



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Civil Appeal 508 of 2009

FARMERS CHOICE LIMITED. APPELLANT

VERSUS

GIDEON NDINIKA GITAU. RESPONDENT

(From the judgment and decree of Mokaya M/S Principal Magistrate in Nairobi CMCC No. 6442 of 2008)

J U D G M E N T

The Respondent/Plaintiff, in a plaint dated 29th June 2007, claimed for general damages for malicious prosecution and unlawful arrest, together with costs and interests, against the Defendant. The Defendant filed its defence dated 16th August, 2007.

The facts from which the claim arose are as follows:- The Appellant/Defendant, Farmers Choice Limited, was the employer of the Respondent/Plaintiff at all the material time. The Respondent worked as a general worker who could be directed any time of the day as to where he was to work.

On 8th February, 2003 the Respondent reported at work at his employer's work place. He worked until 5.00 p.m. when his senior officer summoned him to the employers' office. There he met a police officer who had been summoned a Senior Officer, a Mr. Maina. He was subjected to interrogation by both Mr. Maina and the Police Officer about a stolen computer which had apparently disappeared from the office three days before. The Respondent denied knowledge of the theft but was nevertheless arrested by the Police Officer at the request of the Mr. Maina. He was charged with the theft of the computer jointly with another worker but was acquitted three years later in 2006. Meanwhile on arrest the Respondent remained in custody for nine days before he could raise a bond. His evidence all along was that he had no access to the office where the computer was kept since he only for short period worked in the food making section.

It also came out in evidence that the computer office was accessed by many employees during the working hours. He testified that he was not in good relationship with Mr. Maina who appeared not to like him long before the alleged loss of the computer, and had attempted to have the Respondent sacked before the computer incident.

In his evidence on behalf of the Appellant, Mr. Maina testified that when the report of theft of the computer was made to him on 8th February, 2003, he carried out investigations among the junior general workers from whom he gathered some information that the Respondent may have been connected with

the theft because he had been seen throwing something across the fence near the relevant office on the relevant night. On that reason he reported the theft to the Police at Kasarani who came and arrested the Respondent after also doing their independent investigations.

In her judgment, the honourable trial magistrate considered the evidence before her after carefully considering the legal principles that govern the claim of malicious prosecution and unlawful arrest. She noted that: -

a) the arrest of the Plaintiff should and must have been instigated by the Defendant or Defendant's servant.

b) there should were criminal charges which must have been preferred against the Plaintiff whose determination must have ended in his favour.

c) the arrest and prosecution of the Plaintiff must have been maliciously activated and were not founded on any probable or reasonable cause.

The honourable trial magistrate did not find it difficult to conclude that the arrest was instigated by Mr. Maina who was a Senior Supervisor of the Appellant after which the Police charged and prosecuted him before the Respondent was acquitted for lack of sufficient reasonable evidence.

In her consideration of the 3rd arm of the principle, i.e. whether there was probable or reasonable cause for Mr. Maina to have reported the incident to the police with a finger pointed to the Plaintiff as the culprit, the honourable magistrate found that there was no evidence which should have made Mr. Maina narrow investigation against the Plaintiff which eventually led to his arrest and prosecution.

The trial court noted that the only reason why the Plaintiff became the suspect was it was because alleged that he had been seen by another worker, throw a small sack across the fence during the material night. That the small sack, if any there was, was not recovered to find out what was in it and in particular, if it carried a computer. That no search either by Mr. Maina or the police was conducted in the Plaintiff's home to establish whether the allegedly stolen computer was there. That none of the guards who were confirmed to have been on duty guarding the offices the same night, were questioned to establish when the computer was stolen and whether the Plaintiff was seen close by or suspected by them since they were on duty and were guarding the place.

In the above circumstances, the trial magistrate could not see why, less of malice, Mr. Maina could point an accusing finger at the Plaintiff to the police. She could also not see how a reasonable police officer in these circumstances, could independently decide to arrest and later prosecute the Plaintiff for the theft of the computer, unless he was acting under the Plaintiff's employer's influence.

I have on my part as an Appellate court, carefully considered the evidence adduced before the lower court. I have also examined the manner the lower court came to its conclusions and judgment. My finding is that there was little or no reasonable evidence upon which Mr. Maina for the Appellant Company and the Police Officer, could decide to arrest and later prosecute the Plaintiff/Respondent for the theft of the computer. Indeed, despite their claim that they each investigated the matter, before arrest, evidence shows they did nothing of the kind. For example, they did not question the guards who guarded the office in which the computer was stationed. They neither questioned the guards staying outside the fence where the Plaintiff is alleged to have thrown a small sisal bag to. In the circumstances, the co-worker called to give evidence in the criminal charge could have been just fixed to serve the purpose. Mr. Maina's evidence at the lower court that it was only the Plaintiff who had access to office where the computer was, was not supported by evidence.

The main issue that arises from all the above is whether there is good reason by this court to disturb the lower court's finding?

This court is without doubt mandated to reconsider and re-evaluate the evidence adduced at the trial court,

so as to arrive at its independent decision. In that process, I have re-examined the facts independently. However, for this court to differ with the conclusions reached by the trial court, there must be shown good reasons. This is because the trial court had the benefit of seeing and hearing the witnesses at close range and had better opportunity to test their demeanor which this court does not have.

As put in **Selle and Another V. Associated Motor Boat Company Limited and Others [1968] E.A page 126**

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it, itself and draw its conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of witness is inconsistent with the evidence in the case generally.”

In tenor of the principles pronounced above, I have examined adduced before the trial court and the conclusions the honourable magistrate reached. I find no fault or inconsistency in the findings which I find to have not been based on any misapprehension of the evidence. I find that the magistrate did not act on any wrong principles. I accordingly find no reasonable or lawful ground to interfere with her findings.

It is trite that acquittal of the Respondent in a Criminal charge per se is not sufficient reason or basis on which to ground a suit for malicious prosecution. I however, in this case find that neither Mr. Maina for the Appellant Company nor the Police Constable, who was summoned to the company premises, had reasonable cause to suspect the Plaintiff/Respondent for the theft of the computer. Their totally shallow investigations in relation to the alleged theft, point to the fact that they had without good reason decided to arrest and prosecute the Plaintiff with a criminal charge which was unsupported by evidence. Such conduct in my view reveals on their part, spite, ill-will or improper motive. Those who adopt the said conduct should not be allowed to hide behind the screen of so called independent investigations by the police which if it otherwise existed, would be a full defence in malicious prosecution cases. In addition, in this case, the Respondent gave evidence to the effect that Mr. Maina, made his report to the police on account of his dislike for the Respondent and not because there was evidence that would support the theft of the computer.

I have also considered the damages awarded by the trial magistrate. I do not find them exorbitant especially when it is clear that the malicious act of the Appellant led to the loss of the Respondent’s job apart from the unlawful arrest and detention. Indeed, had the Respondent made a cross-appeal on the level of general damages awarded, this court would have been ready to reconsider the same upwards?

The conclusion I make is that this appeal has no merit. It is dismissed with costs to the Respondent. Orders are made accordingly.

Dated and delivered at Nairobi this 25th day of September, 2012.

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D A ONYANCHA

JUDGE