



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL NO. 23 OF 2016

BETWEEN

KENYA POWER & LIGHTING COMPANY LIMITED APPELLANT

AND

NICHOLAS ODUOR MWALI 1ST RESPONDENT

THE PERMANENT SECRETARY

(MINISTRY OF INTERNAL SECURITY) 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. Njalale, RM at the Senior Resident's Magistrates Court at Winam in Civil Case No. 228B of 2012 dated 5th April 2016)

JUDGMENT

1. Before the subordinate court, the 1st respondent, who was the plaintiff, stated that between 28th October 2008 and 20th July 2009, the appellant, without any justifiable cause and with malice, laid a false statement with the police resulting in his arrest, assault, illegal confinement and subsequent trial whereupon he was acquitted. He claimed general damages for false imprisonment, malicious prosecution and defamation of character.

2. In its defence, appellant denied the claim but admitted that it made a genuine complaint to the police who duly conducted independent investigations resulting in criminal proceedings against the 1st respondent. The 2nd and 3rd respondents denied that they were liable. They admitted that the 1st respondent was arrested after a genuine report was made to the police by the appellant after which the matter was investigated and the 1st respondent charged.

3. After hearing the case, the trial magistrate found the appellant liable and awarded the 1st respondent Kshs. 500,000/- as general damages to compensate him for false imprisonment, malicious prosecution and defamation of character. It is this judgment that has precipitated this appeal. In the memorandum of appeal dated 12th April 2016, the appellant has attacked the judgment on several grounds but the gravamen of the appeal is that the appellant failed to prove the essential elements of the tort of malicious prosecution.

4. As this is a first appeal, this court is enjoined to evaluate the evidence tendered before the trial court

and arrive at its own conclusions bearing in mind that it neither saw nor heard the witnesses testify (see ***Selle v Associated Motor Boat Co. [1968] EA 123***). In order to proceed with this task, it is necessary to set out the salient facts that emerged before the trial court. Only the 1st respondent testified. Neither the appellant nor the 2nd and 3rd respondent called any witnesses.

5. The plaintiff gave an account of his arrest and prosecution. He told the court he was working with the appellant as a storeman when he was arrested in 2008. Upon his arrest in Kisumu, he was taken to Nairobi where he was charged at Makadara Law Courts. The case was then transferred to Kisumu where he was arraigned at the Kisumu Law Court in ***Criminal Case No. 4 of 2008***. The case was withdrawn and he was immediately charged at Winam Law Courts in ***Criminal Case No. 2373 of 2008***. The 1st respondent was acquitted under **section 210** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***. He denied that he had stolen electricity poles from the appellant.

6. The 1st respondent produced the court proceeding in ***Criminal Case No. 2373 of 2008***. According to the proceedings, the 1st respondent was charged with the offence of stealing contrary to **section 275** of the ***Penal Code (Chapter 73 of the Laws of Kenya)***. He was accused of stealing 83 ten-metre electricity transmission poles valued at Kshs. 996,000/- belonging to the appellant. The prosecution called 20 witnesses and the gist of the case was that 83 electricity poles were missing from its Mambo Leo yard in Kisumu. It was discovered that the poles had been removed from the yard and transported to Nairobi where they were recovered. The evidence implicating the 1st respondent was that his signature was found on the delivery notes which had been used to remove the poles from the yard. The prosecution called a handwriting expert to prove that the 1st respondent's handwriting was on the document. The magistrate acquitted the 1st respondent after finding that he had no case to answer. The reason for the decision was that the dates in the charge were disparate, that no one saw the accused at the scene of the theft and that the existence of the poles was not established.

7. Except the 2nd respondent, the parties filed written submissions in support of and in opposition to the appeal. They are agreed on the principles applicable to this appeal and the ingredients to be proved in a case of malicious prosecution. Among the cases cited; ***Kagane and Others v Attorney General and Another [1969] EALR 643***, ***Katerregga v Attorney-General [1973] EALR 287***, ***Mbowa v East Mengo District Administration [1972] EA 352*** and ***Murunga v Attorney General [1979] 138*** have highlighted the ingredients of the tort of malicious prosecution. These are;

- 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

8. The appellant admitted that it laid a complaint with the police when it was discovered that its electricity poles had been stolen. This led to the arrest and prosecution of the 1st respondent by police. The prosecution resulted in an acquittal. The main issue in this appeal is whether elements (c) and (d), I have set out above were established.

9. The first question is whether there was reasonable and probable cause. The test as to what constitutes probable or reasonable cause is objective and it is whether the material known to the prosecutor would have satisfied a prudent and cautious man that the plaintiff was probably guilty of the offence. In ***Kagane v Attorney General and Another (Supra)***, it was held as follows: -

Excluding cases where the basis for the prosecution is alleged to be wholly fabricated by the prosecutor, in which the sole issue is whether the case for the prosecution was so fabricated or

not, the question as to whether there was reasonable and probable cause for the prosecution in primarily to be judged on the basis of an objective test. That is to say, to constitute reasonable and probable cause the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material consisted of facts discovered by the prosecutor or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty. If and insofar as that material is based upon information, the information must be reasonably credible, such that an ordinary reasonable prudent and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for the prosecution.

10. In this case, it is not denied that the appellant's poles were stolen from its go-down. This matter was reported to the police who investigated the matter. From the proceedings, the prosecution called 20 witnesses to prove its case which is evidence that there was indeed some basis for prosecuting the 1st respondent. The key evidence against the 1st respondent was that his name and signature were found on the document that led to the release of the poles from the appellant's go-down. In my view, there was a reasonable and probable cause for the appellant to report the matter to the police. Moreover, it is clear from the court record that the 1st respondent was acquitted not because he was not implicated in the offence but because the prosecution was unable to establish a prima facie case as I have outlined elsewhere.

11. The appellant submitted that the 1st respondent failed to prove malice or ill-will against the appellant and or any of its officers. Malice means spite or ill will and it must be proved in order for a claimant to succeed. In ***Standard Chartered Bank Kenya Ltd v Intercom Services Ltd and 5 Others Civil Appeal No. 37 of 2003 [2004]eKLR***, Onyango Otieno JA., observed as follows:

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.

12. Where the defendant is corporate person, there must be malice on the part of its agent from which the company can be held liable. Moreover, the fact of an acquittal is not sufficient to establish malice. In ***Nzoia Sugar Company Limited v Fungututi [1988] KLR 399***, the Court of Appeal had this to say;

Acquittal per se on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill will or improper motive cannot be found in an artificial person like the appellant but there must be evidence in one of its servants that can be attributed to the company.

13. The 1st respondent did not point to anyone employed by the appellant who had ill-will or malice against him. The trial magistrate concluded that malice could be inferred from the manner in which the 1st respondent was arrested, charged in Nairobi, transferred to Kisumu and subsequently charged at Winam. This was a misdirection as the process of charging the 1st respondent was wholly under the control of the 2nd and 3rd respondent and could not be attributed to the appellant who had laid a genuine complaint.

14. In ***Mbowa v East Mengo District Administration (Supra)***, 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.” In light of the evidence I have outlined, I find and hold that the 1st respondent failed to prove his case.

15. I allow the appeal with costs to the appellant. Consequently, I set aside the subordinate court judgment and substitute it with an order dismissing the suit against the appellant, 2nd and 2nd respondents with costs to the appellant, 2nd and 3rd respondents.

DATED and DELIVERED at KISUMU this 20th day of November 2017.

D.S. MAJANJA

JUDGE

Mr Nyamwange instructed by Wamaasa & Company Advocates for the appellant.

Mr Neriko instructed by Neriko and Company Advocates for the 1st respondent.