



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT HOMA BAY**  
**CIVIL APPEAL NO. 1 OF 2012**

**BETWEEN**

**MARIKO MOSEGERE OMARIBA ..... APPELLANT**

**AND**

**THE P.S. MINISTRY OF HEALTH ..... 1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**HOMA BAY MUNICIPAL COUNCIL ..... 3<sup>RD</sup> RESPONDENT**

***(Appeal from the original judgment and decree in Civil Case No. 28 of 2007 at the Principal Magistrates Court at Homa Bay, Hon. N. N. Njagi, PM, dated 14<sup>th</sup> November 2012)***

**JUDGMENT**

1. The appellant appeals against the dismissal of his claim for Kshs 39,000.00 special damages, general damages for wrongful arrest, false imprisonment, malicious prosecution, defamation of character and loss of earnings and profits.
2. The appellant moved the subordinate court by a plaint dated 10<sup>th</sup> May 2007 where he alleged that on 28<sup>th</sup> July 2006, an official from the Ministry of Health, Public Health Department maliciously and without probable cause laid a false complaint at the Homa Bay Police Station and the Homa Bay Municipality alleging that he was slaughtering pigs in an unauthorized slaughter house within the Municipality. As a result of the complaint, his premises were raided by the police and municipal officers and he was arrested and charged before the court.
3. On 28<sup>th</sup> July 2006, the appellant was charged in ***Homa Bay Senior Residents Magistrates Court Criminal Case No. 954 of 2006*** with two counts under the ***Food Hygiene Regulations*** made under the ***Food Drugs and Chemical Substances Act (Chapter 254 of the Laws of Kenya)*** to wit; operating a slaughter slab without providing sanitary facilities and running water and operating a slaughterhouse without a valid health licence. The third count was slaughtering pigs in an area which is not a Municipal Slaughter House contrary to the ***Homa Bay Municipal Council (Slaughter House and Meat Trade) By Laws, 2000***. The case was heard and on 15<sup>th</sup> March 2007 he was acquitted under **section 215 of Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**.
4. The appellant testified that he was the owner of the duly licenced pig slaughter house as pigs could not be slaughtered in the normal slaughterhouse. He stated that as he was licenced, the complaint

by the Public Health Officer was not valid and as such he was entitled to claim damages for malicious prosecution.

5. The respondents, in their respective statements of defence, denied the appellant's claim and stated that that if the appellant was arrested, charged and prosecuted then such action was lawful, reasonable and in good faith. An administrative officer testified on behalf of the 3<sup>rd</sup> respondent. He denied that the Council had anything to do with the complaint by the Public Health Officer or that it directed the inspection of the appellant's premises or arrest of the appellant on 28<sup>th</sup> July 2006. He stated that the appellant had been paying licences for his operation. He recalled that on 28<sup>th</sup> July 2006, it is the Public Health Officer who wanted to inspect the premises
6. After hearing the case, the learned magistrate held that the police acted in accordance with the law based on the a complaint laid by the Public Health Department which is charged with enforcing public health and sanitary regulations. The court concluded the complaint to the police was based on reasonable grounds and that there was no malice.
7. The appellant has set out several grounds of appeal in the memorandum of appeal dated 26<sup>th</sup> November 2012 which may be condensed into one issue that is whether the learned magistrate erred in dismissing the appellant's claim on the ground that it was not proved. Mr Osoro, learned counsel for the appellant, submitted that he appellant had proved all the ingredients of the tort of malicious prosecution. He submitted that the appellant was acquitted and there was no reasonable cause for the complaint laid against the appellant as the appellant had a valid licence to slaughter pigs outside ordinary slaughter house. He referred to the testimony of the Veterinary Officer in the criminal case who stated that she had licenced the appellant's premises after satisfying herself that the minimum requirements for establishment of a slaughterhouse were met by the appellant. Counsel maintained that the police and the municipality admitted that the appellant had a licence hence the appellant proved his case.
8. The respondents relied on written submissions in which they supported the judgment. They submitted that the appellant had not proved the elements of the tort of malicious prosecution. Mr Nyaube, counsel for the 3<sup>rd</sup> respondent, submitted that no malice was demonstrated by the appellant as against the 3<sup>rd</sup> respondent and that the case was properly dismissed.
9. As this is a first appeal, I am called upon to examine and evaluate the evidence and reach an independent conclusion bearing in mind that I did not hear or see the witnesses testify. I have read the record of appeal and the central issue for consideration is whether the appellant proved his case on the balance of probabilities. The ingredients for the tort of malicious prosecution have been settled in this jurisdiction in several cases among them; ***Kagane and Others v Attorney General and Another* [1969] EALR 643**, ***Katerregga v Attorney-General* [1973] EALR 287**, ***Mbowa v East Mengo District Administration* [1972] EA 352**, ***Murunga v Attorney General* [1979] KLR 138** as follows;
  - a) The plaintiff must show that prosecution was instituted by the defendant, or by someone for whose acts he is responsible;
  - b) That the prosecution terminated in the plaintiff's favour
  - c) That the prosecution was instituted without reasonable and probable cause;
  - d) That the prosecution was actuated by malice
10. In ***Mbowa v East Mengo District Administration (Supra)***, the East Africa Court of Appeal stated that;

