



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO. 189 OF 2007**

*(Being an appeal from the judgment of Hon. B. O. Ochieng – Principal Magistrate delivered on 20<sup>th</sup> September 2007 in Makindu PMCC No. 1 of 2004)*

DWA ESTATE.....APPELLANT

**VERSUS**

JOSEPH WAITA KITUKU.....RESPONDENT

**JUDGMENT**

1. The Appellant, **Dwa Estates Limited** was sued in the Lower Court jointly with The Attorney-General for damages for wrongful imprisonment and malicious prosecution.
2. The Respondent, **Joseph Waita Kituku** in his claim alleged that police officers acting under the instructions of the servants or agents of the Appellant arrested him on 8<sup>th</sup> June, 1999. That the Respondent was wrongfully imprisoned then charged and maliciously prosecuted at Makindu Law Courts. The Respondent further alleged that there was no sufficient evidence to warrant his being charged. That he was intimidated and harassed and his character and reputation injured.
3. The Appellant's statement of defence denied the claim. It was stated that the Respondent was arrested on reasonable suspicion that he had committed an offence.
4. After a full trial, judgment was entered against the Defendants jointly and severally for Ksh 200,000/= General Damages, Ksh 50,000/= Special Damages, costs and interests.
5. The Appellant was dissatisfied with the said judgment and appealed to this court on grounds that can be summarized as follows:
  - a) That the judgment was against the weight of the evidence.
  - b) That the Respondent was arrested and prosecuted on reasonable and probable cause.
  - c) That the award of Ksh 200,000/= as General Damages was excessive.
  - d) That the special damages claim was not proved.
6. The appeal was canvassed by way of written submissions which I have duly considered.

7. This being the first appellate court, the court is duty bound to re-evaluate the evidence on record and come to its own findings – *See Selle –vs- Associated Boat Co. Ltd (1968) EA 123.*

8. In a suit for unlawful confinement and malicious prosecution, the following must be proved –

- a) the prosecution was instituted by the Defendant;
- b) the prosecution terminated in the Plaintiff’s favour;
- c) the prosecution was instituted without reasonable and probable cause;
- d) the prosecution was actuated by malice.

(*See for example Crispus Karanja Njogu v Attorney General & Anor [2005] eKLR.*)

9. The Respondent (PW1) gave evidence that he was chased out of the compound of his employer the Appellant on allegations of theft. The then Appellant’s security agents and police officers from Kibwezi Police Station arrested him and escorted him to Kibwezi police station where he was detained for two days before he was arraigned in court. The Respondent was then charged with the offence of theft but he was acquitted after the court ruled that he had no case to answer. The Respondent also produced receipts in support of the claim for special damages.

10. DW1 Joseph Omudenga Mulikiti and DW2 Mbuvi Munyalo testified on the Appellant’s side. DW1 who was a security officer in the Appellant’s offices testified that he reported the alleged theft at the police station after he had received a report of the same. That he interrogated the Respondent but the Respondent thereafter disappeared. DW1 and police officers from Kibwezi Police Station subsequently went to the home of the Respondent and arrested him. The Respondent was escorted to Kibwezi Police Station and after investigations he was charged.

11. The evidence of DW2, another security officer from the Appellant company is that he saw the Respondent who was driving a tractor registration No. KAH 308H carrying two metal rails. It was DW1 who made a report to DW2, thereby setting the events in question in motion. According to DW2, when the Respondent was questioned, he pleaded for forgiveness. DW2 maintained his evidence during cross-examination.

12. The evidence of DW1 and DW2 showed their reasons for making a report to the police officers. There was therefore reasonable and probable cause.

It was the duty of the police officers to carry out investigations and prefer charges if any offence is disclosed. Although the Respondent was acquitted, there is no evidence of malice on the part of the Appellant or the investigating officers.

13. On whether the award of Ksh 200,000/= as General Damages was excessive, the same is within the range of similar awards made in similar cases (*for example Hassan Ogwimba Akibaya v Attorney General & 2 others [2015] eKLR and James Orengo v Attorney General & Another [2007] eKLR.*)

The award of Kshs 50,000/= was specifically proved as evidence by the receipts produced.

14. The Respondent’s counsel in his submissions referred to the Rule No. 77, 80 and Rule No. 87 of the Appellate Jurisdiction Act Cap. 9, Laws of Kenya. The preamble to the said Act states as follows:

***“An Act of Parliament to confer on the Court of Appeal jurisdiction to hear appeals from the High Court and for purposes incidental thereto.”***

The said Act does not therefore apply to the High Court.

15. On whether the 2<sup>nd</sup> Defendant, the Hon. the Attorney-General ought to have been served with the Notice of Appeal, **Order 42 rule 5** states as follows:

***“Where there is more than one Plaintiffs or Defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the Plaintiffs or to all the Defendants, any one of the Plaintiffs or of the Defendants may appeal from the whole decree, and thereupon the High Court may reverse or vary the decree in favour of all the Plaintiffs or Defendants, as the case may be”.***

The lack of service on the Attorney-General is therefore not detrimental to the Appellant’s case.

16. The Respondent’s counsel’s submissions that the copy of the decree appealed from was omitted from the record of appeal has no merits as there is a copy of the decree in the record of appeal. Some of the exhibits produced in the lower court have however not been included in the record of appeal. This court has however looked at the original record of the lower court, including the documentary exhibits in question.

15. Having held that there was reasonable and probable cause for the arrest, the appeal has merits and is allowed with costs.

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**B. THURANIRA JADEN**

**Dated and delivered** at Machakos this 20<sup>th</sup> day of May, **2015**

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**B. THURANIRA JADEN**

**JUDGE**