



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**CIVIL SUIT APPEAL NO. 875 OF 2007**

**HASSAN OGWIMBA AKIBAYA.....APPELLANT**

**VERSUS**

**THE ATTORNEY GENERAL..... 1<sup>st</sup> RESPONDENT**

**A W N..... 2<sup>nd</sup> RESPONDENT**

**J K.....3<sup>RD</sup> RESPONDENT**

*{Being an Appeal from the whole of the judgment and decree of Hon. Ms. Maina given on 25<sup>th</sup> September 2007 at Nairobi in CMCC 10094 of 2003}*

**JUDGMENT**

1. The appellant herein had been charged with the offence of indecent assault on a female minor aged 3 years contrary to section 144(4) of the penal code in criminal case No. 8502 of 2002. The matter went to full hearing and the court held that, *“the evidence given by the complainant was of tender age was not corroborated on material facts as such the learned trial magistrate held that without any evidence to corroborate the testimony of the young child the court is indeed tied and the accused must be allowed the benefit of doubt.....he is therefore reluctantly acquitted under section 215 of the Criminal Procedure Code.”*
2. Subsequently the appellant filed a civil suit being Civil Case No. 10094 of 2003 claiming as against the appellants for general damages for false imprisonment and malicious prosecution. The plaintiff in his testimony testified that on 29th November 2002 he was going about his daily duties. He picked and dropped the child L from home to school and other errands as per the request of the 2nd defendant. Later, that day he was called and told to handover the car keys to the defendant’s secretary and go home. The following day he was lured to Kilimani Police Station where he was arrested for defiling a three (3) year old. He was arraigned in Kibera Law Court and charged with indecent assault on a minor. He was granted a bond of Kshs. 70,000/- which he raised after 2 weeks. He stated that the matter was heard and held in his favor. He claimed that due the said charges by the defendants his reputation was damaged and he could not get employment, his wife abandoned him and his mother died of shock.
3. On re-examination he stated that it was Njenga who took him to the police station and was incarcerated by the inspector of police.
4. The 1<sup>st</sup> defendant in his defence denied that the plaintiff was unlawfully arrested and maliciously prosecuted as alleged in the plaint and put the plaintiff to strict proof. He stated that the prosecution that ensued was based on probable and reasonable suspicion that the plaintiff had committed an offence of indecent assault on one L W, aged 3 years a daughter to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants which action was punishable under the law and the his agents acted pursuant to powers

granted to them under the Constitution and the Police Act. It was his testimony that a mere acquittal of the plaintiff in Cr. Case No. 8501 does not and cannot divest them from such power. He denied that the plaintiff had suffered any loss and put him to strict proof thereof.

5. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants joint their issues and denied the plaintiffs claim as raised in his plaint or having knowledge of any criminal proceedings against the plaintiff nor any malice in the arrest, detention and trial of the plaintiff nor the same was without probable cause and put the plaintiff on strict proof thereof; that the acquittal of the plaintiff does not immediate translate to a claim for damages in civil proceedings; that the plaintiffs suit is misplaced as a result of the misjoinder of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.
6. The defence in their case called 2 witnesses. DW1 No. 56586, Constable Police Rose Ndolo who indicated that the matter was reported by Mr. K that his daughter L private parts had been touched by the plaintiff. In the cause of investigation she went to Mr. K's home and spoke to the House girl one R N who stated that while she was bathing L on 25<sup>th</sup> November 2002 she told her not to touch her where Hassan had touched her and this was repeated to the parents.
7. On cross examination she indicated that she had referred the child to the doctor as she speculated there could have been injuries though there was no pressure from J K or his wife.
8. DW3. J K testified that he was informed that the daughter had been assaulted by the plaintiff and the same was confirmed by the daughter. He reported the matter to his Chief Security officer who took charge of the matter from there.
9. On cross examination by Mr. Sitima he stated that he reported the matter on basis that the plaintiff was a member of the Sarova and did not know if the same would be reported to the police. The police recorded statements from him, his wife and the house maid; that the doctor was also examined to ensure that there was no penetration, injection or injury. On cross examination by Mr. Keyonzo he denied having told Mr. Njenga to take the plaintiff anywhere and the following day he was asked to report to Kilimani police station where the matter had been taken.
10. On re-examination he stated that the plaintiff was never his employee but an employee of Sarova Hotel just as he was.
11. The matter went to full trial and the Learned to Trial Magistrate in dismissing his claim held that, *"a prudent and cautious man would have been satisfied in the circumstances that the plaintiff was probably guilty. Indeed the Trial Magistrate was almost convinced and only acquitted for lack of corroboration, there indeed was reasonable and probable cause to charge the plaintiff. As regarding malice I do not find any. The plaintiff himself testified that he had a good working relationship with the 3<sup>rd</sup> defendant under whom he worked only that his moods which varied. The police officer did not know him prior to that and to say that all this was occasioned by Margaret was far-fetched."*
12. Dissatisfied with the said judgment the appellant appealed the said decision and filed his memorandum of appeal dated 23<sup>rd</sup> October 2007 raising the following 3 grounds;
  - i. That the Learned Trial magistrate erred and was wrong in deciding that the respondents in preferring criminal charges against the Appellant had probable grounds on which to do so.
  - ii. That the learned Trial Magistrate erred and was wrong in holding that the Respondents in preferring a prosecution against the appellant were not malicious.
  - iii. The Learned Trial Magistrate erred and was wrong in failing to access the damages that would have been payable to the Appellant in the event that her decision in dismissing the Appellant's case against the Respondent was found to be wrong on appeal.
13. He urged the Court to allow the appeal and set aside the order dismissing the appellant's case, that judgment be entered against the respondent on liability; damages be given for the appellant as maybe appropriate in the circumstances and urged the Court to grant him cost of the appeal and case below.
14. Parties filed written submissions. The appellant in his submissions argues that the analysis by the Learned trial Magistrate chose to ignore the evidence of R K in the criminal case; that the evidence was that the girl told her not to touch her where Hassan had pinched her and that she did not follow up on the matter as she did not know what the girl was saying and she told this to the co-worker Margaret who told the girl's parents; that it was quite clear that the evidence of the sexual assault was couched or taugt.

15. On malice the plaintiff submitted that there was evidence of a grudge between the appellant and Margaret and he wanted him fixed and was the prime mover of the complaint against the plaintiff. He submitted that this coupled with the fact that there was no reasonable or probable cause to institute prosecution proceedings made the whole prosecution malicious. He relied on the case of ***Kariuki versus East Africa Industries Ltd and Another (1986) KLR 383***, it was held that, “*the lack of reasonable and probable cause in instituting a prosecution can be taken into consideration as some evidence of malice on the part of a defendant.*”
16. That it is prudent and advisable for a magistrate to assess damages even if the plaintiff failed to prove his claim so that in the event of a successful appeal it is not necessary to remit the case to the Magistrate to assess damages. He urged the Court to allow the appellant’s appeal and award the plaintiff Kshs. 200,000/-.
17. The 1<sup>st</sup> defendant submitted that the plaintiff’s claim is not tenable as there are no particulars of malicious prosecution contrary to the very clear provision of Order VI Rule 8 of the Court of Court procedure Rules; that for a plaintiff to prove malicious prosecution he must prove;
- i. That the proceedings was instituted by the defendants or by someone for whose acts they are responsible
  - ii. That the prosecution was terminated in his favour
  - iii. That the prosecution was instituted without a reasonable and probable cause.
  - iv. That the prosecution was actuated by malice.
18. It was submitted that the plaintiff failed to prove that the prosecution was instituted without reasonable or probable cause and or that it was actuated by malice; that the appellant was charged with indecent assault. The plaintiff in his testimony testified that on 29th November 2002 he was going about his daily duties he picked and dropped the child Lauryn from home to school and other errands as per the request of the 2<sup>nd</sup> defendant. Later, that day he was called and told to handover the car keys to the defendant’s secretary and go home. The following day he was lured to Kilimani Police Station he was arrested and arraigned in a Kibera Law Court and charged with indecent assault on a minor by touching her private parts; that after hearing the prosecution witness the Court put the appellant on his defence after establishing that he had a prima facie case against the appellant. The matter proceeded to full trial and the appellant was only acquitted on a legal technicality due to lack of corroboration of a child’s evidence and the magistrate reluctantly acquitted him. Counsel relied on the case of ***Murunga –vs- Attorney General (1979) KLR 138***. Where, the Court held that , “ whether the prosecution was instituted without reasonable or probable cause is whether on the material known to the prosecutor would have satisfied a prudent and cautious man that the plaintiff was probably guilty of an offence. That the 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.
19. The 2<sup>nd</sup> and 3<sup>rd</sup> defendant in their submissions fully associated themselves with the 1<sup>st</sup> defendant’s submission and further submitted that the judgment of Honorable Maina was sound both in law and in fact; that malice and particulars thereof were not pleaded and the same was found lacking by the Honorable magistrate; that the appellant did not prove that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents had played any role in the decision to prosecute the him and that the appellant continues to suffer the misconception of law that an acquittal by a criminal Court is tantamount to an outright malicious prosecution. They invited the Court to study the criminal court proceedings which show that there was more than ample and probable cause to warrant the prosecution of the appellant and his acquittal under section 215 of the Penal Code was merely on a technicality.

