REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL CASE NO. 234 OF 2013

(FORMERLY EMBU CIVIL APPEAL NO. 75 OF 200)

LAWRENCE MUCHIRI KAMUTU……..……..…APPELLANT

VERSUS

JAMES WANJOHI MWANIKI…..…….....…1ST RESPONDENT

BERNARD MURIUKI MWANIKI……...…..….2ND RESPONDENT

SAMUEL KIMOTHO CHARE…….....……3RD RESPONDENT

Being an appeal from the judgment of the Principal Magistrate's Court (P. T. Nditika) Civil Case Number 78 of 2003 delivered on 19th November, 2008 at Kerugoya)

JUDGMENT

1. This is an appeal that arose from the judgment in Kerugoya Principal Magistrate's Court Civil Case No. 78 of 2003. In that case the appellant **LAWRENCE MUCHIRA KAMUTU** had been sued together with the Attorney General of Kenya by the Respondents herein **JAMES WANJOHI MWANIKI, BERNARD MURIUKI MWANIKI** and **SAMUEL KIMOTHO CHARE** for the following reliefs:

(a) General damages for false and/or wrongful imprisonment and malicious prosecution.

(b) General damages for defamation.

(c) Costs of the suit and any other relief the court deemed fit to grant.

After trial, the trial court entered judgment in favour of the respondents and awarded them Kshs.100,000/= each for false imprisonment and Kshs.100,000/= each for malicious prosecution. Before I embark on the issues in this appeal, it is important to consider the case as presented at the subordinate court.

2. By the plaint dated 12th March, 2003 and filed on the same day, the Respondents sued the appellant together with the Attorney General alleging that on 16th June, 2000 the police from Kerugoya Police Station unlawfully arrested them and remanded them in custody before charging them in court on 19th June, 2000 with the offence of Abduction with intent to confine contrary to **Section 259** of the **Penal**

Code vide Kerugoya Principal Magistrate's Court Criminal Case No. 1557 of 2000. The Respondents contended in the suit that the criminal case defamed them in the eyes of the public and blamed the appellant herein for testifying out of spite and malice against them. They claimed that they suffered because their reputation was scandalized and ridiculed and thereby suffered loss and damage for which they sought damages both special and general.

3. There was defence filed by both the Appellant and the Attorney General which denied the allegations made by the Respondents. They justified the action taken against them stating that their respective actions were free from malice.

4. In their evidence before the trial court, the Respondents testified that they were going about their business on 16th June, 2000 when they were arrested together by Police officers and bundled into a Police vehicle and taken to Kerugoya Police Station where they were locked up for 3 days and thereafter charged vide the above cited criminal case. The criminal file containing criminal proceedings was produced as an exhibit and the same showed that the Respondents were not found guilty of the offence and each of them was acquitted under **Section 215** of the **Criminal Procedure Code**.

5. In his defence, the Appellant testified that on the night of 16th June, 2000, at midnight about 300 people went to his home and demanded that he accompanies them to look for other directors of Ndima Tea Factory. The Appellant told the trial court that he obliged and went with them and identified the Respondents as among the farmers who were taking him to where other directors lived. The Appellant stated that they were left with the Respondents in an area before they decided to go home where they met some Administration Police officers on the way and the three respondents were arrested. The Appellant stated that he did not know who had notified the Police but later recorded a statement and testified in the above cited criminal case against the Respondents. He further stated that it was a campaigning period at the time as new directors were being elected into office. He denied that he was malicious in any way because at the time of testifying he did not know the outcome of the criminal case No. 1557 of 2000.

6. The trial court in its judgment dated 19th November, 2008 found that the Appellant had instigated the arrest of the Respondents and found that the Respondents had proved their case on a balance of probability and entered judgment as aforesaid. The appellant felt aggrieved and filed this appeal citing four (4) grounds as follows:-

> ***(i) That the learned trial magistrate erred in law and fact in failing to set out issues for determination and guiding principles in determining whether malicious prosecution and false imprisonment had been proved and thereby arrived at a wrong conclusion.***
>
> ***(ii) That the learned trial magistrate erred in law and fact in arriving at a wrong conclusion as to who made a complaint to the Police and instigated the arrest of the Plaintiffs/Respondents herein thereby occasioning miscarriage of justice.***
>
> ***(iii) That the learned magistrate erred in law and fact by not giving due consideration to the defence.***
>
> ***(iv) That the judgment given was against the weight of the evidence adduced.***

7. In his written submissions made through Maina Kagio and Co. Advocates, the appellant has contended that his appeal is based on leave granted vide Embu High Court Misc. Civil application No. 31 of 2009 which granted him extension of time to file the appeal now before this Court.

