



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 281 OF 2010

MASTERMIND TOBACCO (K) LTD.....APPELLANT

VERSUS

GERALD MATE KINYUA.....RESPONDENT

*(An Appeal from the Judgment and Decree of the Principal Magistrate (S.M.S.SOITA) delivered at Molo on the 12th day of October 2010 in **Molo Principal Magistrate's Court Civil Case Number 129 of 2009**)*

JUDGMENT

1. The Appeal hereof arose from the judgment of the trial court in which the Respondent was awarded a sum of Kshs.400,000/= damages for malicious prosecution and Kshs.100,000/= in special damages.

The Respondent was the plaintiff in the trial court. In his testimony, he testified that on the 6th May 2006 he was arrested by the police from Molo police station at his house where the police recovered seven(7) cartons of cigarettes upon a complaint from **Mastermind Tobacco (K) Limited**. He was detained at the police station for five(5) days and later was charged with the offence of robbery with violence and also being in possession of Government stores in **Molo PMCC Criminal Case Number 1375 of 2006**.

After hearing the prosecution case, the court made a finding that he had no case to answer and was acquitted for lack of sufficient evidence under **Section 210 of the Criminal Procedure Code**, while his two co-accuseds were put on their defences.

It was his testimony that he sued the Appellant because it was the complainant who gave false information to the police leading to his arrest and subsequent prosecution.

He further testified that he sued the Attorney General because it did not investigate the case properly. The Appellant filed its defence but did not call any evidence. The trial court found the defendants jointly and severally liable and awarded damages as stated above.

2. The appellant was dissatisfied with the trial court's judgment and lodged the appeal stating grounds, in summary, that the trial Magistrate erred in fact and law by finding that the Respondent was maliciously prosecuted at the instance of the appellant and in his finding that the Respondent had proved his case on a balance of probability. The Appellant faulted the trial court for awarding the Respondent what it termed as alarmingly excessive general damages. The court is urged to set aside the said judgment and dismiss the case in the trial court.

Both the Appellant and the Respondent filed written submissions on the appeal.

3. **The Appellants submissions.**

In its submissions, the appellant submitted that the report of the alleged robbery and hijacking of its motor vehicle and goods around Salgaa along the **Nakuru-Eldoret highway** was made by the Respondent's co-accuseds being the driver and conductor of the said vehicle **KAM 145X Canter**, and not itself, at Molo Police station. The police arrested the two employees of the appellant as it did not believe the report. Later after their investigations, they arrested the Respondent who was the appellants former employee, and who assisted the two employees by signing bond on their behalf to secure their release. It is its submission that the police recovered its stolen cigarettes stored in a house by the Respondent and upon which the three were re-arrested and charged.

The trial court however found no case against the Respondent and acquitted him. It is upon that acquittal that he filed the civil case for damages for malicious prosecution and false imprisonment.

In its submission, the Appellant stated that it is the accused who made the report of the robbery to the police, and not the appellant who instituted the said criminal proceedings.

On cross examination in both the criminal and civil trials, the Respondent admitted that the report of robbery was true, to which it is stated that, then, there was no false report made as the contents of the said report were true.

It is further submitted that even if the report were found to be false, it is the respondent's co-accuseds who made it, not the appellant who was the owner of the stolen property. The Respondent stated that in their evidence in the criminal trial, the appellants witnesses who testified never stated that the respondent stole the cigarettes. In his testimony the Respondent stated he was dragged into the criminal case by his former landlord and not the Appellant.

It is their final submission that the trial courts judgment was not supported by the evidence on record, and the court considered irrelevant factors. The appellant urged the court to allow the appeal.

4. **The Respondent's submissions**

The Respondent urged the grounds of appeal collectively on the issue of liability, that for an action of malicious prosecution to succeed, the Respondent has to establish the following:

1. That the proceedings were instituted or continued by the appellant.
2. That the appellant acted without any reasonable and probable cause.
3. That the appellant acted maliciously
4. That the proceedings were terminated in favour of the Respondent.

The Respondent submitted that the first condition above was satisfied when the arresting officer while testifying stated that the complaint against the Respondent emanated from the appellant, and relied on the case **Christine Otieno Calleb -Vs- AG (2014) KLR**.

It further submitted that the Appellant failed to offer any evidence leaving the Respondent's evidence uncontroverted and therefore unchallenged. It was further submitted that the prosecution was malicious, dishonest and unreasonable as the report made to the police was without probable cause, that it was upon the appellant to prove that the police did not act dishonestly or unreasonably which it is stated was the case, and supported the award of damages for malicious prosecution.

