



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 116 OF 2014

CHEMIGAS LTD.....APPELLANT

VERSUS

MAURICE OUMA NYANDUGU alias Maurice Carlos Ouma....RESPONDENT

(Being an Appeal from the Judgment of Hon. T. Obutu SPM in Kisumu CMCC NO.284 OF 2008 delivered on 9th October 2014)

JUDGMENT

Maurice Ouma Nyandugu alias Maurice Carlos Ouma (*hereinafter referred to as respondent*) sued Chemi gas (*hereinafter referred to as appellant*) in the lower court claiming damages for unlawful detention, malicious prosecution and defamation.

The defendant/appellant filed a statement of Defence and denied the claim and urged the court to dismiss the respondent/plaintiff's claim with costs.

In a judgment delivered on **9th October 2014**, the learned trial Magistrate **found that the appellant had proved his claim and** awarded him Kshs. 2,000,000/- for unlawful detention and malicious prosecution and Kshs. 1,000,000/- for defamation.

The Appeal

The Appellant being dissatisfied with the lower court's decision preferred this appeal and filed the Memorandum of Appeal dated 30th October 2014 which set out 13 grounds of appeal that can be summarized into 6 grounds that:-

- 1) The Learned trial Magistrate was impartial in his assessment of the evidence and disregarded unfavourable evidence adduced by the plaintiff and therefore erred in his judicial duty**
- 2) The Learned trial Magistrate erred in law when he based his decision on a matter that had that was not pleaded and on evidence that the appellant had objected to**
- 3) The Learned trial Magistrate erred in law and in fact when he failed to consider that the proceedings relied upon by the plaintiff made an express finding that the appellant's fears were well founded and that no malice was exhibited by the prosecutor**
- 4) The Learned trial Magistrate misdirected himself in law when he made a finding that arrest of the plaintiff in board daylight constituted defamation**

5) The Learned trial Magistrate misdirected himself in law when he failed to consider that there were no spoken or printed words that were published by the defendants so as to defame the plaintiff

6) The Learned trial Magistrate erred in law in failing to apply the doctrine of *stare decisis* and precedent and fell into error

SUBMISSIONS BY THE PARTIES

Appellant's submissions

In further exposition of the above grounds of appeal, learned Counsel for the appellant, invited this court to consider that there was no evidence to support the finding that the institution of the criminal proceedings against the respondent was unjustified. It was submitted that the legal requirements for establishing a claim for damages on malicious prosecution in the leading case of *Murunga v Attorney General (1979) Klr, 138* had not been established. The respondent further submitted that there was probable cause for the prosecution of the respondent. To this end, court was invited to consider the holding in *Mbowav East Mengo District Administration [1972] EA 352, Kakamega CA 4 OF 2007 Asman N. Walumbuka & Shaban N. Echesa v Timothy Misikoi & Attorney General* and *Nairobi CA No. 171 of 2000 James Karuga Kiiru v Joseph Mwamburi & 3 Others.*

Appellant's counsels similarly submitted that the respondent had failed to prove malice and further that an acquittal on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. The court was invited to consider the holding in *High Court of Uganda Civil Case No. 96 of 1971 EA* and *Nzoia Sugar Company Ltd v Fungututi (1988) KLR 399.*

Finally; the appellant submitted that the respondent had not proved any damage or loss for which general damages can be awarded and in support thereof cited *Katerega Vs Attorney General [1973] E.A 287* and *Nairobi CA No. 171 of 2000 James Karuga Kiiru v Joseph Mwamburi & 3 Others.*

Respondent's submissions

It was submitted that the respondent was maliciously arrested and charged but was acquitted. The respondent relied on Article 157(6) of the Constitution. On the ingredients for malicious prosecution, the respondent cited *Gitau v AG (1990) KLR 13* and *Mbowa V East Mengo District Administration [1972] EA 352.* It was also contended that there are dire consequences for malicious prosecution. To this end, the respondent cited *HCCC 1729 of 2000 Thomas Mboya Oluoch v Lucy Muthoni & Another.* The respondent additionally argued that he is an advocate of the High Court of Kenya and that his arrest humiliated him and that defamation had therefore been established. He cited *John Edward v Standard Ltd (2006) eKLR, Dr. Willy Kaberuka v AG Kampala HCCC No. 160 of 1993* cited in *Chrispine Otieno Caleb v AG(2014) eKLR.*

The evidence

The background of this case is that on 14th September 2001, a gas cylinder belonging to the appellant exploded and injured some loaders. The loaders filed various compensatory suits vide various law firms one of them being the respondent's law firm. The appellant's advocate conducted investigations and established that some documents filed by the loaders were not authentic. That the appellant on the advice of their advocate that there was a probable cause of fabrication of documents reported the matter to police. That the police thereafter arrested and charged 6 people including the respondent in *SRM Winam Criminal Case No. 833 of 2007* and after a lengthy hearing the 6 were acquitted. Subsequent to the acquittal, the respondent filed SPM in **Kisumu CMCC NO.284 OF 2008 which is the subject of this appeal.**

Analysis and Determination

This being a first appeal, this court is mandated to evaluate the evidence before the trial court while bearing in mind that it never saw or heard the witnesses and therefore make due allowance for that. The principles governing the consideration and evaluation and findings of an appeal court have well been established particularly in the case of **KirugaVsKiruga& Another [1988 KLR page 348]** where the Court of Appeal held

“An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.”