8. On the first ground of appeal, the appellant has contended that the trial court ignored all the authorities cited and submissions made at the conclusion of hearing. It has been submitted that the following authorities were cited before the trial court.

> (i) Nairobi H.C.C.C. No. 1729 of 2001 Thomas Mboya Oluoch and Anor –Vs- Lucy Stephen and the Attorney General.

(ii) Nairobi H.C.C.C. 1417 of 1981 Gichanga –Vs- BAT Kenya Ltd.

(iii) Nairobi HC.C.C. No. 61 of 2002 Josiah Abobo –Vs- Kenya Commercial Bank and 2 others.

(iv) Murunga –Vs- The Attorney General (1979)KLR.

The appellant has argued that the above authorities clearly gave the following parameters for one to succeed on a claim for malicious prosecution:-

(a) That the Plaintiff must show that the 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 or probable cause.

(d) That the prosecution was actuated by malice.

9. The Appellant has submitted that there is no malice established by the Respondents as in the first place the particulars of malice were not given contrary to the then rules of procedure under **Order VI rule 8(b) of the Civil Procedure Rules** which required a party alleging a condition of mind of another person to plead specific particulars on which the party relied on. Pointing at the plaint filed at the lower court, the Appellant submitted that no particulars of malice either against as the 1st defendant or the Attorney General were made rendering the claim incompetent. The Appellant has argued that because no malice could be established against him in so far as the prosecution of the respondents was concerned, their arrest and detention could not be found to have been unlawful.

10. The Appellant has justified the prosecution of the Respondents by pointing out that the Appellant and another director were abducted on the eve of elections from their homes by about 100 people. This caused the area chief to inform the Police as a result of which the respondents were arrested and charged vide Kerugoya Principal Magistrate's Court Criminal Case No. 1557 of 2000. The Appellant submitted that the evidence on the criminal case was tendered at the trial and the evidence in his view showed that the respondents were acquitted largely because the Appellant was not the one who had initially reported to the Police about the abduction. He however, faulted the trial magistrate in the criminal case for making a finding against the provisions of **Section 89 (1)** of the **Criminal Procedure Code** which provides that criminal proceedings may be instituted by a person making the complaint or by bringing before a magistrate a person who has been arrested without a warrant. In his view the criminal trial court should have sustained a conviction and that the respondents were acquitted merely on technical grounds otherwise the prosecution in his contention was instituted on reasonable and probable cause.

11. On the question of false imprisonment and incarceration, the Appellant submitted that the Respondents were arrested on a Friday and taken to court on the next working day which was the Monday following their arrest upon which they were charged and granted bond which they managed to raise after 2 days. He argued that he could not have been faulted on this as he had no role to play in that regard.

12. The Appellant also faulted the learned trial magistrate in this appeal for making a contrary finding with that of the criminal court who acquitted the Respondents because he found that the Appellant as the complainant had not made a report to the Police. The Appellant has pointed out that in this case the magistrate found that the Appellant had instigated the Respondents' arrests. This finding in his view was neither supported by evidence at the criminal trial or in the civil trial itself.

13. Finally the Appellant has faulted the trial court for treating the defence case so casually that in his view led to unsound conclusion and judgment.

14. The Respondents opposed this appeal vide written submissions by the firm of Magee wa Magee & Company Advocates. The Respondents have faulted the Appellant for omitting the Attorney General in

this appeal and yet he was a party in the lower court. It was their submissions that excluding the Attorney General in both the application for extension of time to appeal and in the appeal itself renders this appeal incompetent and bad in law.

15. The Respondents have supported the learned trial magistrate in her finding that the Respondents' case had been proved to the required standard in law and in particular that all the essential elements in a claim for malicious prosecution had been established. It has been contended that the following elements were proved;

(i) That the criminal proceeding was instituted by the defendant (appellant).

(ii) That the prosecution terminated in favour of the respondents.

(iii) That the prosecution was instituted without justifiable or probable cause.

(iv) That in instituting the prosecution, the appellant was actuated by malice.

16. The Respondents have faulted the arguments advanced by the appellant that he did not make a complaint leading to the arrests of the Respondents arguing that the Appellant testified in the criminal trial against them and therefore in their contention the finding of the trial court was correct.

17. The Appellants relied on the following authorities in their submissions to have this appeal dismissed:-

(a) Thomas Mboya Aluoch & Another –VS- Lucy Muthoni Stephen & Anor [2005] eKLR.

(b) Chrispine Otieno Caleb –VS- Attorney General [2014] eKLR.

18. This appeal has raised a number of issues for determination by this Court. These are:

(i) Whether the respondents claim or suit against the appellant was competent.

(ii) Whether the necessary ingredients of the claim (malicious prosecution and false imprisonment) were established and/or proved to the required standard.

