REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL NO. 38 OF 2014

BETWEEN

KIMA INTERNATIONAL SCHOOL OF THEOLOGY ..... APPELLANT

AND

PETER ONTINO ATICH ……..…….. 1ST RESPONDENT

MARY ATICH ……..……... 2ND RESPONDENT

THE ATTORNEY GENERAL …….....… 3RD RESPONDENT

(Appeal from the original judgment and decree in Civil Case No. 60 of 2011 at the Principal Magistrates Court at Maseno, Hon. A. R. Kithinji, Ag. PM, dated 10th April 2014)

JUDGMENT

1. The appellant appeals against the judgment entered against it for the sum of Kshs. 250,000/- in favour of the 1st and 2nd respondents ("the respondents") on account of a claim for malicious prosecution and false imprisonment.

2. The facts leading to the prosecution of the respondents are clearly set out in the judgment dated 10th February 2010 in ***Maseno Criminal Case No. 1348 of 2006***. In that case the respondents were charged with stealing some chairs belonging to the appellant contrary to **section 272** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. They also faced an additional charge of handling stolen goods namely the same chairs knowing that they had been stolen contrary to **section 322(2)** of the ***Penal Code***. The case was heard and the respondents acquitted under **section 215** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya).***

3. The acquittal precipitated a claim for malicious prosecution, false imprisonment and defamation. According to the plaint, the respondents claimed that the complaint against them was made to the 3rd respondent without legal justification as it knew the charge was false. They accused the police of failing to carry out proper investigations and leading to their being charged on false charges. They further pleaded that they were maliciously subjected to a lengthy trial based on falsehoods.

4. The appellant denied the respondents' allegations while the 3rd respondent also filed a defence denying the allegations against it. It averred that the police merely investigated a genuine complaint and charged the respondents after reasonable and probable cause was established. The 3rd respondent also stated that the suit was time barred by the ***Public Authorities Limitation Act (Chapter 39 of the Laws of Kenya).***

5. During the trial only the respondents testified. The substance of the appeal from the judgment is set out in the memorandum of appeal dated 16th April 2014. The central thrust of the appeal is that the respondents failed to prove their case.

6. As this is a first appeal, I am called upon to examine and evaluate the evidence and reach an independent conclusion bearing in mind that I did not hear or see the witnesses testify. The substance of the respondents' case was the claim for malicious prosecution and the parties did not dispute the elements of the tort of malicious prosecution.

7. The ingredients for the tort of malicious prosecution have been settled in this jurisdiction in several cases among them; ***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,** ***Murunga v Attorney General*** **[1979] KLR 138** and are as follows;

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. These elements were summarized by the East Africa Court of Appeal in ***Mbowa v East Mengo District Administration*** **(Supra)** as follows;

> *The plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage. In other words, the 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.*

9. As to the first element, there was no dispute that the respondents were charged and acquitted. Although the respondents were acquitted, they were called to make their defence hence their acquittal under **section 215** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***. The appellant submitted that the learned magistrate was satisfied that the prosecution had established a case to warrant the respondents being put on their defence hence there was reasonable and probable cause for prosecuting the respondents.

10. The respondents take a different view of the matter. The 1st respondent (PW 1) recalled that on 8th September 2006, while he was at home, a watchman for the appellant school came to his home in the company of a chief and elders and started taking chairs alleging that they had been stolen. He told the court that the chairs were taken despite him having and showing receipts demonstrating that he had purchased the chairs. He stated that he was arrested, stayed in custody for a week and was charged in court.

11. The 2nd respondent testified that she was the 1st respondent's sister in law and that she recalled the day when brother in law was arrested. Although PW 1 initially resisted arrested and showed them some receipts, he was taken into custody. She was later arrested when police officers came to her home and found some chairs which they also took.

12. Was there reasonable and probable cause? Unfortunately the learned magistrate did not address this aspect of the evidence. He fell into error by stating that in order to prove a case for malicious prosecution; the plaintiff need only show that there was a prosecution and that it was malicious and ended in his or her favour.

13. The respondents relied on the fact that the appellant made a false report to the police and that shoddy

investigations were carried out which led the magistrate to not only acquit them but also order that the chairs be returned to them. Counsel for the respondents submitted that they demonstrated that they had receipts showing that they purchased the chairs hence there were no grounds to charge them.

14. According to ***Halsbury's Laws of England*, 4th Edition - Reissue, Vol. 45 (2).**

> *[R]easonable and probable cause for a prosecution has been said to be an honest belief in the guilt of the accused person based on a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonable lead any ordinary prudent and cautious man, placed in the position of an accuser, to the conclusion that the person charged was probably guilty of the crime ...*

15. The fact that the respondents were put on their defence to answer the charges means that there was reasonable evidence upon which the prosecution could prosecute the case. This point is buttressed by the fact that the learned magistrate in the criminal case held that, *"From the evidence on record, it is clear that the 1st accused was found with one chair while the 2nd accused was found with 26 chairs. This piece of evidence does not tally with the particulars in the charge. The prudent thing was to charge each accused separately with the number of chairs they were found."*

16. That the respondents were acquitted does not negate the finding of reasonable cause as to hold otherwise would mean that an acquittal per se means that the element of reasonable and probable cause is established. In the case of ***Murunga v Attorney General (Supra)*** the Court of Appeal held that;

> *[T]he fact that the appellant was put on his defence was proof enough that there was reasonable and probable cause for prosecuting the appellant and that the prosecution was commenced after reasonable suspicion.*

I therefore hold that there was reasonable and probable cause established to charge and prosecute the respondents.

17. With respect to malice, the law is clear that the mere fact that a person has been acquitted of the criminal charge does not necessarily connote malice on the part of the prosecutor. In ***Nzoia Sugar Company Ltd v Fungututi* [1988] KLR 399**, the Court of Appeal held;

> *Acquittal per se on a criminal 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.*

18. In the plaint, the respondents have set out the following matters as constituting malice and illegality on the appellant's part.

> *(a) Laying a false and malicious/erroneous claim in court against the plaintiffs knowing it was false.*
>
> *(b) Having a desire to see the Plaintiffs punished for no good reason.*
>
> *(c) Hoping to see the downfall of the Plaintiffs,*
>
> *(d) Alleging that the Plaintiffs were common thieves while it was not true.*
>
> *(e) Unlawfully seizing the Plaintiff's properties (chairs) without any justification.*

19. The matters as pleaded do not establish the malice contemplated under the law. Malice and ill-will were not proved. The respondents did not say anything about the relationship with the appellant or its agents and what the appellant or its agents did that would constitute malice. In addition and in light of the

***Nzoia Sugar Company Ltd v Fungututi* (Supra),** it is doubtful whether the case could be made out against the appellant when it was not clear whether it was a corporate or an unincorporated body. At any rate no evidence was led to show that an officer of the appellant had spite or ill will against the respondents.

20. I find and hold that the respondents failed to prove the essential elements of the tort of malicious prosecution. They also failed to prove false imprisonment and defamation hence the suit ought to have been dismissed.

21. This appeal is allowed with costs to the appellant. The suit is the subordinate court is therefore dismissed with costs to the respondents.

DATED and **DELIVERED** at **KISUMU** this 30th day of **June** 2016.

D.S. MAJANJA

JUDGE

Mr Mbiyu instructed by Mutonyi, Mbiyu and Company Advocates for the appellant.

Mr Odeny instructed by Bruce Odeny and Company Advocates for the 1st and 2nd respondents.

Ms Langat instructed by the Office of the Attorney General.