REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO.98 OF 2013

ENOCK MUHANDA MUKHWESO.....APPELLANT

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

A.P.C. JOEL SAGWE.....2ND RESPONDENT

P.C KIPKORIR BII.....3RD RESPONDENT

A.P.C. PETER CHEMEI.....4TH RESPONDENT

PERMANENT SECRETARY, MINISTRY OF PROVINCIAL

ADMINISTRATION & INTERNAL SECURITY.....5TH RESPONDENT

SEPENZIA KHASTALA ONG'AYO.....6TH RESPONDENT

(Being an appeal from the judgment of Hon. F. Makoyo, R.M in Kakamega CMCC No.5 of 2012 delivered on 19/07/2013)

J U D G M E N T

Background

1. By the plaint dated 9th June 2012, the appellant sued the respondents herein jointly and severally for:-

    a. General damages for unlawful arrest, confinement malicious prosecution and defamation of character;

    b. Special damages of Kshs.82500/=

    c. General damages for assault

    d. Costs of the suit

    e. Interest on (a), b, (c) and (d) above at Court rates

    f. Any other relief this Honourable Court deems just and fit to grant.

2. The appellant's claim against the respondents was set out in paragraph 6 of the plaint to the effect that "that on or about 7th January 2011, the plaintiff was, at the instigation of the 6th defendant unlawfully and without any colour of right arrested by the 3rd defendant at Kakamega Police Station where the plaintiff had gone to record a statement about his assailants and instead the plaintiff was locked up in cells and he was subsequently charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code in Kakamega CM Criminal Case No.47 of 2011 in which he was acquitted under Section 215 of the Criminal Procedure Code, Laws of Kenya. The appellant at paragraph 8 of the plaint that the said arrest, confinement and prosecution was false, unlawful and malicious and as a result of which he suffered humiliation, anguish, discomfort while at the remand, loss and damage for which he held the respondents both jointly and severally liable. Particulars of malice were set out in the same paragraph while particulars of alleged injuries were set out in paragraph II of the plaint.

3. The appellant gave evidence and filed written submissions and after carefully considering the evidence on record, the submissions and the law, the learned trial Magistrate found no merit in the appellant's case for failure on the part of the appellant to demonstrate that the criminal case of which he had been acquitted was premised on malice and ill-will.

The Appeal

4. Being dissatisfied with the whole of the learned trial Magistrate's judgment the appellant filed this appeal based on 6 (six) grounds. The appellant prays for ORDERS:-

a. THAT this appeal be allowed

b. THAT the judgment of the lower Court be set aside

c. THAT the appellant's claim in the lower Court be allowed

d. THAT this Court do make a finding on quantum of damages payable to the appellant

e. THAT the Respondents do pay the costs of this appeal and the lower Court

f. THAT this Court do make any further orders as it deems fit

There is no doubt this is a first appeal and in the circumstances this Court is under a duty to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter only bearing in mind the fact that it has no opportunity of seeing and hearing the witnesses who testified during the trial. This caution is critical because if any of the findings by the learned trial Magistrate are based on demeanor of witnesses then this Court has no business controverting such a finding. Generally see **Peters –vs- Sunday Post Ltd [1957] EA 424**. I shall reconsider and evaluate the evidence afresh as I consider the 6 grounds of appeal.

The Law

5. The principles of Law applicable in cases of this nature were set out in the case of **Murunga –vs- the Attorney General [1976 – 80] 1KLR 1251** where it was held that in a case of malicious prosecution the plaintiff must show:-

1. That a prosecution was instituted by the defendant or by someone for whose acts he is responsible;

2. That the prosecution terminated in the plaintiff's favour;

3. That the prosecution was instituted without reasonable and probable cause and

4. That it was actuated by malice.

The Court went on to state that "the test whether the prosecution as instituted without reasonable and probable cause 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" Also see **Kagane –vs- Attorney General [1969] EA 643.** In the Murunga case (above) the dispute involved a civil matter over stoppage of the payment of a cheque he had given to the complainant in part payment for goods supplied and delivered. The Court found that arresting and holding the appellant prisoner over such an issue was unjustified imprisonment, was false and unlawful. The Court also found that the material which was in the possession of the arresting officer was such that one could not conclude that the appellant was probably guilty hence the finding that the arresting officer was actuated by malice. In light of the above principles and the additional remarks by the Court in the Murunga case (above) it is my considered view that each case must be considered on its own merit, otherwise there is likely to arise miscarriage of justice.

