



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

HIGH COURT CIVIL APPEAL NO. 16 OF 2014

(From the original decision in Mwingi SRM civil suit No. 66 of 2014)

STEPHEN MBUTHI..... 1ST APPELLANT

MWANGANGI MBUTHI 2ND APPELLANT

V E R S U S

CHRISTINE NTHAKYE WAMBUA..... 1ST RESPONDENT

HON. ATTORNEY GENERAL2ND RESPONDENT

JUDGMENT

On the 5th of September 2014 the learned magistrate at Mwingi G. W. Kirugumi – R.M dismissed a civil suit for damages for alleged malicious prosecution, filed by the appellants with costs to the respondents herein.

Dissatisfied with the decision of the trial court the two appellants brought the present appeal, on the following grounds:-

- 1. That the learned trial magistrate erred and misdirected herself both in law and fact in holding that the appellants had not proved their case on a balance of probabilities when***
- 2. the evidence on record showed clearly that the appellants had proved their case as required.***
- 3. The learned trial magistrate erred and misdirected herself both in law and facts when she failed to consider that the matter before her arose from a Criminal Case No. 541 of 2011 where the two defendants (appellants) were proved not guilty of the alleged offence and were acquitted under section 215 of the Criminal Procedure Code.***
- 4. The learned trial magistrate erred and misdirected herself both in law and fact when she failed to find that the 1st respondent's donkeys had truly entered the plaintiff (appellants) shamba and destroyed their crops, hence detaining the donkeys was only meant for talks on how to compensate the plaintiffs.***
- 5. The learned trial magistrate erred in law and infacts when she failed to consider that the two plaintiffs were minor persons and school going young men, who had never been charged in any***

other court of law with any other capital and/or lesser offence, hence the first defendant's acts amounted and all was just meant to tarnish the two plaintiffs good name and character.

6. The learned magistrate erred and misdirected herself both in law and fact by holding to the respondent's side when she held that the appellants had stolen her donkeys, when the donkeys were found in the compound of the two appellants, and that the donkeys were not hidden.

7. The learned trial magistrate erred and misdirected herself both in law and facts when she failed to understand that with Kamba customs and rites when a person detains another person livestock it does not mean that he or she intends to steal the same, but it is a routine meant to come together and negotiate, while in this case the defendants interpreted this to mean that the appellants stole her donkeys.

8. The learned trial magistrate erred and misdirected herself, both in law and fact by failing to find that the 1st defendant was using the two Administration Police as a cover up to avoid compensation because she knew very well the donkeys had destroyed the appellants crops.

9. The learned trial magistrate erred and misdirected herself both in law and fact by failing to find that the matter herein ought to have been passed through the relevant authorities like village elders, Assistant Chief or Chiefs Offices for resolution before taking the matter to the police.

10. The learned trial magistrate erred and misdirected herself both in law and fact by failing to consider evidence on record and failing to make a finding that the plaintiffs evidence disclosed the truth of the matter.

The appellants and the 1st respondent filed written submissions to the appeal.

During the hearing of the appeal, the appellants relied on the written submissions filed. The 1st respondent's counsel Mr. Owuor also relied on written submissions filed. The Attorney General did not file written submissions, nor participate in the hearing of the appeal.

I have perused and considered both sets of written submissions.

In the written submissions, the appellants relied on a case of ***Kagane -vs- Attorney General and another (1969) EA 643*** on the definition of reasonable and probable cause in a case of malicious prosecution. They also relied on the case of ***Michael Ochieng Odera -vs- Attorney General (2012) eKLR*** and the case of ***Zablon Mwaluma Ngandori -vs- National Cereals and Produce Board (2015) eKLR***, in each of which damages of Kshs 500,000/- for malicious prosecution were awarded by the court.

Counsel for the 1st respondent, relied on the case of ***Kagane -vs- Attorney General (1969) EA 643*** on what is required for the proof of a claim of malicious prosecution.

During the trial before the trial magistrate, the appellants who were plaintiffs called 3 witnesses. PW1 was Stephen Munene Mbuthi. PW2 was Paul Mwangangi Mbuthi, while PW3 was Stephen Kili an Executive Officer of the Mwingi Magistrate's Court who produced the Mwingi Criminal Case No. 541 of 2012.

The respondents called 5 witnesses who were DW1 APC Kipkorir Leonard, DW2 Godfrey Mwathi Muthengi, DW3 Christine Wambua, DW4 Mary Mwendu Mutemi, and DW5 John Tulu Mutunga.

The facts of the case in brief, are that on 18th of August 2011 one adult and one young donkey of Christine Wambua (1st respondent) went missing. She searched for the two donkeys and later got information that the two donkeys were in custody of Stephen Munene Mbuthi and Paul Mwangangi

Mbuthi the appellants.

She proceeded to the farm of the father of Stephen Mbuthi and Paul Mbuthi and asked for the two donkeys. The two young men however appeared to be annoyed and initially refused to release the donkeys. Christine Wambua then reported the matter to the Administration Police Officers. Ultimately the donkeys were released with the two appellants Stephen Mbuthi and Paul Mbuthi saying that they detained the two donkeys because they had grazed on the crops of their father. The appellants were however charged in court with theft of the two donkeys.