### **Determination**

20. I have carefully read and considered the pleadings, the evidence adduced as well as the submissions made. This being 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. It is settled law that for a plaintiff to prove malicious prosecution he must show that;

- I. The plaintiff must show that prosecution was instituted by the defendant, or by someone for whose acts he is responsible;
- II. That the prosecution terminated in the plaintiff's favour
- III. That the prosecution was instituted without reasonable and probable cause;
- IV. That the prosecution was actuated by malice

In the case of ***Mbowa v East Mengo District Administration [1972] EA 352, Murunga v Attorney General [1979] KLR 138 the East Africa Court of Appeal*** held that, “*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.*”

21. It is not in dispute that the appellant was charged and acquitted. The matter was investigated by Constable Police Rose Ndolo who indicated that on receiving the said complaint she went to Mr. K's home and spoke to the House girl one R N who stated that while she was bathing Lauryn on 25th November 2002 she told her not to touch her where Hassan had touched her and this was repeated to the parents. This gave reasonable cause for the police to proceed to arrest and charge the appellant.
22. Subsequently the magistrate on hearing the witnesses put the appellant on his defence after establishing that the prosecution had established a case against the appellant. In the case of ***Murunga vs- Attorney General (1979) KLR 138***, where, the Court held that, “*the 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*”.
23. The matter proceeded to full trial and the appellant was only acquitted on a legal technicality due to lack of corroboration of a child's evidence as was stated by the magistrate in her judgment, “*the evidence given by the complainant was of tender age was not corroborated on material facts as such the learned trial magistrate held that without any evidence to corroborate the testimony of the young child the court is indeed tied and the accused must be allowed the benefit of doubt.....he is therefore reluctantly acquitted under section 215 of the Criminal Procedure Code.*”
24. The law is clear that being acquitted of the criminal charge does not necessarily connote malice on the part of the prosecutor. In the case of ***Nzoia Sugar Company Ltd v Fungututi [1988] KLR 399***, the Court of Appeal held that, “*an 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*”.
25. I find that the appellant did not specifically set out the particulars of malice in his pleadings and neither did he prove that the charges were made against him maliciously. I find that since the appellant failed to prove the essential elements of the tort of malicious prosecution, the suit was properly dismissed.
26. I however agree with the appellant on the issue that it is prudent and advisable for a magistrate to assess damages even if the plaintiff failed to prove his claim so that in the event of a successful appeal it is not necessary to remit the case to the Magistrate to assess damages. In the case of ***JOEL KIMITHU MWANGI v SHADRACK KUIRA [2010] High Court Civil Appeal 80 of 2008*** it was held that, “*when a trial court dismisses a suit for damages based on a running down claim, it is obligatory that it assesses damages that it would have otherwise awarded had it found favor with the Plaintiff's claim.*”
27. The magistrate should have assessed the appellant's damages regardless of him failing in proving the same. Should the appellant have succeeded in proving his case on malicious prosecution he would have been awarded the amount of Kshs.200,000/- or more, though I find that Kshs. 200,000/- was reasonable. The appeal is dismissed with costs.

Dated, signed and delivered this **26<sup>th</sup>** day of **February** 2015.

**R.E. OUGO**

**JUDGE**

In the presence of:-

.....For the Appellant

..... For the 1<sup>st</sup> Respondent

.....For the 2<sup>nd</sup> & 3<sup>rd</sup> Respondent

.....Court Clerk