



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 44 OF 2005**

**PAULINE WARUIRU GICHERU.....APPELLANT**

**VERSUS**

**ROBERT KIRAGU KIMWAKI**

**THE ATTORNEY GENERAL.....RESPONDENTS**

*(Being an appeal from the Judgment of Hon. Lucy Mutai (Senior Resident Magistrate) delivered on 9th January, 2005 in Githunguri Senior Magistrate's Civil Case No. 46 of 2001)*

**JUDGMENT**

The Appellant was the 1<sup>st</sup> Defendant in the trial court. The suit was filed against her by the 1<sup>st</sup> Respondent. The 2<sup>nd</sup> Respondent was the 2<sup>nd</sup> Defendant in the suit. His (the 1<sup>st</sup> respondent) claim was for general damages for unlawful arrest, detention and malicious prosecution. Special damages of Kshs. 24,000/- together with interest and costs of the suit were also sought.

Following a full trial, the learned trial Magistrate entered judgment on liability for the Plaintiff and awarded general damages for false imprisonment amounting to Ksh. 85,000/=. He was also awarded costs of the suit plus interest at the court rates.

The Appellant being aggrieved by the Judgment filed this appeal upon six (6) grounds namely-

1. That the learned trial Magistrate erred in law and fact in finding the Appellant and the 2<sup>nd</sup> Respondent were jointly and severally liable.
2. That the trial Magistrate erred in law and fact in entering judgment against the Appellant and the 2<sup>nd</sup> Respondent for the sum of Kshs. 85,000/- without weighing the evidence of the appellant.
3. That the learned trial Magistrate erred in law and fact by failing to consider the submissions and the evidence adduced by the appellant thus arriving at a wrong conclusion.
4. That the learned trial Magistrate erred in law and fact in holding that the essential ingredients of the tort of malicious prosecution had been proved by the 1<sup>st</sup> Respondent.
5. That the trial Magistrate erred in law and fact in failing to consider the 1<sup>st</sup> Respondent had not particularized the facts constituting malice as required by the law.

6. That the trial Magistrate erred in law and fact by failing to take into account the fact that the plaintiff had failed in proving the essential elements of the tort of malicious prosecution against the Appellant.

The appeal was argued by way of written submissions.

In view of the foregoing, the issues for determination are -

- i. Whether the Appellant and 2nd Respondent were liable for unlawful arrest, detention and malicious prosecution of the 1st Respondent.
- ii. Whether all the 1st Respondent's claims were proved on a balance of probability.
- iii. Whether the damages were awarded appropriately.

The duty of this court, being the first appellate court is to re-evaluate the evidence on record and come up with a finding of its own bearing in mind that it has neither seen nor heard the witnesses. See **Sumaria & Another -Vs- Allied Industrial Limited (2007) 2 KLR 1.**

In the plaint, the 1st Respondent averred that on 3<sup>rd</sup> October, 2000 police officers from Githunguri Police Station arrested him on allegations of attempted Robbery with Violence where he was confined for six (6) days. Thereafter he was arraigned in court in **Limuru Senior Resident Criminal Case 2208 of 2000** from which he was subsequently acquitted under Section 210 of the Criminal Procedure Code.

Hence, according to the 1st Respondent, his arrest, detention and malicious prosecution was without factual and legal basis and was actuated by malice. As well, there was no basis why the police detained him.

The principles that govern a claim founded on malicious prosecution were laid down by Cortran, J in the case of **Murunga -Vs- Attorney General (1979) KLR, 138 -**

- a. The Plaintiff must show that the prosecution was instituted by the Defendant, or by someone for whose acts he is responsible.
- b. The Plaintiff must show that the prosecution terminated in his favour.
- c. The Plaintiff must demonstrate that the prosecution was instituted without reasonable and probable cause.
- d. He must also show that the prosecution was actuated by malice.

In his testimony in the lower Court, the 1<sup>st</sup> Respondent stated that he was arrested on the allegation that he had attempted to rob the Appellant in her home, as an unknown person had thrown a stone in her compound injuring the Appellant's employee. After being charged, he was remanded in Kamiti Maximum Prison for six months.

The Appellant's testimony was to the effect that she only reported an incident in which her employee's finger was injured when a stone was thrown in her compound. She further testified that she did not name the suspect as she did not know who had thrown the stone. She mentioned in her testimony that she knew the 1<sup>st</sup> Respondent's family and had differed with them prior to this incident. This was not substantiated.

From the summary of evidence, it is clear that the complaint to the police against the 1<sup>st</sup> Respondent was made by the Appellant.

As to whether the matter was terminated in the 1st Respondent's favour, it is factual that he was acquitted after it was established that he had no case to answer. The Court found that there was no evidence to link him to the alleged robbery. Thus the prosecution terminated in his favour.

Was he arrested and/or prosecuted without probable and reasonable cause?