After a full trial, the learned magistrate found that the offence of theft of the donkeys had not been proved by the prosecution, and acquitted them under Section 215 of the Criminal Procedure Code (cap.75).

After that acquittal, the appellants filed a civil case in the same court, which was also heard by the same magistrate. The case of the appellants was dismissed by the trial court, thus giving rise to the present appeal.

This is a first appeal. As a first appellate court, I am required reconsider the evidence on record, and come to my own conclusions. See the case of *Selle -vs- Associated Boats Limited (1968) EA 123*.

I have reconsidered the evidence on record and the findings of the trial magistrate.

I agree with the case cited by both the appellants and counsel for the 1st respondent, on what is required for a litigant to prove a case of malicious prosecution, that is *Kagane -vs- Attorney General (1969) EA 643*, in which authorities Rudd J stated as follows:-

“In order to succeed for malicious prosecution the plaintiff must prove four ingredients.

1. That the prosecution was initiated by king(complainant). This is admitted.

2. That the prosecution terminated in the plaintiffs favour. This is also admitted, and infact the plaintiffs were completely exonerated as well as being acquitted. I think however, that there was still remaining a feeling on the part of the state counsel that infact the plaintiffs should not have been exonerated and that infact they were guilty. As regard this I wish to say, as I can, that I have no doubt that the plaintiffs were infact innocent.

3. The plaintiffs must also prove that the prosecution was instituted without reasonable and probable cause. This is a matter which requires very careful consideration as regard two aspects; the first aspect being as to whether the evidential material on which the prosecution was based was such that a reasonable prudent and cautious man should have honestly believed that it was sufficiently credible and cogent to justify the institution of a prosecution; and the second aspect being the effects of the fact that the prosecution was instituted on the directions of a state counsel in the attorney generals chambers.

4. The plaintiffs have further to prove that the prosecution was instituted with malice on the part of the prosecutor king. In this connection malice means that the prosecution was motivated by something more than a sincere desire to vindicate justice”.

Coming to our present case, it is clear that the first report by the 1st respondent was made to the Administration police officer. The regular Police Officer PC Jackson Kalumba of Mwingi police station stated that on 2nd August 2011 while in the office the two appellants were brought there by the AP on allegations that they had stolen 2 donkeys. He interviewed them and they claimed that the donkeys had trespassed on their land.

PW3 APC Boniface Muthengi Mwathi on the other hand, stated that on the 20th August 2011 at about 2.00 pm he was called to reinforce other officers Sergeant Joseph Nyambane and Sergeant Kipkorir, who

went to a scene and found the two appellants, who on interrogation, agreed to show them the two donkeys. They then arrested them.

In cross examination, he stated that the area Chief informed them that he had received a report that the donkeys had been detained for causing damage to the farm of the appellants.

The complainant in the criminal case Christine Wambua (1st respondent) who testified as PWI stated that she looked for the donkeys and when the 1st appellant Mwangangi Mbuti refused to release them, she reported the matter to the Assistant Chief and also to the police and the donkeys were recovered.

If indeed what the prosecution witnesses were saying in the criminal case was true, one wonders how the appellants ended up being charged in court and tried for a serious offence of theft of livestock. It all goes down to stating that the respondents had no reason at all to charge and prosecute the appellants in court for a criminal offence.

The 1st respondent Christine Wambua, did not at any point state that she had no complaint of theft against the appellants. This court as well as the trial court, did not have the advantage of seeing the statement that she made to the police on the matter.

She says on appeal that she was not in control of the action that the police took in charging the appellants in court with theft. She however did not at any time claim that she wanted to withdraw her complaint that the appellants had stolen her donkeys.

I note that the Attorney General has not bothered to defend themselves in either the civil case, or in this appeal which clearly demonstrates that they have something to hide. I do not think that it is right for people to misuse their liberties against other people and then get away with it.

In my view, all the four ingredients of malicious prosecution against the two respondent were proved in the civil case, as supported by the evidence in the criminal case. I will thus alter the finding of the trial court on the liability of the respondents. I find that all the respondents were jointly liable for maliciously prosecuting the two appellants.

The issue of age of the appellants is a mute point, and I think it does not add any value or benefit to any of the parties in this court determining the same. I do not find it necessary to go into its proof or otherwise. It is enough for me to observe that, I have seen both appellants in court and they appear to be young men. I cannot however say that they are below 18 years, or whether they attend school.

As for damages, I have been referred to two cases, both of which talk of Kshs 500,000/= as damages. The cases are not very old cases. However each case has to be considered on its own merits. In the circumstances of the present case, I am of the view that an award of Kshs 100,000/= for malicious prosecution is an adequate compensation for the appellants. I thus will award the appellants general damages for malicious prosecution in the sum of Kshs 100,000/- against both respondents jointly and severally.

To conclude I allow the appeal, and set aside the decision of the trial court. I find the respondents herein jointly and severally liable to the appellants for malicious prosecution. I order that the respondents will jointly and severally pay the appellants general damages of Kshs 100,000/- as compensation for malicious prosecution. I award costs of this appeal and costs of the civil case in the magistrate's court to the appellants against the respondents jointly and severally.

Dated and delivered at Garissa this 28th day of July 2016.

GEORGE DULU

JUDGE