



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 18 OF 2012

(An appeal from the judgment and decree of the Senior Resident Magistrate T. N. Bosibori Ms in Civil Case No. 44 of 2010 at Vihiga)

NICKSON MAJANI IDAGASI APPELLANT

VERSUS

THE HON. THE ATTORNEY GENERAL RESPONDENT

JUDGMENT

The appellant brought civil proceedings in the subordinate court at Vihiga through a plaint filed on 8/9/2010. The prayers were as follows -

- a. Special damages Kshs.398,300/=.
- b. General damages for wrongful arrest and false imprisonment.
- c. General damages for malicious prosecution.
- d. Costs.
- e. Interest on (a) from the date of filing suit until payment in full and on (b) and (c) from the date of judgment until payment in full.
- f. Any other relief the honourable court may deem to order.

In progressing the case in the subordinate court, the appellant called two witnesses. The 1st was the appellant himself PW1. He stated that he was a businessman trading in the name of Nixon Majani Timber Works. That he was wrongfully and maliciously arrested at the Chief's office in Mudungu, Sabatia area in April 2007. He was charged with an offence of wilfully and maliciously cutting trees at the Chief office, while he had actually been sent by Mr. Kibisu, a former MP of the area to cut the said trees.

He called Mr. Kibisu as PW2. The said Mr. Kibisu did not testify in chief. However, by consent of the appellant's counsel and the State Counsel a written statement was admitted in court as his testimony. Mr. Kibisu was however cross-examined and he confirmed that he sent the appellant and others to cut down the trees because he had only sold land to the Government for the Chief's office but not the trees. He maintained that the trees belonged to him and that he had been called to the scene at the time of arrest of the appellant and confirmed that he was the one who sent him and others to cut the trees.

In defence, the Attorney General called four witnesses. DW1 was John Kidali, the Chief of the area. He stated that he received a call from the D.O. on 16/4/2007 informing him that some people were cutting down trees at the office. The appellant was arrested because though others ran away, he did not do so. He produced a copy of a search and minutes which showed that Mr. Kibisu had sold the land to the

Government. He stated that the sale of land included the trees. DW2 was Cpl. John Orombo. It was his evidence that by 16/4/2007 there was a previous report that the Chief's office had been burnt down. On that day, some people were found cutting down trees at the Chief's office. He pursued them and arrested the appellant. DW3 was Thomason Tarus. His evidence was that on the material date, he received a report from his seniors that trees were cut down at the Chief's office. That he arrested the appellant who told him that he had been contracted to cut down the trees by Hon. Kibisu. DW4 was a Forest Service Officer. It was his evidence that he went to the scene and assessed the value of the tree which was cut at Kshs.6,000/=. That was the evidence before the magistrate.

On conclusion of the case and after considering that the appellant had been acquitted in a criminal case where he was charged prior to filing the civil suit, the learned magistrate found that the appellant did not prove his case on the balance of probabilities. The learned magistrate found that the appellant did not establish malice or lack of probable cause in his arrest, detention and prosecution in court. The learned magistrate held the view that since Hon. Kibisu had sold the land, he had also sold the trees which were items permanently attached to the land. She therefore found that though the appellant was acquitted in the criminal case, the Government reasonably believed that the trees belonged to them. The Government also followed the laid down procedures to protect their property. The learned magistrate found that the Government had reasonable cause and did not act maliciously. The magistrate therefore found that the appellant was not entitled to either award of special or general damages. The court dismissed the appellant's case.

The appellant being aggrieved by the decision of the lower court has appealed to this court through his counsel T. T. Aswani Advocate. The grounds of appeal are as follows -

- a. That the learned Senior magistrate erred in law and in fact in holding that the respondent had shown that it had a reasonable and proper cause to prosecute the appellant as it did.
- b. That the learned Senior magistrate erred in law and fact in holding that the appellant had not established malice that actuated the respondent in prosecuting him.
- c. That the learned senior magistrate misdirected herself in valuation of the evidence in the criminal trial as to the ownership of the trees.
- d. That the learned senior magistrate erred in law and in fact in finding that the appellant had not established his case on a balance of probabilities.
- e. That the learned senior magistrate erred in law and fact in denying to award any of the special damages to the appellant as claimed.
- f. That the learned senior magistrate erred in law and in fact in failing to assess the general damages which would have been awarded to the appellant had he succeeded in his case.

The counsel for the parties T. T. Aswani for the appellant, and the Attorney General on the other hand filed written submissions to the appeal. Mr. Amendi who appeared at the hearing of the appeal for the appellant and Mr. Onyiso who appeared for the respondent, relied on the submissions filed. I have considered the submissions filed by both counsel for the parties as well as the authorities cited.

This is a first appeal. As a first appellate court, I am required to re-assess the evidence on record. I am not bound to agree with the findings of the trial court. See the case of **Selle & Another -vs- Associated Motorboat Company Limited & Others [1968] EA 173**. This case was cited by the appellant's counsel.

I have re-assessed the evidence on record. There is no dispute that the land on which the trees were cut by the appellant and others, previously belonged to Peter Kibisu. There is no dispute that Peter Kibisu sold the land to the Provincial Administration or the Chief. The agreement for sale appears to have been done, not through lawyers or through the Attorney General, but through the local Provincial Administration and the seller. The seller Mr. Kibisu interpreted the sale to mean that the trees had not been sold. It is not in dispute that Peter Kibisu is the one who sent the appellant and others to cut down the trees. He was called to the scene immediately the D.O. arrived and confirmed having sent the appellant to cut trees. However, the appellant was arrested, detained and charged and prosecuted for the cutting of the tree.