In the case of Nairobi HCCA No. 595 OF 2000 Socfinaf Kenya Ltd Vs. Peter Guchu Kuria Aganyanya J. (as he then was) noted -

***“That a suspect was acquitted of a criminal case is not sufficient ground for filing a civil suit to claim damages for malicious prosecution or false imprisonment. Evidence of spite, ill will, lack of reasonable and probable cause must be established.”***

In the case of Hicks Vs Fawkers (1878), 8 Q.B.D. 167 probable and reasonable cause was defined as -

***“Reasonable and probable cause is an honest belief in the guilt of the Accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary, prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed.”***

In Kagane – Vs – Attorney General & Another (1969) EA 643 it was reiterated -

***“...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 the 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.”***

In the matter before this court, when the Appellant reported the attempted robbery, it was up to the police to take further steps like taking a suspect to court if they had sufficient evidence against such suspect to warrant such action.

The onus of proving that there was no reasonable and probable cause for the arrest and prosecution of the suspect lies on him/her who queries such arrest or prosecution. In the case subject to this appeal did the Respondent prove on a balance of probabilities that the report made to the Police Station about the attempted robbery with violence was false and malicious?

As to the prosecution of the 1<sup>st</sup> Respondent, the complainant could not force police to do so when there was no evidence to take him to court. Police carry out investigations before taking suspects to court and there are various incidents when police have declined to prosecute a suspect when investigations have disclosed no offence to warrant it. Acquittal of a suspect in a criminal case is not sufficient ground for filing a civil suit to claim damages for malicious prosecution or false imprisonment. Evidence of spite, ill-will, lack of reasonable and probable cause must be established.

In Thomas Mboya Oluoch & Another Vs. Muthoni Stephene & Another [2005] e KLR J.B Ojwang, J. (as he then was) averred -

***“Unless and until the common law tort of malicious prosecution is abolished by Parliament, policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice, in initiating prosecution and in seeking conviction against the individual, cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense.”***

Therefore, there was nothing wrong with the police arresting the 1st Respondent if they had during their independent investigations established that he was culpable and if they found that he was not culpable, release him. In lieu thereof, the police ought to have given him a bond pending their independent investigations. Instead, they detained him in the cells for six (6) days on mere robbery allegations and on their instigation he was remanded for a further six months in a maximum correction facility without an iota of evidence against him. There was no probable cause to do it and it is safe to conclude that it was actuated by malice as the police may have intended to please the Appellant.

Under Section 72 (3) (b) of the repealed Constitution, a suspect ought not to have been held in the remand for more than 24 hours without any justifiable cause. Having found that there was no justifiable cause why the 1st Respondent was incarcerated in the police cells for that long, it follows that he was entitled to a claim of false imprisonment.

Furthermore, the Appellant in her testimony was at pains to explain why she would report an incident of attempted robbery with violence (that three men attempted to rob her while armed with dangerous weapons) while evidence available in the trial court did not confirm any of her allegations. The appellant's employee was hit with a stone on the finger by people she did not see but in the identification parade she startlingly positively pinpointed the 2<sup>nd</sup> Respondent as one of the men who had hit her.

In her judgment the learned magistrate noted -

***“The 1<sup>st</sup> Defendant knew very well that he never saw anybody at the scene and so armed with dangerous weapons she knew very well that nobody ever attempted to rob her yet she told the police that somebody attempted to rob her while armed with dangerous weapons. It is on record that prior to or before 1.8.2000 the 1<sup>st</sup> Defendant husband had assaulted the Plaintiff and another. The Plaintiff had made the report to the police as against the 1<sup>st</sup> Defendant husband who was duly arrested but released soon thereafter. Immediately he was released the Plaintiff was arrested and charged with the said offence. It was revealed by the Investigating officer that the assault case reported by the Plaintiff was stayed so that the attempted robbery case could be dealt with first. I did note that there was no causation or connection between the two complainants to justify any waiting as stated by the investigating officer. I noted that the parties were however the same which left me to find that the police were caused by the 1<sup>st</sup> defendant to stay the Plaintiff complain.....” (See judgment in the trial court at page 79 of the Record of Appeal)***

It would therefore be correct to conclude that on liability, the learned magistrate did not misapprehend the facts and the law and accurately analysed the law and evidence available before her to find that the Defendants were jointly and severally liable for unlawful arrest, detention and malicious prosecution.

Finally, on the issue of quantum, an appellate court will only interfere with an award of damages if the same is either inordinately so high or so low, or the estimate is erroneous and is based on a wrong factor or wrong principles of the law.

In the instant case, the 1st Respondent was detained for six (6) days before being arraigned in court and thereafter was remanded for six (6) months before he was finally acquitted. Kshs. 85,000/= awarded was reasonable and there is no reason to disturb it.

In the end this appeal is dismissed. The award of general damages for unlawful arrest, detention and malicious prosecution amounting to Kshs. 85,000/- is upheld payable by the Appellant and the 2nd Respondent jointly and severally with interest from the date of Judgment in the trial court. The 1<sup>st</sup> Respondent shall have costs of this appeal and the lower court suit.

It is so ordered.

***Dated, signed and delivered at Nairobi this 22<sup>nd</sup> day of July, 2015***

**A . MBOGHOLI MSAGHA**

**JUDGE**