



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL APPEAL NO. 40 OF 2014**

**BETWEEN**

**ISAIAH LUGANIA ALWANYI.....APPELLANT**

**AND**

**SAMSON ALUSIOLA.....1<sup>ST</sup> RESPONDENT**

**HON. THE ATTORNEY GENERAL .....2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the decision of Kakamega Chief Magistrate in Civil Suit No. 542 of 2012 dated 14<sup>th</sup> April, 2014)*

**JUDGMENT**

**Introduction**

1. By his plaint dated 19/12/2012 and filed in court on 30.12.2012, the appellant sued the respondents claiming both general and special damages for alleged unlawful and malicious arrest confinement and prosecution as set out at paragraph 5 of the plaint. The appellant also prayed for costs of the suit and interest at court rates until payment in full and such other relief as the court would deem fit and just to grant. The appellant was represented by the firm of K.S. Ombaye & Co. Advocates.
2. Both respondents filed their defences on 20.02.2013 and 25.01.2013 respectively. They each denied the appellant's claims. The 2<sup>nd</sup> respondent averred at paragraph 6 of its defence that the appellant's arrest was based upon probable and reasonable grounds, namely that the appellant committed the offences for which he was charged. The 2<sup>nd</sup> Respondent also averred that the police did proper investigations and the trial Magistrate did not find that the prosecution of the appellant was malicious.
3. On his part, the 1<sup>st</sup> respondent averred that the appellant's arrest followed the making of a valid report to the police which report the 1<sup>st</sup> respondent stated was not false, malicious and/or without any probable or justifiable reason as claimed by the appellant. the 1<sup>st</sup> respondent also averred at paragraph 3 of his defence that the appellant destroyed maize and other agricultural crops owned and planted by the 1<sup>st</sup> respondent on Land Parcel No. Isukha/Serem/2390 and also demolished the boundary. The 1<sup>st</sup> respondent also averred that the appellant's acquittal was not due to lack of evidence but was due to technicalities which included failure of key witnesses being called to testify and failure by the trial court to visit the scene of crime. Both respondents urged the trial court to dismiss the appellant's case.

**Judgment of the Trial Court**

4. After carefully considering all the evidence that was placed before him, the learned trial Magistrate reached the conclusion that there was no evidence of malice. That the police acted on the information they received from the witnesses and that the fact of the case being dismissed was based on technicalities. The learned trial Magistrate also noted that the charges against the appellant were framed badly and that the police also failed to inform the appellant that his claim was time barred. The trial Court concluded that the appellant had failed to prove that the respondents were malicious and accordingly dismissed the appellant's claim but with no orders as to costs.

### **The appeal**

5. The appellant felt aggrieved by the trial Court's judgment, hence this appeal which is premised on three grounds;- that the learned trial Court erred in law and fact by dismissing the appellant's suit when there was evidence in support of the appellant's claim. That the learned trial Magistrate was wrong in acting as if it was an appellate Court and finally that the learned trial Magistrate erred in law and fact by failing to analyse the whole evidence and thereby arriving at a wrong decision.

6. The appellant's prayer to this Court is that the Judgment of the learned trial Magistrate dated 14.04.2014 be set aside and an order allowing the appellant's claim as set out in Kakamega CMCC No. 542 of 2012 be allowed with costs.

7. As this is a first appeal, this Court is duty bound to reconsider and evaluate the evidence afresh with the view of reaching its own decision in the matter only bearing in mind the fact that it does not enjoy the privilege of seeing and hearing the witnesses who appeared before the trial court. For guidance on this issue I rely on the case of Peters – Vrs Sunday post Ltd (1957) E.A 424.

### **The appellant's case**

8. The appellant testified as PW1 and told the Court that while he was at his home on 24.11.2010 AP officers arrived thereat and told him he was to be arrested in connection with a complaint lodged by Samson Alusiola who is 1<sup>st</sup> Respondent in this appeal. He was arrested and placed in cells until the following day when he was charged in Kakamega CMC Cr. Case No. 542 of 2010. That the criminal case eventually ended in his favour as per PExhibit 1, being certified copy of proceedings in the Criminal case. He denied interfering with boundary features and contended that the police did not carry out proper investigations as a result of which his name was spoiled.

