



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

HCCA NO. 89 OF 2013

JUBILEE JUMBO HARDWARE LTD.....APPELLANT

VERSUS

MARK OYUGI KASERA.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

(Being an appeal from the Judgment of Hon. Obutu Senior Resident Magistrate delivered at

Kisumu on 10th October 2013 at Kisumu Chief Magistrate Civil Case No. 450 of 2010)

JUDGMENT

The appellant being aggrieved by the award of Kshs.600,000/= and Specials of Kshs.50,000/= made to the Respondent for malicious prosecution has filed this appeal. The appellant who was the 1st Defendant in the lower Court has listed the following grounds in the Memorandum of appeal:-

- 1. That the learned Magistrate erred in law and fact by finding that there was malicious prosecution without supportive evidence.**
- 2. That the learned Magistrate erred in law and fact by failing to analyze the evidence given both in the Criminal and Civil case hence arising at a wrong decision.**
- 3. The learned Magistrate erred in law and fact by finding that the complainant refused to come to Court to testify in the Criminal case when he was never summoned or bonded to attend Court.**
- 4. The learned Magistrate erred in law and fact by failing to interpret the law properly hence arriving at a wrong decision.**
- 5. The learned Magistrate erred in law and fact by giving a judgment against the weight of evidence on record.**
- 6. The learned Magistrate erred in law and fact by failing to consider the defence evidence on record hence arising at a wrong decision.**
- 7. That the learned Magistrate erred in law and fact by making award which is unreasonably high and not supported by law.**

8. That the learned Magistrate erred in law and fact by considering extraneous factors hence arriving at a wrong decision.

9. The learned trial Magistrate erred in law and fact by blaming the complainant for the failure in the criminal case and yet the complainant was not the one prosecuting the case.

10. The learned trial Magistrate erred in law and fact by failing to find that the Plaintiff had not proved his case as against the Appellant to the standard required by law.

The Respondent's claim in the lower Court was based on an unsuccessful prosecution on a charge of theft by servant contrary to section 281 of the Penal Code. It had there been alleged that he had failed to deliver a sum of Kshs.200,000/= given to him by one of his employer's customers to deliver to him. However he denied it and after considering the evidence adduced by the prosecution, the Court found that there was no conclusive evidence that the money had been given to him and acquitted him under Section 210 of the Criminal Procedure Code.

In the lower Court the Respondents averred that the prosecution which was instigated by the appellant and which terminated in his favour was without probable and reasonable cause and was actuated by malice. In the plaint he pleaded the particulars of malice as follows:-

- a. Making a false, malicious and unfounded report to the police with the sole purpose of intimidating the Plaintiff and unfairly punishing him.**
- b. Accusing the Plaintiff of theft by servant occasioning the loss of the employment.**
- c. Giving false, misleading and unbelievable evidence against the Plaintiff.**
- d. Arraigning the Plaintiff in Court without proper and conclusive investigations.**
- e. Presenting a charge that could not be proved in Court.**

In his evidence he vehemently denied that any money had been given to him to take to his employer. He testified that although the police searched his house nothing was recovered. He stated that the Attorney General who was the 2nd Defendant in the matter acted without proper instructions.

The appellant on her part called one witness who conceded making the report, that resulted in the Respondent being charged to the police. He stated that he had sent the Respondent to collect 200,000/= from one of the customers and contended that the Respondent did not bring the money. He further testified that he had no proof that he sent the Respondent to collect the money.

As the first appellate Court I am obligated to reconsider and evaluate the evidence afresh so as to arrive at my own conclusion all the while being cautious that unlike the trial Magistrate I did not have the benefit of seeing and hearing the witnesses – **Selle & Another V. Associated Motors Boat Company [1968] E.A. 123**. I have in addition considered the submissions of the learned Advocates for the parties and perused the authorities in support of their arguments.