(iii) Whether the defence was taken into consideration in the judgment.

(iv) Whether this appeal is competent or not.

18. (a) <u>Whether this appeal is competent</u>

I have considered the submissions made by the Respondents herein regarding the competency of this appeal which I consider to be the starting point in considering this appeal. The proceedings at the subordinate court was against both the appellant and the Attorney General who was sued on behalf of Government of Kenya. The suit filed sought to find both the Appellant and the Attorney General jointly and severally liable. The judgment however, did not specify if the judgment was jointly against both the defendants or severally. It is a matter of fact the award made by the trial court ironically is made to the defendant but the judgment does not specify which defendant was awarded the money and for what because there was no counterclaim in the first place. One can only assume that perhaps the learned trial magistrate meant that the plaintiffs were being awarded the amount stated after finding that they had proved their case as required by law. It is on the basis of that assumption that this appeal is founded otherwise the Respondents could have been the ones feeling aggrieved by the said judgment which I have taken the trouble to check the hand written version just to overrule the question of typographical error. But having made the observations which appear to have missed the attention of the parties their counsels and even the trial court when the judgment was delivered, I feel the less said the better. Now going back to the issue at hand which is whether the failure by the Appellant to include the Attorney General as a party in this appeal is fatal or not, is that owing to lack of clarity in the judgment, that whether the

judgment was against both the Appellant and the Attorney General, jointly or severally or both, the Respondents' contention that this appeal is incompetent is not well founded. I must however, point out that the contention by the Appellant that the judgmnent of the trial court was a bit casual is not far fetched. The judgment with due respect is lacking both in depth and quality. The two pages of the judgment in my view was not sufficient to dispose of all the issues in the suit considering that counsels on both sides made elaborate submissions supported by authorities.

19. (b) <u>Whether the Respondents' suit against the appellant and the Attorney General was competent.</u>

The Appellant has pointed out that the Respondents' plaint was incompetent for want of particulars which were not pleaded as required under the provisions of the then **Order VI R. 8 (b)** of the **Civil Procedure Rules**. The rules (Now Order 2 rule 10 in current rules) provided that every pleading shall contain the necessary particulars of any claim…….

> ***"Where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies."***

I have looked at the 14 paragraph plaint dated 12th March, 2003 and the only particulars given are contained under paragraph 4 and 5 where the respondents gave particulars on how their character and standing had been affected by the criminal case. The plaint is totally silent on the condition of the mind of defendants in the institution of the criminal case. It is important to note that the reasons behind that rule was and is still to ensure that the opposite party knows before hand what the claim against him is all about for him to defend himself accordingly so that the issue of ambush does not arise at the trial. The trial court did not make any finding on this issue which in my view was crucial in determining the competency of the claim of malicious prosecution. The suit was based on both malicious prosecution and false imprisonment and in my view both claims were separate and distinct and either of them could stand on its own so that even if the trial court had correctly found that the claim on malicious prosecution was incompetent, it was incumbent upon it to make a separate finding on the question of false imprisonment. This Court finds that the claim on malicious prosecution was unsustainable in law for the above reasons. The rules cited above are couched in mandatory terms so they had to be properly pleaded and proved to be sustained in law. The authority cited by the 2nd defendant in the case of **<u>GITAU –VS- EAST AFRICAN POWER & LIGHTING CO. LTD. (1986) KLR 365</u>** was relevant but the learned trial magistrate inexplicably ignored it altogether with the issue. I find that had the trial magistrate considered the point raised by both defendants in their pleadings and their submissions, the conclusion would have been totally different.

20. I also find that the Attorney General raised another crucial and key issue touching on the competency of the suit. This was the fact that the Plaintiff's claim against the 2nd defendant (Attorney General) was bad in law for being time barred. The Attorney General cited the provisions of **Section 3 (1)** of the **Public Authorities Limitations Act Cap. 39 Laws of Kenya** which provides as follows:

> ***"No proceedings founded on tort shall be brought against the Government or a local authority after the end of 12 months from the date on which the cause of action arose."***

The cause of action in the suit as per the plaint arose on 19th June, 2000 and the suit was filed on 12th March, 2003 which was more than 2 years late. This limitation perhaps informed the decision by the respondents to file an application for extension of time dated 24th June, 2003. I have looked at the proceedings and though the application for extension was allowed on 1st July, 2003, the respondents did not file their suit within the 14 days as directed by that court. That omission coupled with the fact that the respondents had not sought orders to have the filed suit deemed duly filed in my view rendered the respondents' suit fatally defective and incompetent *ab initio*.

21. (c) <u>Whether the necessary ingredients of the claim (based on malicious prosecution and false</u>

imprisonment) were established.

