failed to prove malice.

26. Pamela did not particularise any malice in her respective pleadings. She alleged that the claims against her were false and malicious. She did not demonstrate how the allegations against her were false and malicious. Further, neither the pleadings nor evidence pointed to any person in the employ of SONY who had spite or ill will against her and who would have driven the prosecution against her.

27. In ***Mbowa v East Mengo 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.” The totality of my analysis is that the 1st respondent's case was threadbare and could not support any judgment in her favour.

Conclusion

28. I allow the respective appeals and order that the judgment and decree of the subordinate court in each case be and is hereby set aside and substituted with an order dismissing each suit with costs to the appellant. The appellant is awarded costs of this appeal assessed at Kshs. 40,000/-.

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

D.S. MAJANJA

JUDGE

Ms Anyango instructed by Otieno, Yogo and Ojuro Advocates for the appellant.

Mr Nyambati instructed by Nyambati and Company Advocates for 1st respondent.

Ms Chepkurui, Litigation Counsel, instructed by the Office of the Attorney General for the 2nd and 3rd Respondent.