



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT HOMA BAY**

**CIVIL APPEAL NO. 20 OF 2013**

**BETWEEN**

**MAURICE OWINO ONYANGO ..... APPELLANT**

**AND**

**MUSIC COPYRIGHT SOCIETY OF KENYA ..... RESPONDENT**

***(Appeal from the original judgment and decree in Civil Case No. 81 of 2012 at the Chief Magistrates Court at Homa Bay, Hon.N. Kariuki, RM, dated 20<sup>th</sup> September 2013)***

**JUDGMENT**

1. The facts leading up to this appeal are not in dispute. The appellant was working at Ruma Tourist Lodge. On 4<sup>th</sup> November 2009 at about 1 pm, an officer from the respondent's office came to the Lodge accompanied by police officers. They took away the DVD player, music system and speakers. At the time the hotel guests were being entertained by Lingala music. He was arrested and charged at the Homa Bay Law Courts in ***Criminal Case No. 1575 of 2009*** for the offence of infringement of copyrighted material contrary to **sections 35(1) and 38(2)** of the ***Copyright Act, 2001***. Following a trial, the appellant was acquitted under **section 210** of the ***Criminal Procedure Act (Chapter 75 of the Law of Kenya)*** after the court found that the prosecution had not established a prima facie case.
2. Following his acquittal he filed a suit against the respondent for malicious prosecution. He alleged that proceedings were instituted with malice and that he was subjected to the inconvenience and expense of a trial and that he suffered loss and damage and in particular special damages amounting to Kshs. 50,000/- being the legal fees he paid his lawyers. He prayed for special and general damages for malicious prosecution.
3. The respondent denied the allegations that its actions were malicious. It admitted that the appellant was arrested as the establishment was playing music without licence issued by it and that as a result its equipment was impounded and he was charged in court.
4. After hearing the case, the learned magistrate dismissed the appellant's claim. The appellant appeals based on the following grounds set out in the memorandum of appeal dated 20<sup>th</sup> September 2012;
  1. *The learned trial magistrate misapprehended the applicable law with regard to those protected by the 1<sup>st</sup> respondent.*
  2. *The learned trial magistrate erred in law in failing to appreciate the fact that there was no*

- probable cause to put the appellant through the criminal trial as the appellant had not played any music protected under the law.*
3. *That the learned Trial Magistrate erred in law when she failed to appreciate the fact that the trial of the appellant in the criminal proceedings was only meant to coerce the appellant or the appellant's employer to pay fees otherwise considered illegal by the appellant.*
  4. *The learned trial magistrate erred in law in holding that the 1<sup>st</sup> respondent is duty bound to ask for licence from the appellant even if the appellant was not playing the 1<sup>st</sup> respondent's member artistic work.*
  5. *The learned magistrate failed to appreciate that the trial of the appellant and not the appellant's employer was malicious.*

5. As this is a first appeal, I am called upon to examine and evaluate the evidence and reach an independent conclusion as to whether the judgment in the court below should be upheld bearing in mind that I did not hear or see the witnesses testify (see ***Selle v Associated Motor Boat Co. [1968] EA 123***). The facts as I have outlined in the opening part of the judgment are not really in dispute.

6. In their written submissions both parties agree on the ingredients to be proved in a case of malicious prosecution. These elements have been stated in several cases among them; ***Kagane and Others v Attorney General and Another [1969] EALR 643***, ***Katerregga v Attorney-General [1973] EALR 287***, ***Mbowa v East Mengo District Administration [1972] EA 352***, ***Murunga v Attorney General [1979] KLR 138*** as follows;

- a) The plaintiff must show that 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 and probable cause;
- d) That the prosecution was actuated by malice

7. In ***Mbowa v East Mengo District Administration (Supra)***, the East Africa Court of Appeal stated 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.*

8. Whether there was reasonable and probable cause is to be determined from the nature of the charge preferred by the police. The respondent was charged with the infringement of copyrighted musical works contrary to **section 38(2)** of the **Copyright Act** which provides;

