



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NO. 16 OF 2011

JOAB WANYONYI.....APPELLANT

VERSUS

SAMSON WAMBULWA.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGEMENT

1. This is an appeal arising from the judgement of Hon. J.K. Ng'arng'ar PM in CMCC No.467 of 2009 wherein the appellant had sued the respondents for general and aggravated damages arising from unlawful arrest, false imprisonment and malicious prosecution. He also sought for interest and costs.

The case was challenged by the respondents and after hearing the case, the trial Court dismissed the claim with costs to the respondents as the Court found that the appellant had failed to prove his case on a balance of probabilities.

2. Being aggrieved by the judgement of the trial Court the appellant preferred this appeal on the following grounds;

- **The trial Court failed to consider the evidence on record.**
- **The trial Court failed to find that that appellant had proved his case on a balance of probabilities.**
- **The trial Court erred in Law and fact by failing to find the Criminal Case No.973 of 2003 was instituted by the respondent without probable or reasonable cause and with malice.**
- **The appellant's evidence remained unchallenged.**
- **The judgement was contrary to Law.**
- **The trial Court erred by awarding costs to the respondent.**

3. At the hearing of the appeal parties relied on written submissions which may be summarized as follows;

Appellant's Submissions

Sometime in April 2003 the 1st respondent made a report to Kimilili Police Station accusing the Appellant of trespass upon his land. The police arrested the appellant and charged him with the offence of trespass on private land. The appellant was acquitted and vide a plaint dated 3rd July, 2008 he filed suit seeking for general damages for unlawful arrest, false imprisonment and malicious Prosecution, costs

and interest which suit was dismissed.

It was submitted further that the evidence on record was clear that the police did not carry out proper investigation to ascertain the boundaries between the Appellant and the 1st respondent and that 1st respondent failed to prove ownership of Bokoli/Chwele/1247.

Further that the level of proof in a civil matter is on a balance of probabilities and the appellant proved that the 1st respondent maliciously and without any reasonable and justifiable cause made a report to the police and the police arrested and charged the appellant without proper investigations or any at all.

It is the malicious and baseless report that led to the appellant's acquittal.

The 1st appellant was not the registered proprietor of Bokoli/Chwele/1247 yet he reported trespass as though he is the proprietor.

Counsel for the appellant relied on **G.B. Kariuki Versus The A.G. Civil Suit No.696 of 2009, KPLC Versus Michael, Muruwa Vs A.K.**

The award to the respondent was positive no reasons were given for the award.

4. 1st Respondent's Submissions

The Appellant was acquitted based on a technicality in that the 1st respondent was not the registered proprietor of the land in question. In his judgement the trial Court found no malice on the part of the respondents and found therefore that the claim had no basis. That the Appellant failed to prove the ingredients of the offence of malicious prosecution as set out in **Kagane & Others Vs A.G (1973) E.A LR, Mbowas Vs East Mengo District Administration (1972) EA & Murunga Vs A.G (1979) KLR.**

There is an admission that the appellant was arrested at the behest of the 1st respondent and Prosecuted by the second, however the appellant failed to prove that the case was instituted without reasonable and probable cause and was actuated by malice. Cost ordinary follow the event and granting of costs otherwise is a discretion of the Court. The suit failed and consequently the appellant was to meet the costs.

5. The 2nd Respondent's Submissions

Counsel for the 2nd respondent, reiterated that 4 ingredients ought to be proved in a case of malicious prosecution for the same to succeed. He relied on the case of **Patrick Nyakonu Omabati Vs Credit Bank Limited C.A. in Kisumu CA No.9 of 2015**

It was further submitted that the appellant was arraigned in Court and the Court formed the opinion that a prima facie case had been established against him. That the police did investigations and place witnesses before Court.

Further that after investigations the police had reasonable cause to suspect the appellant and charged him accordingly.

Following a decision of the land tribunal the 1st Respondent found the Appellant cultivating his land and made a claim and availed witnesses. The report was not false neither was there malice in the Prosecution. The case of **Robert Okeri Omuka Vs Central Bank of Kenya Civil Appeal No.105, 2007** was cited.

Further, the 2nd respondent did not act maliciously as it only discharged its statutory mandate to prosecute. The case of **James Karuga Kiiru Vs Joseph Mwamburi & Another Civil Appeal No.171 of**

2009.

6. In a plaint dated 3rd July 2008 the Appellant sued the Respondents herein Samson Wambulwa and the Hon. The Attorney General. He claimed that in April 2003, the 1st Respondent maliciously, unlawfully and without any reasonable cause or justification made a report to Kimilili police station that the Appellant had trespassed upon the 1st Respondent's private land. And as a consequence of the malicious report the Appellant was arrested, placed in custody for several days, and without proper investigations the police charged him for the offence of trespass on Private land. The Appellant sought for general and aggravated damages for unlawful arrest, false imprisonment and malicious prosecution, costs and interest.

7. The 1st respondent filed his statement of defence dated 14th September, 2009 denying the allegations set out and in particular the particulars of malice and stated that the appellant was investigated, arrested and charged which were all beyond his control. Further that if the Prosecution was malicious he would not been placed on his defence.

