REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 102 OF 2012

ALFRED LUMITI LUSIBA…….....…..…APPELLANT

VERSUS

PETHAD RANIK SHANTILAL…..…….....……1ST RESPONDENT

RICHARD KARIUKI MUTAHI…….....……..2ND RESPONDENT

SAMRAT SUPERMARKET…….....…….3RD RESPONDENT

JUDGMENT

The plaintiff filed in the magistrates' court a suit against the respondents, claiming against them, jointly and severally, damages for pain, suffering, and loss of amenities; he also claimed for damages for false imprisonment as well as punitive damages and costs of the suit.

According to the plaint, on 29th July, 2010, the respondents falsely imprisoned the plaintiff in a generator room within a supermarket and thereafter assaulted him as a result of which he sustained serious bodily injuries. He lodged a formal complaint to the police, who acted on the complainant and charged the 1st and 2nd respondents in the **Chief Magistrates' Court Criminal Case No.922 of 2010;** at the conclusion of their trial the 1st and 2nd respondents were convicted and each of them was fined Kshs 50,000/= or to serve one year imprisonment in default.

The respondents denied the appellant's claim and apart from filing their defence to that effect, they also filed a motion dated 11th May, 2012 seeking a stay of the proceedings pending the hearing and the determination of the appeals they had lodged against their conviction and sentence. According to them, their appeal had overwhelming chances of success and if the hearing of the civil case against them proceeded for hearing and determination, their appeal would be rendered nugatory.

The learned magistrate agreed with the respondents' argument and in the order she issued on 10th September, 2012, the civil case against the respondents was stayed pending the hearing and determination of the respondents' appeal in this Court. It is against this order that the appellant appealed against.

In his memorandum of appeal, the appellant impugned the decision of the learned magistrate on the grounds that the civil suit against the respondents was not wholly dependent on the outcome of the criminal case against them because the two were independent of each other. The appellant also contended that the in any event the standard of proof required in civil cases is lower than that demanded of the

prosecution in criminal cases. It was also the appellant's contention that whatever the outcome of the criminal case, the appellant was entitled to seek civil remedy for the damages he had suffered and it was wrong for the learned magistrate to have held that the criminal case against the respondents was the basis of the civil suit against them. It was also the appellant's contention that, even if the respondents were entitled to appeal, the learned magistrate ought to have appreciated that there was a valid judgment that had not been overturned and the appeal by itself could not be a basis of stay of the civil proceedings.

Both counsel agreed to have the appeal determined by way of written submissions; I have had the chance to read their respective submissions and I gather that the main issue in contention is whether there is any legal basis for staying a civil suit whose cause of action is based on facts similar to particulars of an offence in a criminal trial where the defendant or defendants have been convicted and sentenced pending the hearing and determination of an appeal against the conviction and sentence.

Ordinarily, whenever the prosecution of a person is based on the same facts which invariably constitute the basis of a civil suit against the same person, it is common in this sort of scenario for the person to apply to stay the criminal proceedings usually on the ground that his prosecution is meant to bring pressure to bear upon the applicant to settle the civil suit against him; or the prosecution is meant for a purpose other than upholding the criminal justice; or that the prosecution is an abuse of the criminal process of the court; or that it amounts to harassment of the applicant and contrary to public policy. Normally, a successful applicant would have the criminal proceedings stayed, prohibited or quashed altogether on all or any of the foregoing grounds. At least that is what this court held in **Nairobi Miscellaneous Application No. 356 of 2000, Samuel Kamau Macharia & Another versus Attorney General & Another** (per Mwera, Mitey and Rawal, JJ. as they then were); in **Nairobi Miscellaneous Application No. 839 & 1088 of 1999 Vincent Kibiego Saina versus the Attorney General** (per Kuloba, J. as he then was); and in **Cruisair Ltd versus CMC Aviation Ltd (Ltd), (1978) KLR 131 (per Madan, Wambuzi and Law JJ A).** I followed the reasoning in these decisions in my judgment in **Murang'a High Court Constitutional Petition No. 4 of 2013 Peter Macharia Ruchachu versus Director of Public Prosecutions & Another**.

The situation between the appellants and the respondents in this appeal is a bit different and, I dare say, somehow strange; I say so because the respondents sought to stop, not their prosecution, but the civil case instituted against them by the appellant, pending the conclusion of the criminal process! As at the time they lodged their bid to halt the civil case, their trial was as good as complete because they had been convicted and sentenced. Even then, they somehow still succeeded in persuading the learned magistrate that the civil case against them could be stayed pending the determination of the appeal against their conviction and sentence.