*The plaintiff, in order to succeed, has to prove that the four essentials or requirements of*

*malicious prosecution, as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must “unite” in order to create or establish a cause of action. If the plaintiff does not prove them he would fail in his action.*

11. There was no dispute that the appellant was charged and acquitted. Although the appellant was acquitted, he was called to make his defence hence his acquittal under **section 215** of the **Criminal Procedure Code**. This means that the learned magistrate was satisfied that the prosecution had established a case to warrant the appellant being put on his defence.
12. The appellant submits that the respondents did not have reasonable and probable cause as the appellant had all the relevant licences to operate a slaughterhouse. According to the evidence, the complaint was brought by the Public Health Officer who went to inspect the premises and found that the appellant was operating a pig slaughtering facility which was not in conformity with the relevant regulations and had no approved building plans as it was a temporary structure. On the other hand the Veterinary Officer testified that she had inspected the structure and was satisfied that it met the minimum requirements of a slaughter house and under the relevant regulation and she proceeded to licence it. In essence, the appellant argued that the Ministry of Public Health had no locus standi to bring the complaint as it was not the licencing or enforcement authority.
13. The question is whether the Public Health Officer who lodged the complaint acted reasonably. It is important to note that the appellant was charged with three offences. The first count related to the operation of an unsanitary slaughterhouse while the second and third counts were licencing offences. The Public Health officer testified that when she inspected the appellant’s premises, the building was a temporary shack and not a permanent one as provided by the regulations, it did not have a sand drainage or condensation pit, it had no running water, toilet or washing facilities hence it contravened **Regulation 11** of the **Food Hygiene Regulations** which states as follows;

*11(1) No person shall use any premises as a food plant unless—*

- a. *adequate sanitary conveniences are provided for use by employees and every premises where food is prepared and served are provided with adequate separate sanitary conveniences for public use;*
- b. *the water supply to the premises is derived from an adequate source, sufficient for the intended operations and potable;*
- c. *running water at a suitable temperature is provided in all areas where the processing of food, and the cleaning of equipment, utensils and containers are carried on;*
- d. *the drainage of effluents is made through an adequate sewerage system or disposed of through other adequate and approved means;*
- e. *the plumbing is of adequate size and design and so installed and maintained as to—*
  - i. *carry sufficient quantities of water to all areas where the water is required;*
  - ii. *properly convey sewage and liquid disposal waste;*
  - iii. *provide adequate floor drainage in all areas where the floors are subject to flooding type cleaning or where normal operations release or discharge water or other liquid waste on the floor; or*
  - iv. *constitute no source of contamination to food ingredients, food products and water supplies;*
  - v. *refuse and offal is conveyed and disposed of so as to minimize noxious odour, to prevent waste which attract or harbour or provide a breeding place for vermin and to prevent the contamination of food, food contact surfaces, ground surfaces and water supplies.*

14. The learned magistrate who reviewed the evidence concluded that, *“The plaintiff failed to provide a healthy place for the slaughter of his pigs. There is no water at the scene. There is even no toilet facility within the slaughter slab. There is no drainage at the scene. In light of all, it is my humble view that the environment, within which the plaintiff was doing his business, was not worth being licenced and the arrest and subsequent charging in court by the deputy OCS Homa Bay, was based on reasonable ground and not malice.”* I also hold that given the state of the premises and the applicable law which I have outlined above, the Public Health Officer was entitled to lay the complaint even if the slaughterhouse was in fact licenced. The grant of a licence is not *ipso facto*

conclusive of the fact that the appellant had complied with the statutory provisions as to the operation of the slaughterhouse. I therefore find that there was reasonable and probable cause by the Public Health Officer to lay the complaint.

15. With respect to malice, the law is clear that the mere fact that a person has been acquitted of the criminal charge does not necessarily connote malice on the part of the prosecutor. In *Nzoia Sugar Company Ltd v Fungututi* [1988] KLR 399, the Court of Appeal held;

*Acquittal per se on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecutor. The mental element of ill will or improper motive cannot be found in an artificial person like the appellant but there must be evidence of spite in one of its servants that can be attributed to the company.*

16. In his testimony, the appellant stated that the Public Health Officer used to demand money from him. He did give particulars of these demands and whether they led to the institution of the impugned proceedings. I agree with the learned magistrate that the appellant did not demonstrate that the charges were laid maliciously.

17. As the appellant failed to prove the essential elements of the tort of malicious prosecution, the suit was properly dismissed. The plaintiff likewise failed to prove false imprisonment and defamation.

18. This appeal accordingly fails and is dismissed with costs to the respondents.

**DATED and DELIVERED at HOMA BAY this 18<sup>th</sup> day of *December* 2014.**

**D.S. MAJANJA**

**JUDGE**

Mr Ogoro instructed by Moriasi Ogoro and Company Advocates for the appellant.

Mr Nyauke instructed by Nyauke and Company Advocates for the 3<sup>rd</sup> respondent.