



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 10 OF 2016

KENYA POWER & LIGHTING CO. LTD.....APPELLANT

VERSUS

FLORENCE MUSAU NTHENYA.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

(Being an Appeal from the Judgment of Hon. M.C.Nyingei (RM) in Maseno CMCC NO.184 OF 2013 delivered on 27th January, 2016)

JUDGMENT

Florence Musau Nthenya (*hereinafter referred to as the 1st respondent*) sued Kenya Power & Lighting Co. Ltd (*hereinafter referred to as appellant*) and The Hon. Attorney General (*hereinafter referred to as the 2nd respondent*) in the lower court claiming damages for wrongful arrest and malicious prosecution.

The defendants filed statements of Defence and denied the claim and urged the court to dismiss the 1st respondents claim with costs.

In a judgment delivered on **27th January, 2016**, the learned trial Magistrate **found that the 1st respondent had proved her claim and** awarded her a sum of Kshs. 50,000/- general damages and Kshs. 250,000/- in exemplary damages.

The Appeal

The Appellant being dissatisfied with the lower court's decision preferred this appeal and filed the Memorandum of Appeal dated 15th February, 2016 which set out 7 grounds of appeal to wit:-

- 1) The Learned trial Magistrate erred in law and in fact by finding that the appellant had instituted prosecution against the 1st respondent without reasonable and probable cause**
- 2) The Learned trial Magistrate erred in law and in fact by finding that the prosecution of the 1st respondent had been actuated by malice on the part of the appellant without any evidence at all**
- 3) The Learned trial Magistrate erred in law and in fact by finding that the appellant had failed to properly investigate the case when it was the appellant's duty to do so**
- 4) The Learned trial Magistrate erred in law and in fact by failing to consider the written**

submissions and authorities filed by the appellant

- 5) The Learned trial Magistrate erred in law and in fact by shifting the burden of proof to the appellant's case contrary to the provisions of the Evidence Act**
- 6) The Learned trial Magistrate erred in law and in fact by finding that the appellant jointly and severally liable**
- 7) The Learned trial Magistrate erred in law and in fact by awarding the 1st respondent a sum of Kshs. 50,000/- general damages and Kshs. 250,000/- exemplary damages which award was too excessive in the circumstances**

SUBMISSIONS BY THE PARTIES

When the appeal came up for hearing on 28.3.17; the parties' advocates agreed to dispose it off by way of written submission which they dutifully filed.

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 1st respondent was unjustified. To this end; the appellant relied on **Zablon Mwaluma Kadori v National Cereals & Produce Board [2005] eKLR** where Maraga J (as he then was) reiterated that it was the plaintiff's duty to prove that the prosecution was without reasonable and probable cause. The judge cited with approval Hawkins, J, in **Hicks – Vs – Fawkner (1878), 8 Q.B.D. 167 at P.171** where he said:

“Reasonable and probable cause is an honest belief in the guilty 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 an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed.”

The learned trial magistrate was faulted for finding the appellant liable only for the fact that it made a complaint to the police whereof the 1st respondent was subsequently charged and acquitted. It was submitted for the appellant that an acquittal *per se* is not sufficient basis to ground a suit for malicious prosecution. In support thereof, the court was invited to consider the holding in **Nzoia Sugar Company Ltd v Fungututi (1988) KLR 399** in which the Court of Appeal held:-

It is trite learning that acquittal, per se, on a criminal case 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.

Respondent's submissions

It was submitted that the 1st respondent that the criminal case against her was actuated by malice because the appellant reported the matter to the 2nd respondent and the appellant and 2nd respondent failed to coordinate and conduct proper investigations.

The evidence

The background of this case is that on 15.3.12, one Stanley Kiprotich, an artisan with the appellant received a telephone call that there was a power blackout in Maseno. That he proceeded to the scene and found that a transformer had been vandalized. That at the scene; he recovered a plate with number KBM 558Q which he handed over to the police when he reported the case. That police conducted investigations

and obtained a search from the Registrar of Motor Vehicle which revealed that the 1st respondent was the owner of Motor Vehicle KBM 558Q. That the police thereafter arrested and charged the 1st respondent in **PM Maseno Criminal Case No. 619 of 2012** and she was subsequently acquitted under section 210 of the Criminal Procedure Code on 4.10.12. Subsequent to the acquittal; the respondent filed **Maseno PMCC NO.184 of 2013 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 **Kiruga Vs Kiruga & 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 issue for determination in this appeal is whether the prosecution against the respondent was malicious. The principles that govern a claim founded on malicious prosecution were laid down in the case of **Katerega Vs 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 principles were further expounded 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 test to be applied is whether there was reasonable and probable cause for the 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, the appellant's transformer was

vandalized on 15.3.12 and the action caused a power blackout in Maseno. Stanley Kiprotich, an artisan with the appellant proceeded to the scene where he recovered a plate with number KBM 558Q which the Registrar of Motor Vehicle confirmed belonged to the 1st respondent. The number plate was handed over to the police who conducted investigations and subsequently charged the 1st respondent. The 1st respondent testified that her vehicle had been involved in an accident on 9.11.12, that the number plate got lost, that the vehicle was in a garage until 19.3.12 and that she had reported the matter to the police in Maseno on 10.11.12 but no evidence in support thereof was tendered.

In her judgment, the learned trial magistrate rendered herself as follows:

“The investigation diary reveals that on 28.3.12, a report was made to Maseno Police Station that a transformer was vandalized on 14th and 15th March 2012 at Ratta area along Kombewa-Maseno road. Plaintiff was charged with stealing a transformer.”

The appellant’s report to the police that its transformer was vandalized on 15.3.12 and that the number plate of 1st respondent’s motor vehicle number KBM 558Q was recovered at the scene of was factual and truthful. There is evidence that police conducted investigations and subsequently charged the 1st respondent. As stated hereinabove; there was no evidence that the accident allegedly involving the 1st respondent vehicle on 9.11.12 in which the number plate allegedly got lost was reported to the police in Maseno. The police therefore acted reasonably when they charged the 1st respondent on the basis of the complaint made by the appellant.

I am persuaded from the evidence before the trial court which was based on the material from the criminal case, that this prosecution was instituted with reasonable and probable cause. There is no material to support the allegation that the prosecution was actuated by malice. The fact that the 1st respondent was acquitted is not sufficient basis to ground a suit for malicious prosecution. (See ***Nzoia Sugar Company Ltd v Fungututi (supra)***).

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 wrongful arrest and malicious prosecution. Had the 1st respondent proved her case; the sum of Kshs. 50,000/- awarded as general damages would have sufficed. Exemplary damages are only awardable firstly where there are oppressive, arbitrary or unconstitutional actions by servants of the government and secondly where defendant’s action was calculated to procure him some benefit at the expense of the plaintiff. None of these conditions were met by the 1st respondent and the award of exemplary damages was therefore unfounded.

In the end; this appeal 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 29th DAY OF June, 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Appellant - Mr. Oduor h/b for Mr. Nyamwange

1st Respondent - N/A

2nd Respondent - N/A