8. The second respondent on his part filed its defence dated 18th November, 2009 and urged that its action was based on probable and reasonable grounds of suspicion founded on the honest and lawful belief that the plaintiff had committed an offence cognizable and punishable by Law. And that it acted within its statutory duties.

9. In his evidence before Court the Appellant stated that he had been accused of trespassing the 1st respondent's land yet the Court found he was not to blame. The 1st respondent gave false information to the police who failed to investigate the case well.

The **1st defendant** in evidence stated that he borders the Appellant whose land is Bokoli/Chwele/683 and his is Bokoli/Chwele/647. That the land initially belonged to his father. He reported the matter of trespass to the Chief who was uncomfortable as he was related to the Appellant. The Chief referred him to the police. The police thereafter took action. He had no malice. He is the administrator of the land and they have had a dispute.

DW1 and **DW2** testified that there was a land dispute between the two and the land subject matter belonged to the 1st respondent's deceased father.

DW3 was **investigating Officer** in the Criminal Case No.973/03, he stated that during investigations he established the land belonged to the 1st respondent. He also established that the appellant had crossed the river separating the two properties and that the Appellant had ploughed land that was not his and further did not have documents to prove ownership.

10. In order to appreciate the case I have considered the Criminal Case number 973 of 2003, which formed part of the appellant's case in acquitting the appellant the trial Court stated;

“I thus find that the Complainant did not satisfactorily establish that he is the registered proprietor of Bokoli/Chwele/1247 and as such both the 1st and 2nd Count cannot be maintained.”

11. In order to ascertain a claim of malicious prosecution 4 ingredients must be proved. This has been set out in various decisions of the Court including ***Kagane & Others Vs Attorney General and Another (1969) E.A. LR at 643***. The same are as follows;

1. The plaintiff must show that the Prosecution that was instituted by the defendant, or someone for whose acts he is responsible.

2. The Prosecution was terminated in the plaintiffs favour.

3. That the Prosecution was instituted without reasonable and probable cause.

4. The Prosecution was actuated with malice.

12. Number 1 & 2 are not disputed the 1st respondent reported and the police arrested and charged and the appellant was acquitted.

The issues therefore for determination are;

i. Whether the Prosecution was instituted without reasonable and probable cause.

ii. Whether the Prosecution was actuated by malice

13. The reason for the acquittal was because the 1st appellant was not a registered proprietor. There was evidence that the parties had been before the elders and an award made in favour of the 1st respondent which award was not challenged, this led the 1st respondent to report the presence of the Appellant on the said land to the Chief who in turn referred the 1st respondent to the police. This piece of evidence 1st featured in Criminal Case No.973 of 2003. Both the Appellant and 1st respondent inherited the portions from their respective fathers. The issue again featured in CMCC No.467 of 2009.

14. Before the Court there is evidence that the two; that is the Appellant and 1st respondent both inherited land from their respective fathers and they had an outstanding issue of a certain portion. That in a bid to resolve the issue the 1st Appellant went to the elders, the Chief and the police who made some investigations as stated by DW3 and DW3 believing that the documents in possession of the 1st respondent were sufficient, the police charged the Appellant for trespass.

15. Did the police have any reasonable and probable cause upon receiving the report from the 1st respondent to charge the Appellant?

In **Robert Okeri Ombeka Vs Central Bank of Kenya Nairobi Civil Appeal No.105 of 2007**, the Court of Appeal quoted the case of **Hicks Vs Fawkers (1878)QBD 167 at 171** where **Hawkins J** stated;

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

It was further stated

“the requirement of reasonable and probable cause is a ‘sensible one’ since it is important to the Community that persons who have reasonable cause for a Prosecution should not be deterred from setting the Criminal Law in motion against those whom they believe to have committed offences, even if in so doing they were actuated by indirect and improper motive.

16. The 2nd respondents witness DW3 stated that he received a report did investigations, considered documents availed to him by the 1st respondent and in the absence of any documents being availed to him by the Appellant he charged the Appellant. On his part the appellant stated;

“I blame the police for not investigating the case well. I also blame the police for charging me and putting me in custody. I was in remand and cells.

I was arrested yet the Complainant report was false.”

In *James Kanga Kiiru Vs Joseph Mwamburi & Another Civil Appeal No.171 of 2009* the Court was of the view that to prosecute one is not prima facie tortious to do so dishonestly or unreasonably is.

The Appellant did not in my view demonstrate that the police acted dishonestly or unreasonably even though their investigation may not have been proper or conclusive.

17. Was the Prosecution actuated with malice?

This was not demonstrated either. The police acted on a complaint which they believed formed a basis to charge the Appellant. See Evidence of DW3. The appellant and the 1st respondent had a dispute imaginary or otherwise and the 1st respondent reported the dispute. The Criminal case clearly flopped on a technicality not because, as the appellant puts it in his evidence that he was blameless. The appellant did not even remotely show any malice on the part of the respondents. It was not enough to say he was reported and action taken without proper investigations.

18. As to the issue of costs, costs ordinarily unless for reasons stated follow the event. There is nothing unusual or unreasonable in the trial Court's order as relates to the costs. In the circumstances of this case I would order likewise.

19. All in all I do concur with the judgement of the trial Court for the reasons above stated. The appeal is consequently dismissed with costs.

DATED and DELIVERED at BUNGOMA this 27th day of April 2017

ALI-ARONI

JUDGE