*Any person who causes a literary or musical work, an audio-visual work or a sound recording to be performed in public at a time when copyright subsists in such work or sound recording and where such performance is an infringement of that copyright shall be guilty of an offence unless he is able to prove that he had acted in good faith and had no reasonable grounds for supposing that copyright would or might be infringed.*

9. In essence, the provision makes it an offence to cause the performance of a literary, musical or audio visual work protected by copyright in public where such a performance constitutes an infringement. Under **section 35(1)** of the **Act**, an infringement includes, inter alia, the following;

*35(1) Copyright shall be infringed by a person who, without the licence of the owner of the copyright—*

- a. *does, or causes to be done, an act the doing of which is controlled by the copyright; or*
- b. *imports, or causes to be imported, otherwise than for his private and domestic use, an article which he knows to be an infringing copy.*

While displaying a licence issued by the respondent is one way of showing that owner of the premises has permission to cause the copyrighted work to be performed publicly, it is by no means necessary as the accused is permitted to show that he acted in good faith and had no reasonable ground for supposing that copyright would or might be infringed.

10. The appellant in his testimony in the criminal and civil case admitted that Ruma Lodge did not have a licence and that it was playing Lingala music in a public. Under the provisions of **section 38(2)** as read with **section 35(1)** of the **Act**, all public performances of music in which copyright subsists require permission from the copyright owner. The appellant contended that the respondent did not show that the musician more particularly Franco was its member. In my view this was not necessary. The offence for which the appellant was charged was causing a musical work in which copyright subsists to be played in public. The appellant did not contend that copyright did not subsist in the work by Franco or that it had been permitted to play the music by Franco in public. As the appellant did not have a licence, the provisions of the **Act** were breached and the respondent's officer was entitled to lay a complaint to the police.
11. The appellant's grounds of appeal I have set out above basically impugn the capacity of the respondent to enforce licensing provisions of the **Copyright Act**. The respondent is a body licenced to collect royalties under **section 46** of the **Act**. The purpose of the respondent laying the complaint is to ensure that the appellant and other establishments respect copyright law generally. The charge laid against the appellant was not in regard to membership of the respondent but in respect of breach of copyright. I had occasion to deal with this argument in **Music Copyright Society of Kenya v Tom Odhiambo Ogowl Homa Bay HCCA No. 17 of 2014 [2014]eKLR** where I held that;

*With profound respect to the learned magistrates who dealt with the criminal and civil case, the offence [under section 38 of the Copyright Act] had nothing to do with membership of a copyright society. The offence was prosecuted by the police and it applies in respect of all and any works where copyright subsists. A Collection Society, such as MCSK, is charged with collection of royalties on behalf of its members and safeguarding its members' interests by ensuring that persons who play music publicly are duly licenced and if they are not, they are prosecuted and that is why lays a complaint with the police. It is entitled to lodge complaints with the police where reasonable grounds exist.*

12. I find and hold that therefore was probable and reasonable cause for the respondent's officer to lay a complaint against the appellant as there was clear violation of the **Copyright Act**.
13. The law is clear that the mere fact that a person has been acquitted of the criminal charge does not necessarily connote malice on the part of the prosecutor. In **Nzoia Sugar Company Ltd v Fungututi [1988] KLR 399**, the Court of Appeal held;

*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.*

14. Like the learned magistrate I find that no malice was proved. The appellant was prosecuted since he was the one found at the premises and he was the one the respondent's officer dealt with when she and the police officers went to the lodge. Nothing in her conduct suggests ill-will or malice.
15. After evaluating all the evidence before the subordinate court and considering the arguments proffered in the appeal, I affirm the decision of the subordinate court and dismiss the appeal with

costs to the respondent.

**DATED and DELIVERED at HOMA BAY this 30<sup>th</sup> day of April 2015.**

**D.S. MAJANJA**

**JUDGE**

Mr Nyauke instructed by Nyauke & Company Advocates for the appellant.

Mr Rombo instructed by Rombo & Company Advocates for the respondent.