The Submissions

6. The appellant's submissions are dated 1st March 2016 but filed in Court on 3rd March 2016. In his opinion, the case against the appellant was drummed up since he was arrested when he went to make a report at Kakamega Police Station. In other words, that the material that was in the possession of the Police following the appellant's arrest would not have satisfied a prudent and cautious man that the appellant was probably guilty. He asks for the orders.

7. The submissions of the 1st – 5th respondents are dated 9th February 2016 and filed in Court on 9th March 2016. These respondents argue that applying the principles set out in the Murunga case (above) the appellant's case had no chance of success and that equally this appeal has no chance of success. Citing the case of **Nzoia Sugar Co. Ltd –vs- Fungututi [1988] KLR 399**, it was submitted that the trial Magistrate had no basis for awarding damages. These respondents want the appeal dismissed with costs.

8. The submissions of the 6th Respondent are dated 11/03/2016 and filed on 14th March 2016. In essence the 6th respondent is in agreement with the other respondents. That this appeal has no merit. Reliance was placed on the case of **Robert Okeri Ombeki –vs- Central Bank of Kenya, Civil Appeal No.105 of 2007 [2007] e KLR** for the proposition that…..probable cause in a criminal case is determined at the time of subscribing criminal complaint and it is immaterial that the accused thereafter may be found guilty."

Analysis and Determination

9. I shall now proceed to consider the 6 grounds of appeal and as I do so, I shall also be evaluating the evidence laid before the trial Court afresh. As I proceed to do so, I am acutely aware of the caution that I must exercise: That the trial Magistrate's decision to dismiss the appellant's case was clearly wrong for reason of misdirection on the law or for reason that the learned trial Magistrate took into account matters he should not have considered or left out matters he should have considered, then the trial Court's judgment should be left intact. This was the position held by the Court of Appeal in the case of **Mbogo & another –vs- Shah [1968] EA 93** and also in the case of **Matiba –vs- Moi [2008] 1 KLR 670**. In the Mbogo case, Sir Charles Newbold P held, inter alia That "…a Court of Appeal should not interfere with the exercise of jurisdiction of a single Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice …..". In the Matiba case (supra) the Court exposed itself thus on the point: "The High Court was exercising discretion and the Court of Appeal was not entitled to substitute the Judge's discretion with its own discretion. It had to be shown that the Judge's decision was clearly wrong because he misdirected himself or because he acted on matters on which he should not have acted on or because he failed to take into consideration matters which he should have taken into consideration and in doing so, arrived at a wrong decision."

10. The above cited cases have neatly cut out the duty of this Court as the first appellate Court. I agree with these decisions and now move on to dissect the appeal.

11. In ground 1, the appellant complains that the learned trial Magistrate erred in both law and fact in failing to hold that the appellant's arrest, confinement was unlawful and the subsequent prosecution was malicious. The appellant faulted the trial Court for merely stating that the acquittal of the accused only but formed one ingredient do give the appellant the right to file suit on malicious prosecution. He submitted that the trial Court should have gone ahead to enter judgment in his favour because there was malice.

12. On this ground, Counsel for the 1st – 5th respondents submitted that the appellant did not prove his case on a balance of probabilities, having failed to meet all the 4 conditions for proving a malicious prosecution claim as set out in the Murunga case (above). The appellant has contended that because the sons of the 6th respondent who was complainant in the criminal case were Police officers was not sufficient to prove malice. The 6th respondent submitted that all she did was to lodge a complaint with the Police after she had been assaulted and robbed on 26th December 2010 at Ebwaba village. From the judgment in Kakamega CMC Cr. Case No.47 of 2014, the 6th Respondent alighted from a taxi at Muyala stage at about 10.00p.m. As she did so, she saw some young men in a bar in the town and as she headed for her house she saw a person squatting near a kiosk. She recognized that person as Erick, the appellant herein. She stated that the appellant went ahead of her and pointed a knife at her and told her he would kill her. After a struggle, the appellant is said to have stabbed the 6th respondent on the left arm before stealing from her that formed the particulars in the charge sheet. In his haste to escape, the appellant is said to have left one of his slippers at the scene. That was the genesis of the 6th respondent's report to the Police. The appellant's story according to his evidence during the trial of the civil case, is that he was arrested from his house on 3rd January 2010 at about 3.00p.m, beaten and handcuffed. That he reported the assault to the Police, was given a P3 form and treated at Kakamega Provincial General Hospital. He told the Court that those who assaulted him were all children of the 6th respondent who testified as PW3 and PW4 respectively. At paragraph 6 of the 6th respondent's defence, the 6th respondent averred that "Further in the alternative but entirely without prejudice to the foregoing, the 6th defendant avers that if there was any arrest confinement and prosecution of the plaintiff as alleged on the plaintiff, then the same was lawfully carried out by law enforcement officers and/or institutions."