I have perused the entire record of appeal and considered the submissions for both parties. The principle that governs a claim founded on malicious prosecution was laid down in the case of **Murunga -Vs- Attorney General (1979) KLR, 138** as follows:-

- (a) The Plaintiff must show that the prosecution was instituted by the Defendant, or by someone for whose acts he is responsible.***
- (b) The Plaintiff must show that the prosecution terminated in his favour.***
- (c) The Plaintiff must demonstrate that the prosecution was instituted without reasonable and probable cause.***
- (d) He must also show that the prosecution was actuated by malice.***

The principle issue for determination in this appeal is whether the prosecution against the respondent was malicious. In establishing whether the prosecution was malicious, the test to be applied has been set out in several decisions among them, the case of **Mbowa V East Meno District Administration [1972] EA 352, Kakamega CA 4 OF 2007 Asman N. Walumbuka&Shaban N. Echesa v Timothy Misikoi& Attorney General, Nairobi CA No. 171 of 2000 James KarugaKiiru v Joseph Mwamburi& 3 Others. Kagane and Others Vs Attorney General and Another [1967] E.A** and **Gitau v AG (1990 KLR 13** cited by the parties herein. The principles were further expounded in the case of **KateregaVs Attorney General [1973] E.A 287** where it was held that

- (i) “A person instituting legal proceedings is not responsible for imprisonment which is the result of an order of the court;***
- (ii) The plaintiff has to prove that the person instituting the proceedings was actuated by spite, ill-will or improper motives;***
- (iii) Lack of reasonable and probable cause cannot be relied upon by itself to show malice.”***

The test to be applied is whether there was reasonable and probable cause for prosecution and whether on the facts, a reasonable person would honestly have believed that the prosecution was likely to succeed. The Court of Appeal in a recent decision **Standard Chartered Bank Kenya Ltd Vs Intercom Services Ltd and 5 others Civil Appeal No. 37 of 2003 page 46** held that

“Where the complainant reports a commission of crime to the police and police upon independent investigations initiate a prosecution the reporter is not liable for the tort of malicious prosecution unless the report is made falsely and maliciously.”

According to the records especially the proceedings of the criminal trial, PW2 Benjamin Oyoo Bala a Health Records and Information Officer at Kisumu District Hospital stated that the names on the list of victims in hospital records were different from the list of victims on the police abstract. PW1 and PW2 in their evidence confirmed that some outpatient numbers were outside the range of outpatient numbers of

the year 2001 while some serial numbers of the victims' medical treatment sheets were from the children's register even though the victims were adults.

It is clear from the records that there was a probable cause which led the appellant to file a complaint with the police. Once the matter was with police the appellant had nothing to do with the cause of events. The police must have formed an opinion that there was reason to charge the respondent.

However after the close of the prosecution case, the learned trial magistrate rendered herself as follows:

“I have looked at all the complaints and supporting documents in Case No. 468/04, 472/04; 631/04; 632/04 and 633/04. They leave a lot to be desired and raise unanswered questions as to their authenticity.....”

The court while noting that the case had collapsed after some witnesses turned hostile observed as follows:

“I can understand the prosecution's frustration especially by their choice of witnesses during the subsistence of an advocate-client relationship”.

I am not persuaded that from the evidence before the trial court which was based on the material from the criminal case, that this prosecution was instituted without reasonable or probable cause. There is also no material to support the allegation that the prosecution was actuated by malice. The fact that the prosecution failed to prove the case to the required standard cannot be taken to mean that the prosecution was without probable cause and was with malice.

It is the respondent's case that the malicious prosecution caused injury to his credit, character and reputation, particularly because he is an advocate of the High Court of Kenya. Defamation arises when false words of someone tending to injure his character and reputation are published. The publication may be oral (slander) or written (libel). The actual words complained of must be pleaded. In the present case, there is no plea of any words published by the appellant that tended to defame the respondent. A claim for defamation is a serious one. The law requires it to be pleaded with particularity and, of course, proved on a balance of probabilities. The slanderous or libelous words on which the claim for defamation was founded were not pleaded.

The upshot of the above analysis and evaluation is that the learned trial magistrate was in error. There is no material before the court which supports the case of unlawful detention, malicious prosecution and defamation. The appeal herein is allowed, the judgment of the trial court is set aside and substituted with an order dismissing the suit. The appellant shall have costs of the appeal and the proceedings in the lower court.

DATED AND DELIVERED THIS 28TH DAY OF APRIL 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Clerk Felix

Appellant N/A

Respondent Oriero