5. This is the first appellate court. It is mandated to re-evaluate the evidence tendered before the trial court and come up with its own findings and conclusions as stated in **Selle Vs- Associated Motorboat Co. Ltd (EA)123**.

The court has considered the uncontroverted evidence of the Respondent before the trial court. The Appellant had filed its defence denying all the allegations labelled against it. It did not however tender any evidence. To that extent, the Appellants statements remain as mere allegations. See **Order 2 rule 11 of the Civil Procedure Rules** and **Janet Rehiphe Ouma and Another -vs- Marie Stopes International (Kenya) Kisumu HCCC No 68 of 2007**. Similarly, the same sediments were expressed in the case of **Trust Bank Ltd -vs- Paramount Universal Bank Ltd, Nairobi HCCC No 1243 of 2001** that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements.

The Respondent in his plaint in the lower court stated that he was arrested by the police on grounds that he was a suspect in regard to stealing goods on transit **Contrary to Section 279(c) of the Penal Code**, was maliciously and without reasonable and probable cause charged in **Molo Criminal Case No. 1375 of 2006**. He alleged that the stolen goods belonged to the appellant and the appellant connected the Respondent with and or caused the arrest and prosecution with the offence but after trial he was acquitted under **Section 210 of the Criminal Procedure Code**. Particulars of the malicious prosecution were itemised. As a consequence the Respondent stated that he was injured in his reputation and put to considerable trouble and holds the appellant and the Attorney General jointly and severally liable.

6. In its judgment, the trial court made a finding that the Appellant was the complainant in the criminal trial and the Respondent was arrested upon false information to the police, that the appellant did not call any evidence to rebut that evidence, and that investigations by the police were poorly executed. He proceeded to hold both defendants jointly and severally liable. In the case **Gitau -vs- AG 1990 KLR** it was held that the tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings against a person, and where it is made for personal gain, and not for public good. There must be existence of malice and distortion of the truth.

7. The claimant must establish that the defendant or his agent set the law in motion against him on the criminal charge, meaning, that the defendant must be actively instrumental in causing the person with judicial authority to take action that involves the person in a criminal charge against another before the magistrate and that he who sets the law in motion must have done so without reasonable and probable cause. That duty rests on the officer incharge of a police station. If the officer believes in the testimony of what the witnesses told him, then he is justified in putting the law into motion.

To that extent, the prosecution is not malicious there being probable and reasonable cause.

8. The **Case Kagane -vs- AG(1969) EA 643** set the test for reasonable and probable cause, that it is an honest belief in the guilty 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. It further went on that to constitute reasonable and probable cause the totality of the material within the knowledge of the prosecutor(police) at the time he instituted the prosecution, whether that material consisted of facts discovered by the prosecutor or information which has come to him, must be capable of satisfying that the accused is probably guilty.

The mere fact that a person has been acquitted of a criminal charge does not necessarily connote malice on the part of the prosecutor. This was held in **James Karugu Kiiru -VS-Joseph Mwamburi & 3 Others Nairobi CA No 171 of 2000**. It was also held that to prosecute a person is not *prima facie* tortious, but to do so dishonestly and unreasonably act would be malicious. The burden of proof lies with the prosecutor to prove that he did dishonest or unreasonable act on the person prosecuted.

9. It is also trite that once a complaint is lodged, the police ought to mount an investigation before preferring a charge against a suspect.

The police must therefore act impartially and independently and to carry out thorough investigations.

Having stated the parameters and test upon which a case for malicious prosecution ought to be hangered

on, it now behoves the court to determine whether, upon the evidence in the criminal trial, the prosecution was malicious and without probable and reasonable cause.

The circumstances as stated point to the fact that the prosecution of the Respondent was instituted on behalf, but not by the Appellant whose goods had been stolen. Its officers gave evidence in the criminal trial to establish ownership of the said stolen goods and recovered goods. The appellants witnesses did not mention or lay a claim against the Respondent. They stated that the robbery was reported by the driver and turn boy of their vehicle and after the police investigations, the Respondent was arrested and together with the co-accused were charged with the offences.

10. PW9 Sgt. Hannington Olweny was the investigating officer. He testified how he recovered some of the stolen cigarettes from the respondents house at Nakuru in his presence, the property of the Appellant. It is this Respondent who had signed bonds for the driver and the conductor of the Appellants lorry to secure their release. The investigation officers testimony was quite detailed as to how investigations led them to the Respondent's house and recovery of the stolen cigarettes from the Respondent's house, and eventual arrest and prosecution.