13. So, in the instant case, while it is plainly clear that the prosecution of the appellant was initiated by the respondents or their agents and that the said prosecution was ended in favour of the appellant. The appellant's allegation that the arrest and prosecution was without reasonable or probable cause was not proved. Though the appellant was eventually acquitted of the criminal case after a full trial, there is evidence on record showing that a robbery incident involving the 6th respondent and the appellant (according to the 6th respondent) was reported to the Police and as a result of that report the 2nd – 5th respondents proceeded to charge the appellant. The trial Magistrate in his judgment which gave rise to this appeal, noted that the 6th respondent made a report to the Police on 26th December 2010 after which investigations commenced. Relying on the case of **Hicks –vs- Falkmen (1878) 8QDD (6)** said that the facts presented to the Police by the 6th respondent as to how the attack and robbery took place "would reasonably lead to an ordinary prudent and cautious were placed in the position of the accuser to the conclusion that the appellant charged was probably guilty of the crime." Taking into account the above position against the backdrop of the evidence in the criminal case in which the 6th respondent stated she saw and recognized the appellant. I am satisfied that the learned trial Magistrate did not commit any error in concluding that there was a reasonable and probable cause for the appellant's arrest and subsequent arrest.

14. Further, the learned trial Magistrate was right in concluding that the appellant's mere acquittal did not mean that the arrest and confinement had no probable or reasonable cause. The appellant's allegations that he was arrested and charged because PW3 and PW4 in the criminal case were sons of the 6th respondent and neither here nor there. The first ground of appeal fails.

15. I shall deal with grounds 2,3, and 4 together in which the appellant complains that the learned trial Magistrate erred in law and fact when he failed to award damages for unlawful arrest, confinement and malicious prosecution. Having reached the conclusion that the appellant's arrest and confinement were based on reasonable and probable cause, namely the belief that a criminal offence had been committed though such belief may not have been proved. I now move on to determine whether the prosecution was malicious. On this issue, the appellant submitted that PW2, PW3 and PW4 rushed to charge the appellant without establishing that there was any direct or reasonable evidence linking him to the commission of the alleged offences. He claimed that charging him with the offence on 7th January 2011 after a report had been made on the 26th December 2016 was rushed.

16. That the said witnesses did not explain to the Court why it had taken the police so long to arrest him. In his view, the reason why it took long to arrest the appellant is because PW2, PW3 and PW4 had assaulted him on 3rd January 2011. He also said that there was malice because the report he made to Kakamega Police Station that he had been assaulted was not acted upon. The 1st – 5th respondents submitted

that the Police had the right to arrest the appellant after receiving the report on 26th December 2010 and that the appellant failed to establish malice. In the case of Robert Okeri Ombeka (supra) the Court of Appeal restated the principles of the Murunga case (above) and also went further to expound on what amounts to malicious prosecution.

17. In this regard, the Court relied on a passage from the case of **Jediel Nyaga –vs- Silas Mucheke. (CA No.59 of 1987 (Nyeri)UR** where same Court had expressed itself on the issue thus:

> "It is trite law that false arrest and false imprisonment may very well be found where prosecution is dismissed and the accused acquitted. Malicious prosecution may also be found where determination of prosecution was in favour of the accused, i.e in cases where the prosecution was withdrawn and the accused is not recharged or where prosecution has been terminated with the acquittal of the accused. False arrest may also be constituted where the matter of the false report was actuated by malice. In the instant case, there was no evidence adduced to show that the report by the appellant about the damage to his crop and trees by the respondent was false. He admitted as having made the report. There was evidence that the respondent had erected a stone building on the appellant's land although the dispute was not on the ownership of the land. The Police investigated the complaint and arrested the respondent. The arrest by the Police could not be attributed to the appellant. The position would have been different if the appellant had arrested the respondent himself or that the report was false. Police action cannot be attributed to the appellant who had no authority over them. There was no evidence to suggest that the arrest and prosecution of the respondent was brought without reasonable or probable cause."