The issue here is whether the arrest, detention, charging and prosecution of the appellant was based on reasonable cause by the State. Having re-evaluated all the evidence on record, both in the criminal trial which proceedings were produced in the civil case, and the civil case itself, I am convinced that the State did not have any reason to charge to prosecute the appellant herein. This is because it is a known and undisputed fact that the subject land was sold by Peter Kibisu to the Provincial Administration. It was also a known fact that when the appellant was confronted, he said he was sent to cut the trees by Peter Kibisu. When Peter Kibisu was contacted he immediately came to the scene and confirmed that he was the one who had sent the appellant to cut the trees.

Peter Kibisu went to the D.O.'s office and confirmed that position. Such evidence was given in the criminal trial. Similar evidence was given in the civil case subject to this appeal. It was not disputed. The Forest Officer, DW4 confirmed in evidence before the magistrate's court that he had assessed the value of the tree at Kshs.6,000/=.

In view of the above undisputed facts it cannot be anything but unreasonable and malicious for the State to arrest and charge the appellant with wilfully and unlawfully cutting the tree. The culprit was there and had admitted. It was Peter Kibisu who sent the unsuspecting appellant and others to cut the trees. There could be no blame either civil or criminal to be passed onto the appellant, since the culprit had admitted his role in no uncertain terms. If there was anybody to be charged in court, it would have been Peter Kibisu. He was not charged. If there was anybody to compensate the government for the loss of the tree it should have been Peter Kibisu. The value of the tree was assessed by the Forest Officer to Kshs.6,000/=. No claim has been made for recovery of that amount from the said Peter Kibisu by the Government or the Chief's office.

This is a matter where the role of a known culprit has been transferred without any reason to another person, even in the face of a clear admission by the wrong doer that he was the one in the wrong. There can be no other language to describe the action by the State Officers in detaining and charging the appellant other than being wrongful and malicious. I find that the Government and its officers committed the wrongs complained of by the appellant.

The appellant asked for special damages under paragraph 11 of the plaint. Special damages must be pleaded and specifically proved. This is the position consistently held by the courts in this country. In this regard, I rely on the case of ***Ouma vs City Council of Nairobi [1976] KLR 295***.

Did the appellant prove any of the special damages listed in the plaint? On defending himself in the criminal case, he testified that his lawyer charged legal fees of Kshs.302,000/= as legal fees. He produced receipts. In my view, these are special damages. They were proved necessary.

He also stated that he spent kshs.5,000/= as his bus fare to court. He also claimed to have spent Ksh.26,400/= travelling expenses of surety to court. Loss of business Kshs.50,000/=. Witnesses expenses kshs.9,500/=. Court proceedings Kshs.5,000/=. I find that only the advocates costs can be recovered as special damages, because they were proved by receipts.

The appellant also claimed general damages. On general damages, there is a complaint by the appellant on appeal that the learned magistrate did not assess the same. Indeed, courts have held that even where a suit is dismissed, the trial court should make a finding on the quantum of general damages, in case the case succeeds. I once again refer to the case of ***Selle -vs- Associated Motor Boat*** (supra) where ***Sir Clement De Lestang, VP*** stated as follows -

“It is however unfortunate that the learned judge did not assess the damages and the case will have to back for that to be done. It is always advisable for a judge of first instance to decide all the issues raised in the case before him so that further expenses to the parties and further delay may be avoided in the event the court of appeal adopt the cause which we must in the present case. Had this been done, it would not have been necessary to sent back the case to the high court for damages to be assessed increasing the large costs which the parties have already incurred.”

The learned magistrate erred in not assessing general damages payable in the present case.

Counsel for the appellant has referred me to the case of **Owayo -vs- Aduda [2007] KLR 140** wherein the Court of Appeal noted that the trial court did not attempt to assess the general damages. However, the appellate court, instead of remitting the case to the lower court for assessment of damages, assessed both the special and general damages. In my view, the present is not a case where this court needs to remit the matter of assessment of damages to the trial court. I take into account the fact that the case was determined sometime back and magistrates are transferred quite often. The facts are also relatively clear to me. In my view, doing the best I can, and considering that the appellant was kept in custody for about three days before being charged in court, and that though he was released on bail, he was made to go through the anxiety of having to face a criminal trial in the public glare, an award of general damages of Kshs.300,000/= will be adequate compensation. This figure takes into account the value of money as at the time of the civil proceedings in the lower court, as well as the inflation.

I will award the costs for the appeal as well as the costs of the civil proceedings in the lower court to the appellant.

To conclude, this appeal is allowed. I set aside the decision of the trial court. The claim for special damages is allowed to the extent of Shs.302,000/=. General damages are assessed at Kshs.300,000/=. Costs of this appeal and the civil proceedings in the subordinate court are awarded to the appellant. Interest on general damages will start running from the date of this judgment. Interest on special damages will accrue from the date of the judgment in the subordinate court. Right of appeal 30 days.

Dated and delivered at Kakamega this 19th day of June, 2014

George Dulu

J U D G E