To succeed in a suit for malicious prosecution the Plaintiff must prove :-

1. That the prosecution was instituted by the defendant or by someone to whose acts he is responsible.
2. That the prosecution terminated in the Plaintiff's favour.
3. That the prosecution was instituted without reasonable and probable cause.
4. That the prosecution was actuated by malice.

Murunga V. The Attorney General [1976-80] KLR 1251. As was held by my brother Odunga J in **Dr. Lucas Nudngu Munyua V. Royal Media Services Limited and Another NRB. HCCC 52 OF 2008** and I agree with him:-

"The tort of malicious prosecution cannot stand unless it is shown that there was no reasonable or probable cause for making a report to the police as the case of malicious prosecution must founder on the absence of proof of malice or ill will.....it is trite learning that acquittal per se is not sufficient basis to ground a suit for malicious prosecution without spite or ill will."

The Respondent's case duly met the first and second tests as it was conceded even by the appellant's witness that it was he who reported the matter to the police. It is also clear from the evidence placed before the the Court that the Prosecution terminated in his favour.

The test as to what constitutes probable or reasonable cause is objective and it is "whether the material known to the prosecutor would have satisfied a prudent and cautious man that the Plaintiff was probably guilty of the offence. - **Kagane V. Attorney General and Another [1969] E.A. 643**, where it was held:-

"Excluding cases where the basis for the prosecution is alleged to be wholly fabricated by the prosecutor, in which the sole issue is whether the case for the prosecution was so fabricated or not, the question as to whether there was reasonable and probable cause for the prosecution in primarily to be judged on the basis of an objective test. That is to say, to constitute reasonable and probable cause the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material consisted of facts discovered by the prosecutor or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty. If and insofar as that material is based upon information, the information must be reasonably credible, such that an ordinary reasonable prudent and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for the prosecution."

In addition to demonstrating that the prosecution was without probable and reasonable cause the Plaintiff must prove that the prosecution was actuated by malice.

The Respondent's case was that the report made to the police by the appellant was false. At paragraph 6(a) -(d) he pleads the particulars of malice of the 1st Defendant and at paragraph 8(a) & (b) those of malice by the police. My finding however is that his case did not meet the second and fourth test. There was evidence at the criminal trial that he had in fact been given Kshs.200,000/= to deliver to his employer. The person who gave him that money testified as PW4 at the trial. There was also evidence from a fellow employee, a turn boy (PW2) who had accompanied him on the trip that time that he, Respondent, had confessed to him that he had lost the money. In my view the evidence of PW2 who was his fellow employee confirmed that it was highly probable that the Respondent had received the money to deliver to his employer. The fact that the said employer was not called as a witness was in my view not fatal to the prosecution's case as there was no dispute that the respondent did not deliver the money. What would have been fatal would have been the omission to call the person who had allegedly given the money to him. The case may certainly have been lost on the ground that the respondent had not signed anywhere for it but that in my view does not satisfy the test that the prosecution was without probable or reasonable cause. The onus of proof in a criminal trial is high and it is proof beyond all reasonable doubt. Indeed the trial Magistrate found that this test had not been met.

That does not mean however that the prosecution was without reasonable or probable cause. As I have stated there was indeed evidence that the respondent received the money and that he was heard saying he lost it. The evidence was such as would in my view "have satisfied a prudent and cautious man that the accused was probably guilty." The particulars of malice pleaded in the plaint do not point to malice. Instead they are the respondent's own explanation as to the lack of reasonable and probable cause in the prosecution.

This appeal has merit and I accordingly allow it. Accordingly the judgment of the lower Court is set aside together with the attendant award for damages.

The appellant shall have the costs of this appeal.

Signed, dated and delivered at Kisumu this23rd.... day of July..... 2015

E. N. MAINA

JUDGE

In the presence of:-

Mr. P.D. Onyango for the appellant

Mr. Yogo for the 1st Respondent

N/A for the 2nd Respondent

CC: Moses Okumu