



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
CIVIL APPEAL NO130 OF 2010
LAKE VICTORIA WATER SERVICES BOARD.....APPELLANT
VERSUS
MARTIN OKOLA.....RESPONDENT
[Being an Appeal from Original Judgment from Siaya SRM's
Court: S. O. TEMU – RM in civil case No.12 of 2006.]

J U D G M E N T

The respondent sued the appellant in the lower court claiming general damages for, wrongful arrest and malicious prosecution and defamation. After hearing the case the trial court awarded a sum of Kshs.200,000/= in respect to the above prayers. The appellant being dissatisfied has filed this appeal citing basically 3 grounds, namely.

- 1. The appellant was wrongfully sued and thus not liable for the arrest and subsequent prosecution of the respondent.**
- 2. The Attorney-General and the police were not enjoined in the suit.**
- 3. The award of damages on defamation was erroneous as the same was never pleaded.**

The facts leading to the suit are simple and straight forward. In May 2004 at around 9 p.m. the respondent was arrested by the appellant's employees who were accompanied by the Administration police on allegation that he was using water illegally. He was then charged vide criminal case No.648/2004 at Siaya Law Courts. He was acquitted after the complainant failed to turn up in court to testify against the respondent. He then afterwards filed the civil case asking for damages for malicious prosecution and defamation as earlier stated.

I have perused the proceedings from the trial court, together with the relevant exhibits as well as the submissions by both parties herein. The court is enjoined to analyse the matter afresh and arrive at a new and independent finding.

As to whether the respondent was arrested and charged is not an issue in dispute. The criminal suit No.648/04 is a testimony to that. The question however is whether it was the appellant who instigated the

arrest. The charge sheet in the above criminal case states that:

“Martin Gongga Okola:

On 5th day of May, 2004 at Aringo Estate (Awalo zone) of Siaya district within Nyanza Province was found operating non-registered water point the property of National Water Conservation and Pipeline Co-operation without undertakers authority.”

From the above charge sheet which was not apparently amended, its clear, that the appellant was not a complainant. The respondent has contended in his submission that the appellant took over the liabilities of National Water Conservation and Pipeline Corporation pursuant to minutes of 6th March 2006. Whereas this could be true it is however evident that the criminal case was filed in the year 2004 and terminated in favour of the respondent on 16.8.2004. Clearly if there was any undertaking to take over the liabilities of the complainant then there was nothing difficult to amend the charge sheet.

There was also a Kenya gazette notice of 12.3.2004 produced as part of the evidence and it appears that the appellant was constituted on 2.3.04. If this was so then the charge sheet registered on 10.5.04 ought to have indicated the appellant as the complainant.

In light of the above observation I don't think there was proper joinder of parties and it was therefore wrong for judgment to have been entered against the appellant who was not a complainant in the criminal suit.

Although the above grounds ought to dispose this appeal, the other issues of failing to enjoin the Attorney-General and police are equally valid. Clearly the complainant in that case was not the one who led to the arrest and prosecution of the respondent. In his testimony he told the court that he was incarcerated for about 5 hours and released at the police station. In the criminal regime it is only the business of a complainant to raise forth a complaint but the decision of arrest and prosecution is left to the wisdom of the police. In that case the police were not enjoined which then made the entire case fatal.

Neither do I find the award for defamation proven. There was no evidence led by the respondent to show how he was defamed. The award of Kshs.200,000/= was in error since the respondent failed to establish any proof of defamation.

I think I have said enough to suggest that this appeal ought to succeed. The respondent's claim failed from the day the police drafted a charge sheet which indicated a wrong party as a complainant. There ought to have been an amendment especially taking cognizance of the Kenya gazette notice which effectively set the appellant as the body to oversee water operations in the region.

The appeal is allowed; the lower court judgment and decree is set aside.

Costs to the appellant.

Dated, signed and delivered this 30th day of July 2015.

H. K. CHEMITEI

J U D G E