9. The 1<sup>st</sup> respondent testified as DW1. He stated that following disputes over a boundary with the appellant, people from the Lands office visited the area on 29.10.2008 and fixed the boundaries but immediately thereafter the appellant uprooted the same. A few days later, the village elder reported the dispute to the Chief and on 17.2.2009 the appellant was summoned by the area Chief. In August, 2009, the appellant uprooted DW1's maize crop. A complaint was filed with the police under OB 32/8/09. He stated further that he was unable to work on his land because of continued harassment by the appellant. DW1 stated that the appellant won the Criminal Case because critical witnesses were not called to testify

### **The submissions**

10. The appellant and both respondents filed their respective submissions. The appellant's submissions were centred around the three grounds of appeal. He urged the Court to allow the appeal.

11. The 1<sup>st</sup> Respondent confirmed the averments in his evidence in Chief and stated that the appellant had been a trouble maker to most of the land owners of adjacent lands including closing the access road and forcefully ploughing other people's lands. He also submitted that the appellant was a liar.

12. The 2<sup>nd</sup> Respondent submitted that the appellant's complaints against the Judgment of the learned trial Magistrate were misplaced and that there was no evidence of bad blood between the appellant and the police officers who arrested and charged the appellant. He urged the Court to dismiss the appeal.

## **Analysis and Determination**

13. For the appellant to succeed in this appeal, he must prove the following

a) That the prosecution was initiated by the respondents or by someone for whose acts the respondents are responsible,

b) That the prosecution was terminated in his favour,

c) That the prosecution was instituted without reasonable and probable cause

d) That the prosecution has actuated by malice. (see the case of Murunga – Vrs – The Hon Attorney General (1979) KLR 138)

14. In the first ground of appeal the appellant contends that the respondents acted maliciously by arresting detaining and charging him in Court when there was no sufficient evidence to link him to the offence. After carefully reconsidering and evaluating the evidence afresh, I do find that this complaint by the appellant has no basis. From the record, there is sufficient evidence showing that a report was made first to the local administration namely the village elder, assistant chief and chief before the matter was reported to the police after the appellant destroyed the 1<sup>st</sup> respondent's maize crop in or about August, 2009. The learned trial Magistrate evaluated all the evidence that was before him and reached the conclusion and rightly so in my considered view, that there was no malice in either arresting, detaining or even charging the appellant in Court.

15. It was incumbent upon the appellant to show that there was bad blood between himself and the police officers who arrested him. What is clear from the record is that the police acted on reports made to them in the normal course of their duty and there was no other motive for the police to arrest the appellant save for investigating the complaints made by the 1<sup>st</sup> respondent. From the record, there was credible evidence to connect the appellant to the allegations made against him by the 1<sup>st</sup> respondent. In light of the above, the appellant did not discharge the onus placed upon him of showing on a balance of probabilities that the process for his arrest, charge and prosecution was actuated by malice, and accordingly I dismiss his first ground of appeal. The second ground of appeal is to the effect that the learned trial magistrate erred in law and fact when he acted as if he was the appellate court in dismissing the appellant's claim. I have myself carefully read through and considered the Judgment of the learned trial court and note that the learned trial Magistrate went through the four issues as framed by the Court and reached the conclusion that the entire process through which the appellant was taken from his arrest to his acquittal was not actuated by malice nor was there any evidence to show that there was no probable cause for the appellant's arrest and subsequent prosecution. In my considered view the learned trial magistrate did what was required of him by setting out the evidence, granting the issues and analysing the evidence against the backdrop of those issues. Nowhere in the Judgment does the learned trial Magistrate depict himself as an appellate court. What I can say is that the appellant has grossly misapprehended the Judgment of the learned trial Magistrate. Ground 2 of the appeal, therefore fails.

16. In the third ground of appeal, the appellant alleges that the learned trial Magistrate erred in law and fact by failing to analyse the whole of the evidence thus arriving at a wrong decision. As already noted under the second ground of appeal the learned trial magistrate properly analysed the evidence related the issues for determination and made a finding on each of the issues for determination before reaching the conclusion that first and foremost, the criminal case was dismissed on technicalities, that the charges against the appellant were badly framed; That there was no evidence of bad blood between the police officers and the appellant. I do wish to add here that from the evidence on record the appellant failed to prove his case against the respondents on a balance of probabilities.

## **Conclusion**

17. For all the foregoing reasons, I find that this appeal has no merit and the same is hereby dismissed. Each party shall bear its own costs for this appeal.

Orders accordingly

Judgment delivered, dated and signed in open court at Kakamega this 21<sup>st</sup> day of April, 2016

**RUTH N. SITATI**

**JUDGE**

In the presence of;-

.....Present in Person.....for the Appellant

. ....Present in Person .....for 1<sup>st</sup> Respondent

.....Miss Shibanda Holding brief for Tarus....for 2<sup>nd</sup> Respondent

.....Mr. Lagat .....Court Assistant