In her ruling staying the proceedings, the learned magistrate held that since the appellant had pleaded in his plaint that he would be relying on the criminal proceedings in his suit against the respondents, that implied that he was also relying on the judgment of the court which was being challenged on appeal; it was her opinion that if the civil suit was allowed to proceed the appeal would thereby be rendered nugatory if it was eventually allowed. She cited and relied on **section 47A** of the **Evidence Act, Cap. 80** and held that the judgment by the trial court was not final to the extent that it was a subject of an appeal. That section provides as follows:-

47A. Proof of guilt

> ***A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.***

By holding that the trial court's judgment was not 'final' , the learned magistrate appears to have misapprehended the meaning of what constitutes a 'final judgment' as contemplated under this provision

of the law; contrary to what the learned magistrate understood to be a 'final judgment', it is clear on the face of this provision that a final judgment is not derived of that character of finality merely because the period within which it can be challenged through an appeal has not expired or because a decision on an appeal challenging it has not been rendered. A plain reading of this section underscores the position that a judgment remains a 'final judgment' for all intents and purposes except that it does not conclusively prove the guilt of the accused person unless it is not appealed against or it is upheld on such an appeal.

But even so, the viability of a cause of action in a civil claim does not necessarily stem from the conviction of a defendant in a criminal trial. Further still, the success or failure of a civil suit based on facts similar to those that a criminal prosecution is mounted does not necessarily depend on the conviction or acquittal of the defendant in the criminal trial; the outcome of a civil suit is independent from that of a criminal trial largely because the standard of proof required of a prosecutor in criminal prosecution is higher than that required of a claimant in a civil suit. To sustain a conviction, the prosecution must discharge the burden of proof beyond all reasonable doubt that the accused committed the offence with which he is charged. On the other hand, the claimant in a civil suit will only need to demonstrate on a balance of probability that the defendant is the tortfeasor and as a result of his tortious act or omission, the claimant suffered some sort of loss or damage that would warrant a remedy.

An injured party is entitled to institute a civil suit against a tortfeasor for a claim in damages and, subject to proof, a civil court will award him the damages in compensation for the injuries he may have suffered or the loss he has incurred as a result of the tortious act or omission of the tortfeasor regardless of whether the latter has been convicted or even charged in a criminal court where the tort complained of would also constitute a criminal offence. As long as there is a cause of action, the prosecution or the outcome of such prosecution cannot stand in the way of a civil action for a remedy.

Section 193A of the Criminal Procedure Code contemplates the two processes running concurrently where facts which give rise to a cause of action are the same facts that constitute the particulars of an offence. It states:-

193A. Concurrent criminal and civil proceedings

> ***Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.***

The law is clear that the pendency of a civil suit is not a bar to criminal proceedings; it acknowledges the fact that the trial of the tortfeasor in a criminal prosecution need not be affected by the pending civil action against him. It is implied, therefore, that a civil suit cannot be stayed because of the prosecution of the tortfeasor for the obvious reason that the cause of action is neither rooted in the prosecution of the tortfeasor nor in his subsequent conviction.

In the ***Vincent Kibiego Saina versus the Attorney General*** *case* (supra) Justice Kuloba emphasised that it is not the policy and the practice of this Court to curtail criminal prosecution merely because the matter with which the prosecution is concerned is also a subject of a civil litigation between the same parties or their privies. The learned judge said criminal prosecution can be instituted side by side with a civil suit based on the same or related facts; to quote him the learned judge said;

> ***The High Court does not hold the view that no criminal prosecution should be instituted side by side with a civil suit based on the same or related fact; nor does it hold that a person should never be prosecuted in criminal proceedings when he has a civil suit by or against him which relates to matters in the criminal case.***

The conclusion that one can draw from **Section 193A** of the **Criminal Procedure Code** together with the decisions of the learned judges in aforementioned cases is that both civil and criminal jurisdictions can run parallel to each other and that neither can stand in the way of the other unless either of them is being employed to perpetuate ulterior motives or generally to abuse of the process of the court in whatever

manner.

The upshot of this discussion is that the learned magistrate misdirected herself on law by staying the civil case against the respondents on the ground that the case was based on a judgment which was a subject of an appeal that was pending for determination. I find merit in the appellant's appeal and I hereby allow it. The appellant will also have the costs of the appeal.

Signed, dated and delivered in open court this 12th day of February, 2016

Ngaah Jairus

JUDGE