18. In the same judgment, the Court referred to a passage on page 823 from the book of Clerk and Lindsell on Torts, 18th Edition which prescribes the essentials of the tort of malicious prosecution in the following words:- "In an action of malicious prosecution, the claimant must show first that he was prosecuted by the defendant, that is to say that the law was set in motion against him on a criminal charge secondly that the prosecution was determined in his favour and thirdly that it was without reasonable or probable cause; fourthly that it was malicious. The onus of proving every one of this is on the claimant. Evidence of malice of whatever degree cannot be invoked to dispense with or diminish the need to establish separately each of the first three elements of the torts."

19. In the instant case, there is no dispute that the appellant was arrested, confined, charged and prosecuted after the 6th respondent made a report to the Police following an attack on her at about 10.00p.m on 26th December 2010. The 6th respondent's complaint was investigated and upon completion of the investigations, the appellant was charged and subsequently prosecuted. It is also not in dispute that the prosecution of the appellant ended in his favour. In his judgment delivered on 6th July 2011, the learned trial Magistrate stated in part, "the complainant heard the attacker tell her that was her day and he would kill her. If she actually knew the accused's voice before the incident, she did not reveal that to the Court. In the Courts view more evidence connecting the accused to the robbery was required. The brightness of the light at the kiosk was not made clear to the Court. There was the possibility the complainant saw another person and mistook him for the accused. The slipper found at the scene ……..was not subjected to DNA tests and it was not dusted for finger prints. The recovery of the complainant's bag and other property was also shrouded in mystery …….".

20. So from the above evidence the learned trial Magistrate could not convict the appellant for lack of error-free identification. This finding does not mean that 6th respondent was not robbed; the only issue was that the evidence fell short of pinning the appellant to the robbery; So, does this mean that the appellant's arrest confinement and prosecution was actuated by malice? I do not think so. The appellant did not prove malice on the part of the respondents in the 6th respondent reporting the robbery which indeed was proved to have taken place. Even the trial Magistrate in putting the appellant to his defence during the criminal trial supported the proposition that based on the evidence before it an ordinary prudent person placed in the position of the respondents would have reached the conclusion that the appellant was PROBABLY guilty of the crime imputed. (Emphasis is mine). It is my considered view that at the time of arrest, investigation and prosecution, a complainant or the Police cannot say that they have a water-tight case until the Court makes its pronouncement, but that does not mean there is malice. And in any event, once the 6th respondent lodged her complaint with the Police, the Police were under a duty to proceed with investigations. They did so and were satisfied that it was probable the appellant had committed the offence until the Court found otherwise.

21.The appellant alleged that he was assaulted by PW3, Timothy Ongayo and PW4, Cornel Ongayo who he alleged were sons of the 6th respondent. He however told the Court that he did not know the 6th respondent nor did he suggest that the 6th respondent lied against him. Both PW3 and PW4 denied assaulting the appellant. PW5, No.227527 APC Joel same testified that the appellant was injured when he resisted arrest on 28th December 2010 when attempts were made to arrest him. PW6, No.78897 PC Kipkorir Bill of Kakamega Police Station is the one who received the 6th respondent's complainant and thereafter carried out investigations before charging the appellant.

22. From the above, I find and hold that grounds 2,3,4 and 5 of the appeal have no basis and are accordingly dismissed. Consequent upon the above finding, I find and hold that the trial magistrate's judgment did not result in any miscarriage of justice, the mere fact that the appellant was acquitted of the charge was not sufficient basis to ground the appellant's suit for malicious prosecution.

Conclusion

23. For the reasons stated hereinabove, I have reached the conclusion that the appellant's appeal lacks merit on all the 6 grounds. The appeal is accordingly dismissed with costs to the respondents.

24.Orders accordingly. Right of Appeal explained.

Judgment delivered, dated and signed in open Court at Kakamega this 16th day of June 2016.

RUTH N. SITATI

J U D G E

In the presence of:

Miss Khateshi For Appellant

Mr. Tarus (absent) For 1st – 5th Respondents

Miss Andia (absent) For 6th Respondent

Mr. Okoit - Court Assistant