It is perhaps important to note that all the parties to this appeal as they were during the trial at the subordinate court were in agreement in so far as this issue is concerned. This is because all the authorities quoted in this appeal as cited above are in concurrence on what constitutes essential ingredients in establishing malicious prosecution. In the case of **Chrispline Otieno Caleb -VS- A.G. [2014] eKLR** and **Abubakar Simba -Vs- Stephen W. Wambari [1994] eKLR** just to mention the 2 authorities, the courts stated that essential ingredients to establish the tort of malicious prosecution are as follows:

(i) That the proceedings were instituted or continued by the Defendant (person sued).

(ii) That the defendant acted without any reasonable and Probable cause.

(iii) That the defendant acted maliciously with improper and wrongful motive; and

(iv) That the proceedings in the criminal case were terminated in favour of the plaintiffs, that is to say the case ended with the acquittal of the plaintiffs.

22. Applying the above criteria in the case before the subordinate court assuming the other issues had not come into play, and to begin with the first issue on whether the appellant herein instituted the criminal proceedings against the respondents, it is clear that though he did not begin the process of arrest and prosecution he participated in sustaining prosecution by testifying against them in the criminal proceedings.

23. On the second element on whether the appellant acted maliciously and without reasonable cause or probable cause, this court finds that neither the appellant nor the Attorney General acted maliciously or without probable cause. There was sufficient evidence adduced to show that the Police acted reasonably upon a report being made about the kidnapping of the appellant herein. There was evidence adduced by the appellant at the trial that owing to election fever at the time, there was a lot of tension and things could not be taken for granted. So when the appellant was forcefully taken away in the wee hours of the night and held against his will it was plausible for anyone to discern that an offence had taken place. The appellant did not report to the authorities that he had been held against his will but that in my view could not have negated the fact that an offence could have taken place or that an action could not be taken and prosecution conducted as provided under **Section 89 (2)** of the **Criminal Procedure Code**.

24. This Court has further noted that the proceedings in the criminal case (Kerugoya P.M.CR. No. 1557/2000) were produced as evidence in the trial court and the proceedings showed that all the respondents herein were at the close of prosecution case, found to have a case to answer. This was crucial and key in determining the 2nd ingredient or element in establishing malicious prosecution. This is because at the close of a prosecution case a criminal court has to weigh the evidence adduced and apply a standard of proof which is akin to the standard applicable in civil cases in determining whether a *prima facie* case has been established sufficient enough to call upon the accused person(s) to defend himself/themselves. A criminal court is unlikely to find that there is a case to answer under **Section 211 Criminal Procedure Code** in the absence of a probable cause. This Court therefore finds that the trial court in respect of this appeal misdirected itself when it made an inconsistent finding to that made in criminal court (1557/2000) that the appellant herein acted without reasonable and probable cause. That finding was erroneous in the face of evidence which *inter alia* showed that the respondents had been put to their defence in the criminal case. This Court finds that where an accused person is put on his defence he cannot maintain an action on malicious prosecution because the element of malice is negated by the fact of being put on defence in accordance with **Section 211** of the **Criminal Procedure Code**.

25. This Court in the above premises finds that the Respondents' case at the trial court failed on merit to prove that the Appellant together with the Attorney General acted dishonestly and maliciously. The Respondents' case failed to prove or fulfill all the above elements or ingredients of malicious prosecution. I also find that the defence put forward showed that the Respondents were arrested on a Friday 16th June, 2000 and were arraigned in court on Monday the 19th June, 2000. The question of false

imprisonment did not arise as they were unable to raise bond which they were granted upon being charged in court. The Respondents' claim in that regard was too not proved and could not be sustained in law.

26. The long and short of this is that though this Court finds that this appeal should not have been filed by the Appellant for the reasons aforesaid. It is nonetheless merited. The Respondents' suit at the lower court from whatever angle or view if one looks at it, was doomed to fail from its inception. It was unsustainable because it could not stand the test of law as illustrated above. The judgment of the trial court did not address all the issues brought before it and when it attempted it fell into error. The learned trial magistrate ought to have taken more time in interrogating and addressing the issues in the case. This appeal is allowed. The judgment delivered on 19th November, 2008 is set aside and the awards made are quashed. I shall not make any order for costs in this appeal but the costs of the lower court shall go to the Appellant. It is so ordered.

Dated and delivered at Kerugoya this 14th day of June, 2016.

R. K. LIMO

JUDGE

14.6.2016

Before Hon. Justice R. Limo J.,

Court Assistant Willy Mwangi

Abubakar for Respondent present

Mwangi holding brief for Maina for appellant.

COURT: Judgment signed, dated and delivered in the open court in presence of Abubakar for respondent and Mwangi holding brief for Maina for appellant.

R. K. LIMO

JUDGE

14.6.2016