



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 559 OF 2011

UCHUMI SUPERMARKETS LIMITED.....APPELLANT

- V E R S U S -

CHRISTANTUS AMUKOYA OUMA.....1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

*(An appeal from the judgment and decree of Hon. P. Nditika, SRM in civil case n o. 5598 of 2007
delivered on 11th October 2011)*

JUDGEMENT

1. Christantus Amukoya Ouma, the 1st respondent herein sued Uchumi Supermarkets Ltd and The Attorney General, the appellants and the 2nd respondent respectively claiming general and special damages for malicious prosecution and false imprisonment. Hon. P. Nditika, the then learned Senior Resident Magistrate, heard and gave judgment in favour of the 1st respondent and against the appellant and the 2nd respondent. The 1st respondent was awarded special damages in the sum of kshs.120,000/= and ksh.300,000/= being general damages plus costs and interest. The appellant was aggrieved by the decision hence this appeal.

2. On appeal, the appellant put forward the following grounds:

1. The learned magistrate erred in law and in fact in failing to find the at the overwhelming dominant and only cause for the prosecution of the 1st respondent ws the police.

2. The learned magistrate erred in law in failing to find that all the ingredients necessary to sustain a claim for malicious prosecution had not been demonstrated against the appellant.

3. The learned magistrate misdirected himself on fact in asking why the appellant did not carry out investigations against the d1st respondent when there was clear evidence that the appellant was never accorded an opportunity to carry out such an investigation and, in any event , had no legal duty to investigate an alleged crime.

4. Overall the learned magistrate erred in entering judgment against the appellant.

3. When the appeal came up for hearing this court was prompted by the appellant's counsel to give directions to have the appeal disposed of by written submissions.

4. This being the first appeal, this court is enjoined to re-evaluate the case that was before the trial court. The record shows that the appellant and the respondents each presented the evidence of one witness to support their positions. The 1st respondent testified in support of his case. He told the trial court that he was an employee of the appellant for eight years. He further stated that on 27.2.2005 theft took place and thereafter the appellant's operation and duty manager requested him to record a statement with the police. He stated that he accompanied the police but did not record a statement but was instead taken to Muthaiga Police Station where he was held in custody for four (4) days and was thereafter taken to court to face a charge of robbery with violence, failing to prevent theft and conspiracy. He claimed he spent ksh.120,000/= to conduct his defence before the court trying the criminal case where the appellant was the complainant. The appellant summoned John Peter Kariuki (DW1) to testify in support of its defence before the trial court. DW1 stated that he was the appellant's security services manager. He stated that in February 2005 he reported a robbery which had taken place in the appellant's premises. He said he visited the premises where he found police were already at the scene conducting their investigations. He stated that the appellant had booked a report with the police about the robbery. Hon. Nditika, learned Senior resident Magistrate considered the evidence presented before him and came to the conclusion that the 1st respondent was maliciously prosecuted and falsely imprisoned. He awarded the 1st respondent ksh.120,000/= as special damage being expenses he incurred in prosecuting the criminal case preferred against him. The learned magistrate also awarded him ksh.300,000/= as general damages for malicious prosecution and false imprisonment.

5. I have already outlined the grounds of appeal the appellant has put forward to challenge the decision of the learned Senior Resident Magistrate. It is the submission of the appellant that in order for a claim for malicious prosecution to succeed the plaintiff must prove that the prosecution was instituted by the defendant, that the prosecution terminated in his favour, that the prosecution was instituted without a reasonable or probable cause and that the prosecution was actuated by malice. The appellant averred that it was not instrumental in causing the police to charge the 1st respondent. The appellant stated that it merely reported an incident of robbery. The appellant further argued that there was no evidence of malice on its part. The appellant further denied directing the arrest of the 1st respondent nor detaining him.

6. The 1st respondent on the other hand opposed the appeal and urged this court to uphold the decision of the trial magistrate. It is the submission of the appellant that the appellant and the 2nd respondent were equally liable to the 1st respondent's malicious prosecution. It is further pointed out that the appellant actively participated in the institution of the case against the 1st respondent and cannot now turn around to deny the obvious. The 1st respondent is of the view that the appellant actively participated in his prosecution through its operation and manager on duty. The principles to be considered in proving a case for malicious prosecution were restated in the case of **Kateregga vs Attorney General (1973) E.A 287** in which the court held *inter alia*

- 1. The police officer as an agent for the defendant must have instituted the criminal proceedings against the plaintiff.**
- 2. The police officer must have acted without unreasonable or probable grounds.**
- 3. The police officer must have acted maliciously.**
- 4. The proceedings must have terminated in the plaintiff's favour.**

7. I have already stated that the appellant has denied that it actively participated in causing the police to take action against the 1st respondent. The 1st respondent is saying that the appellant did so through its operation and duty manager to influence and direct the case against him. I have re-evaluated the case that was before the trial court over this singular issue and I find it inconceivable for the appellant to deny an obvious fact. The crux of the matter is that the appellant's manager Judy Gathaiya who instructed one of her staff, Lucy Nderitu to call in the police after the alleged robbery. The appellant cannot therefore deny that it participated in the arrest and prosecution of the 1st respondent. The 1st respondent is emphatic that

he was arrested and prosecuted for no good reason at all. He was maliciously prosecuted and falsely imprisoned. I have carefully perused the criminal proceedings in which the 1st respondent was prosecuted vide **Nairobi C.M.C. Cr no. 530 of 2005**. The 1st respondent was at the time of the robbery a supervisor with the appellant. None of the six witnesses who testified before the court trying the criminal case mentioned the role the 1st respondent played in the robbery. It would appear the police randomly arrested people and quickly had them arraigned in court. The 1st respondent was merely arrested and charged for being present at the service entry through which the robbers gained entry. There is no evidence that the police carried out any serious investigation to connect the 1st respondent to the robbery. Having failed to tender evidence to create the nexus between the 1st respondent and the offences the 1st respondent faced, this court can infer that there was malice on their part. This case has all the ingredients of malicious prosecution in the case **Katerregga =vs- Attorney General**.

8. The learned senior resident magistrate therefore came to the correct decision to find the appellant and the 2nd respondent liable.

9. The appellant did not deem it fit to challenge the decision on quantum, thereof I will not venture to determine the issue.

10. In the end, I find no merit in the appeal. The same is dismissed in its entirety with costs to the 1st respondent.

Dated, Signed and Delivered in open court this 25th day of November, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent