



REPUBLIC OF KENYA

High Court at Embu

Civil Appeal 84 of 2011

MWANIKI MURANGIRI.....APPELLANT

VERSUS

NDWIGA MURANGIRI MURUAMUCI.....RESPONDENT

(An Appeal from the Judgment of E.K. NYUTU - RM sitting at EMBU in Civil Suit No. 21 of 2006 delivered on 26/4/2011).

**J U D G M E N T**

**Mwaniki Murangiri** the “**Appellant**” herein was the 1<sup>st</sup> Defendant in the Court below while **Ndwiga Murangiri** the “**Respondent**” was the Plaintiff. The matter proceeded to hearing and Judgment was entered against the Defendants on 3/3/2011. The Respondent was awarded shs.150,000/= plus costs and interest.

The Appellant was aggrieved by the said Judgment and appealed raising the following grounds;

- 1. The Honourable Court erred in law and in fact in failure to consider that the Appellant Mwaniki Murangiri never arrested or maliciously presented the Respondent.***
- 2. The Honourable Court erred in law and in fact in failure to consider that the Appellant Mwaniki Murangiri had NO power to investigate, arrest and charge Respondent herein.***
- 3. The Honourable Court erred in Law and in fact in failure to consider that there was NO evidence by any witness that Respondent had been arrested, put in custody and prosecuted beyond bare allegations.***
- 4. The Honourable Court erred in law and in fact in failure to consider the Appellant is a sickly cripple who walk with aid of two walking sticks and that he could not hold panga and chase Respondent as alleged.***
- 5. The Honourable Court erred in law and in fact in failure to consider that the Respondent is trying to pre-empt the result of High Court Succession Cause No.96 of 2005, and was never chased with panga by Appellant.***
- 6. The Honourable Court erred in law and in fact in failure to consider that there is NO evidence that the Appellant was liable of any damages to the Respondent.***
- 7. The Honourable Court erred in law and in fact in failure to consider that there is a bitter family struggle on Succession of our fathers estate and there was a reason for Respondent to maliciously***

***accuse Appellant so as to get rid of him.***

Both Counsels agreed to dispose of the appeal by way of submissions which they did.

In his submissions Mr. P.N. Mugo states that according to the decree the Judgment was against one Defendant and not Defendants. And that from the language of the Judgment the Appellant herein was not to blame for anything. He has referred this Court to several portions of the proceedings and Judgment. He also referred to a Succession Cause being the basis of the problem between the Appellant and Respondent.

He finally states that the decree was fraudulently and wrongly drawn and should be set aside.

Mr. Okwaro for the Respondent in his submissions states that the Court below relied on the evidence adduced and entered Judgment for the Plaintiff against all Defendants. And that the Defendants including the Appellant had contributed to the prosecution of the Respondent. Finally he submitted that if the decree had a problem it was a mere technicality/typographical error which can be corrected. His conclusion is that the submissions did not support the grounds in the Memorandum of Appeal hence failing to give any reason why the Judgment entered on 3/3/2011 should be set aside.

This is a 1<sup>st</sup> appeal hence the need for this Court to review the evidence on record, and arrive at its own conclusion.

***1. SELLE & ANOTHER -VS- ASSOCIATED MOTOR BOAT CO. LTD [1968] EA 123***

***2. SUMARIA & ANOTHER -V- ALLIED INDUSTRIES LTD [2007] 2 KLR 1.***

The evidence adduced in the Court below was that the Respondent who is a brother to the Appellant was on 28/8/2004 working on their father's farm when the Appellant accosted him. He threatened to kill him. He was armed with a rungu, axe and panga. He then left and after 3 days the Respondent was arrested by the police and taken to Kathangari police post. He was released in the evening with instructions that he reports back the next day. He did so and was escorted to Manyatta police station on 31/8/2004. He appeared in Court on 3/9/2004 charged with the offence of creating disturbance vide Embu Criminal Case No.2540 of 2004. He was acquitted under section 210 Criminal Procedure Code as the Prosecution failed to establish a prima facie case against him. The Respondent did not call any witness. The Appellant had in his defence told the Court that on 28/8/2004 he was working on his father's shamba when the Respondent came there and told him to leave. He was armed with a panga. The Applicant then reported the matter to the police (Kathangari). The Respondent was arrested on 29/8/2004 and the pangas and other items were impounded. He was released but re-arrested after refusing to let the Appellant work on the land. He denied hurling any insults at the Appellant. The Respondent however stated that he had a genuine complaint which he reported to the police. The Respondent did not call any witness.

A copy of the proceedings and Ruling of the criminal case were produced. The learned trial Magistrate weighed the above evidence and came to the conclusion that the Respondent had proved his case and gave an award of general damages worth shs.150,000/=. The Respondent had vide his plaint dated 30/11/2005 claimed general damages for malicious prosecution and special damages. In paragraph 8 he outlined the particulars of the malice by the Defendants.

The Appellant raised seven grounds of appeal.

I will first deal with the grounds which consist of matters that were never canvassed in the lower Court i.e.

#### **Grounds 4, 5 and 7**

There is no evidence on record that these were matters raised in the lower Court for its consideration. I therefore find the grounds to raise issues that are not supported by the record and I disallow them.

I now proceed to deal with the other grounds.

### **Ground 3**

The Appellant could not have been arraigned in Court without being arrested and formally being charged with the offence giving rise to Embu Criminal Case No.2540/04. The record and proceedings in the criminal case were produced and they form part of this record. They confirm that a report was made and the 2<sup>nd</sup> Defendant and another arrested the Respondent. They arrested the Respondent on 30/8/2004 and arraigned him in Court on 3/9/2004 for plea. There is no indication that the Respondent was out on bond. It is therefore clear that he was in custody. The 3<sup>rd</sup> ground must therefore fail.

### **Ground 1, 2 & 6**

The Appellant states that the Court failed to consider that he never investigated, arrested charged or maliciously prosecuted the Respondent. The learned trial Magistrate found as a fact that it is the Appellant who set the ball rolling in the criminal case by making a report to the police against the Respondent. The issue is not even about the element of reporting per se or acquittal per se. Was this complaint genuine? Was it activated by malice or bad faith?

The learned trial Magistrate appears to have over relied on the evidence in the criminal case, forgetting that she was dealing with a civil case whose burden of proof is on a balance of probabilities. At page 25 lines 16-17 she points out the issues for determination. In the following pages she does not fully address the issue concerning the Appellant. She dwelt on the omissions and commissions of the 2<sup>nd</sup> Defendant.

From the evidence presented in the case at hand the following have emerged;

- i. The Appellant and the Respondent are brothers. The Appellant is older than the Respondent.**
- ii. The scene is land belonging to their now deceased father.**
- iii. Each of them claims to have been attacked by the other when he was innocently working on his portion of the land.**

The land had not been sub-divided then. Of course this evidence about each of them being the victim and not the aggressor cannot be true and on this score I find both of them not to be truthful. I do not understand who between the two of them the learned trial Magistrate believed. She did not therefore make any finding on whether the complaint made by the Respondent was genuine or actuated by malice considering that the subject was their father's land. The mere fact that the Respondent was acquitted in itself did not mean that the Appellant had made a false report. The falsehood and malice in report was not The learned trial Magistrate however analysed well the evidence and the role played by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in the Civil case. Had the 2<sup>nd</sup> Defendant responsibly carried out his investigations he would not have charged the Respondent herein. The Attorney General being the Government's legal advisor was sued in that capacity and is responsible for the 2<sup>nd</sup> Defendant's actions.

I therefore find for the Applicant on grounds 1, 2 and 6. I have also found that the learned trial Magistrate had entered Judgment against all Defendants but the decree extracted did not reflect that position. The result is that the appeal succeeds and I set aside the Judgment of the lower Court.

I accordingly dismiss the Respondent's case against the Appellant and enter Judgment for the Respondent for shs.150,000/= with costs and interest against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in the lower Court jointly and severally. Considering the relationship between the Appellant and Respondent I order that each party bears his own costs of the appeal. Costs in the lower Court to the Appellant. Right of appeal explained.

**DATED AND DELIVERED AT EMBU THIS 19TH DAY OF MARCH 2013.**

**H.I. ONG'UDI  
J U D G E**

**In the presence of:-  
Mr. P.N. Mugo for the Appellant  
Njue – C/c  
Parties**