In Cross Examination before the trial court in **PMCC No. 129 of 2009**, the Respondent stated that it is his co-accuseds who reported the alleged robbery to the police and that according to him, the report of the robbery was true and further that he was dragged into criminal case by his landlord. He did not fault the appellant at all for its arrest.

From the foregoing, it presents to me that the complaint and report to the police emanated from the Respondents co-accuseds. The appellant in my view got involved because the stolen property belonged to it and its employees were bonded to testify as to its ownership of the goods. Indeed, none of the Appellants witnesses pointed at the Respondents guilt.

It is the court's finding that the criminal proceedings were not instituted or continued by the appellant but by the investigating officer who connected the Respondent to the alleged robbery when he recovered part of the stolen cigarettes from the Respondents house and no plausible explanation was offered to his satisfaction.

11. Did the police officers then institute the prosecution without reasonable or probable cause?

As stated in the case **Gitau -vs- AG (Supra)**, there was a legal reason for instituting the prosecution. Indeed in his own testimony, the Respondent confirmed and believed that the report made to the police of robbery was true. It therefore follows that the investigation that followed and subsequent arrest and prosecution was without malice, and there existed a probable and reasonable cause. The case **Kagane -vs- AG (Supra)** held that reasonable and probable cause is an honest belief in the guilt of the accused founded on reasonable grounds of existence of circumstances that point to the commission of the offence.

I have stated that the very detailed investigation pointed to nothing but a honest belief that the accused had committed the offence.

The court finds that any reasonable, prudent and cautious person would have instituted the criminal proceedings against the Respondent.

12. It is true that the Respondent was acquitted of the offences he was charged with. This however does not connote malice on the party who instituted the prosecution so long as the same was done honestly, reasonably and without malice. In the case **James Karugu -vs- R (Supra)**, it was held that the Respondent has the burden to prove that the prosecutor acted dishonestly and unreasonably. In the trial before the lower court, this burden was not discharged. The Respondent did not demonstrate how the police (prosecutor) acted maliciously and dishonestly. He admitted that the police took seven cartons of cigarettes from his house which were suspected to have been part of the stolen cigarettes. He stated that the police told him that it is his two co-accused who made the robbery with violence report to the police station.

It is clear therefore that the Respondent had no reasonable grounds upon which he could claim, in the lower court civil case that the appellant was the complainant and gave false information to the police. Indeed, his testimony was that the Attorney General through the police did not investigate the case properly thus charged him falsely. He continued to testify that they (police) ruined his reputation by labelling him a thief.

13. I have considered the trial court's judgment. I find no grounds upon which the magistrate based his finding that the Appellant was the complainant and that the Respondent was arrested on basis of false information. I have also noted that the Respondent on cross examination stated that it was his former Landlord one **David Kiiru Njoroge** who dragged him into the criminal proceedings and not the appellant. By his own testimony and admission the Respondent exonerated the Appellant from blame and liability totally.

14. The Respondent's evidence in the trial court was not challenged by the Appellant who tendered no evidence. In all the cases relied upon above agree that if a party fails to support its case by evidence, the party's pleadings remain as mere statements – See **Section 107 and 108 of the Evidence Act, and order 2 Rule 11 of the Civil Procedure Code.**

In my considered view, that does not give a party a blanket licence to the prayers sought. The party must prove its case on a balance of probability based on its pleadings and evidence, with or without the defence evidence.

The Respondent tendered his evidence before the criminal trial court resulting to the Judgment under attack in this appeal. I have made my findings and conclusions based on the evidence on record as mandated, without the benefit of the appellants evidence.

The trial court awarded a sum of Kshs.400,000/= damages for malicious prosecution and false imprisonment. The Judgment does not show on what basis that award was granted. It is silent on the method or authorities the court relied on to arrive at the said amount. An award of damages ought to be hangered on some reasoning and comparable authorities. That having not been done, the Appellant was right in its submissions that the trial courts judgment was narrow and not reasoned.

15. The court finds that the Respondent did not prove its case to the required standard on a balance of probability, and that the trial court's judgment was based on no sound analysis of the law and the evidence tendered in court. The appeal is allowed with costs and the trial court's case **SPMCC NO. 129 of 2009** is likewise dismissed with costs.

Dated, signed and delivered in open court this 16th day of December 2015

JANET MULWA

JUDGE