REPUBLIC OF KENYA

High Court at Kisumu

Civil Appeal 77 of 2011

CHARLES OPONDO.....APPELLANT

VERSUS

DILRAY SIGNH BHUI.....1st RESPONDENT

ATTORNEY GENERAL ….....2nd RESPONDENT

JUDGMENT

The appellant has appealed to this court on four (4) grounds namely:-

1. THAT the learned Trial Magistrate erred in law and in fact in finding that there was reasonable cause for the Appellant to be prosecuted

2. THAT the learned Trial Magistrate erred in law and in fact in finding that there was no malice in the prosecution of the Appellant despite the fact that the complainant / prosecution charging the Appellant failing to attend court without offering any reasonable explanation leading to the acquittal of the Appellant

3. THAT the learned Trial Magistrate erred in law and in fact in finding that there was no false imprisonment, defamation and unlawful arrest despite there being strong evidence to suggest that there was.

4. THAT the learned Trial Magistrate erred in law and in fact in failing to quantify the general damages he would have awarded the Appellant had the Appellant succeeded.

The circumstances leading to this appeal began way back on 20th November 2007. According to the appellant he was called by his customer to inspect his motor vehicle which was undergoing repairs at the 1st Respondent's garage. When they reached the garage the appellant told the court that the vehicle had not been properly repaired and not well painted. He told the client and an argument ensued between him and the 1st Respondent.

According to the appellant the 1st Respondent uttered the following words:

" Makende, naweza tomba wewe".

Because of the commotion members of the public were attracted as well as police officers who were on patrol. The said police officers ordered him to leave and go to his garage.

On 21st November 2007, two (2) police officers came to his garage and ordered him to accompany them to the police station where he was detained for about four (4) hours and bonded to attend court on 26th November 2007.

After attending court on several occasions contesting criminal case No. 656 of 2007 where he had been charged with creating disturbance he was acquitted under Section 202 of the Criminal Procedure Code.

The appellant concluded his evidence by stating that as a consequence of the said arrest and subsequent arraignment in court his clients deserted him and that his character was greatly damaged.

PW2 Kenneth Okoth testified in favour of the appellant. He did not however witness the events but he was surprised to find that the appellant who was his customer had been arrested,

The 1st Respondent did not deny the circumstances of 20th November 2007. His disagreement with the appellant was that the repairs which he had done were those sanctioned by the insurance company whereas the Appellant expected much more than that.

According to the 1st Respondent therefore the heated argument generated into some serious commotion and attracted members of the public which forced him to switch an alarm system. The Securicor Company came and parked outside the workshop and subsequently policemen on patrol were equally attracted but apparently the appellant had left. The 1st Respondent went and recorded statement with the police who later arrested and charged the appellant.

What runs across the proceedings is that the appellant was arraigned in court and was eventually acquitted. The appellant contends that he was acquitted as the prosecution lacked evidence and that the 1st Respondent did not turn up in court.

On the other hand the 1st Respondent argued that although he was present in court during the morning session he did not come back as his grandfather felt ill in Nairobi and he was urgently required. Further when the matter was adjourned to 3rd March 2008 he did not attend as he was still dealing with his grandfather funeral rites.

The upshot of the 1st Respondent evidence is that he did not attend court as the circumstances obtaining at that time namely the sickness and passing away of his grandfather could not allow.

After full trial the lower court dismissed the appellant's case hence this appeal.

I have read the able submission by counsels for the appellant and the respondent. The issue to determine was whether the prosecution of the appellant was actuated by malice.

Malice has been defined by Black Law Dictionary 8th Edition as:-

“Reckless disregard of the law or of a persons legal rights”.

The same dictionary describes malicious prosecution as:-

“The institution of a criminal or civil proceedings for an improper purpose and without probable cause”.

Did the respondent institute criminal proceedings at the lower court without any justifiable cause?.

From the evidence at the lower court there is no doubt that the applicant went to the 1st Respondent premises. The issue of disagreement which both parties admit is on the area of repairs of the motor

vehicle which the 1st Respondent was meant to repair against what the insurance company had given.

According to the 1st Respondent the appellant conversed in luo with the client which attracted the by standers.

There is therefore in my opinion sufficient evidence to show that there was a commotion at the premises of the 1st Respondent which attracted a crowd as well as police officers on patrol. The question of who started the argument is actually known by the Appellant as well as the 1st Respondent.

There is also evidence by the 1st Respondent that he switched on the alarm which made securicor people to come and parked in-front of the shop. This was not refuted by the appellant.

I am unable to belief that there was no probable cause that caused the 1st Respondent to make statement with the police. Why did the appellant take the argument to the 1st respondents premises?. If indeed the 1st Respondent abused him then he would have had a better and a civil way to resolve the matter. To the extend that the argument pulled a crowd, caused the 1st Respondent to call Securicor as well as attracting the police on patrol meant that the commotion was such that it attracted investigation by the 2nd Respondent.

It is further worthy to note that it was not the 1st Respondent who called the police but as is agreed by both parties it was the commotion that caused them to check the situation at the scene.

Further the situation was worsened by the fact that the appellant and his customer and others conversed in luo language, a fact which has not been disputed and which degenerated into a situation that caused the 1st Respondent to call the securicor people.

In the case of **Nzoia Sugar Company Limited =vs= Fungututi C. A. No. 7 of 1987 (KLR 2002)** the learned Judges of appeal held that:-

"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".

I do not find any spite or ill will on the part of the respondents. In any case it is the appellants action which attracted the police officers. The police officers found a crowd and a commotion. This was a perfect catalyst for causing disturbance which indeed had happened. If there was no commotion or disturbance a crowd would not have gathered and neither would the police have been attracted to the scene.

It is equally true that the appellant was acquitted. However reading the criminal proceedings and the explanation by the 1st Respondent it would appear that the prosecutor did not explain fully to the trial court why his witness whom the court had seen earlier on had gone away. The testimony in the civil case clarifies the same.

Nonetheless I do not find any spite or ill – will or malice on the part of the respondents jointly and severally and this ground must therefore fail.

As to the argument that the appellant was falsely imprisonment for four (4) hours I do not find this attractive. The 2nd Respondent had to investigate and take statement from the appellant. How would he have expected the police officers to take statement from the appellant. How would he have expected the police officers to take statement without being with him for a period? In any case he was released on bond and required to attend court later. This ground is equally disallowed.

But was the appellant defamed? It is a trite law that in a defamation claim the words which allegedly defamed the alleging party, in this case the appellant, must be set out verbatim I do not find the same in the amended plaint.

Further PW2 a friend to the appellant on cross examination said that the appellant was still his customer and he sells shoes to him. There was no evidence to suggest that anybody thought the appellant was a person of uncontrolled temper or aggressive.

The upshot of this therefore is that contrary to the appellants view that the trial court ought to have assessed damages on false prosecution and defamation I do not think the trial court was wrong. Once there was a finding that there was no false imprisonment as well as malicious prosecution there was no need in my mind for the court to waste judicial time to assess damages against the above sub headings.

Had this court found for the appellant it would have gone ahead to assess the damages in any event.

The appeal is therefore based on the fact that there was no false imprisonment, malicious prosecution and defamation proved against the respondents jointly and severally is hereby dismissed with costs.

Dated, signed and delivered at Kisumu this 25th day of March 2013.

H.K. CHEMITEI

JUDGE

In the presence of:

….....for appellant

….....for the respondents

HKC/aao