



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 633 of 2008

MWANAISHA WARIGA. 1ST APPELLANT

EVANSON KAMAU WAITIKI.2ND APPELLANT

VERSUS

PHILLIP MUSUNGU. RESPONDENT

(From the judgment and decree of Hon. A Ireri, Resident Magistrate in Milimani CMCC No. 2971 of 2006)

J U D G M E N T

The Respondent in a plaint dated 27th March, 2006, had claimed general damages and costs arising from an alleged unlawful arrest and detention and malicious prosecution in Kibera Law Court's Criminal Case No. 7347 of 2003.

The Respondent had pleaded that on 8th October, 2003 the Appellants (who were the complainants in the lower court criminal suit above mention), had, filed theft report with the police at Muthangari caused the police to arrest, detain and prosecute him, for theft. The Plaintiff (Appellant) had further pleaded, that the defendants' report to the police, was malicious and only intended to punish the plaintiff. He had also stated that the defendants had no evidence pointing to the plaintiff's guilt of theft and that, the police had failed to properly investigate the said malicious and baseless report of the alleged theft. The Respondent had finally pleaded, that the defendant's said report to the police had caused the Plaintiff loss and damage in that it led to the tarnishing of the plaintiff's/Respondent's good name and reputation as a church pastor.

The Appellants in their joint defence to the Respondent's claim, had asserted that they indeed had made a report of probable theft of water and electrical equipment at the 1st Appellant's residential houses. They had, however, denied any malicious intention in doing so. In the alternative, they pleaded that police had independently decided to file a criminal charge of theft after doing proper investigation of the complaint. The Appellants had on that basis, denied the claim and sought dismissal thereof.

At the hearing of the suit before the trial court, the Respondent had testified that he had been approached by the 1st Appellant to accompany him to Muthangari Police Station on 8th October, 2003. He did so in good faith, only to find himself being detained there. He stated that the Appellants then falsely alleged that he was their residential premises caretaker who tarnished his good name and reputation as Church Pastor. He further testified, that he was only a tenant of Appellant from the year 2000 and paid his monthly rent of Ksh.4000/- promptly. He denied collecting rents for the Appellants or receiving rents through receipts produced in evidence as exhibits 1 and 2.

The Respondent had called one witness who confirmed that the Respondent was a Church Pastor and that the plaintiff was ex-communicated from the church where he worked because he had been charged with theft; that he was never at any relevant time a caretaker of the Appellants residential houses; and that his good name and reputation had been tarnished by the defendants.

The Defendant's had also testified in their defence and called several witnesses. The 1st Appellant testified that the Respondent first worked for her as a caretaker before he introduced him to her husband the 2nd Defendant/Appellant for a similar job in a different and larger residential premises which 1st Appellant, as wife, still continued to supervise and manage. That on 8th October, 2003 when she went to supervise the husband's premises, she discovered that electrical meters and water meters cisterns, locks, switches and consumer units, were missing and yet the respondent had not made any theft report. That since the plaintiff lived in the premises and was the custodian of all the keys to the empty rooms because tenants who missed electricity and water had left, she suspected him of stealing the equipment as there was no breakage of gate the doors. She accordingly, in company of her daughter, PW 2, made a report of theft at Muthangari Police Station. As a result of the report, the respondent was arrested.

Defence witness, Emmanuel Kenga who was an Assistant police Commissioner, testified for the defendant's. He was a qualified documents handwriting examiner who examined signature claimed to have been written by the Respondent. He compared receipts and a diary claimed to hold Respondent's signatures which was written before the incident. He certified them similar and as having been made by the plaintiff/respondent.

The third witness for the defence was the 2nd Appellant who was the owner of the residential premises at Kawangware, and husband to the 1st Appellant. His evidence supports that of the 1st Appellant. He confirmed as well that the respondent was his caretaker who had the keys to the premises and that when he got a report of the missing water and electricity apparatus, he authorized a report to be made to the police. He said he had no ill-will or malice against the Plaintiff/Respondent and that the latter's remuneration for rent collection and caretaking was 4% of rents or 2 rooms lived-in by the respondent without rent payment. That he also had given the Plaintiff rent receipt books which he used.

The 4th witness was Salome Njeri who had lived in the premises and paid monthly rents to the Plaintiff/Respondent. One of the receipts – exhibit-upon which the rent was received was given to her in the year 2002. She later became the caretaker.

The 5th witness, Mahadia Wanjiru Issa, testified that she was the one who originally introduced the Plaintiff to the 1st Defendant/Appellant.

The last defence witness was Sandra Wairimu Kamau who was the daughter of the Appellants and supported the Defendant's evidence.

In her judgment, the trial magistrate felt that the defendants/ Appellant's evidence, did not successfully rebut the plaintiff's evidence in proof of her claim, particularly because, there was no documentary proof of the fact that Plaintiff was defendant's caretaker. She also came to the conclusion that the verifying affidavit supporting the plaint was signed by one Nyabuto Omache and not Phillip Musungu the plaintiff and could not therefore, supply the plaintiff's signature for handwriting experts comparison.

Having rejected other evidence from the defendant's witnesses, the honourable trial magistrate came to the conclusion that the Plaintiff's name had been tarnished by the report made by the defendant at Muthangari Police Station and that the report lay no basis for criminal prosecution at Kibera Law Courts. She, therefore, concluded that the Plaintiff had a good case against the Defendants and went ahead to award liability at 100% and general damages at Ksh.490,000/- with costs and interest. That provoked this appeal.

The grounds of appeal are summarized as follows: -

a) There was no sufficient evidence for proof of malicious prosecution.

b) The trial court erred in fact and law in disregarding the clear evidence by the defendants which raised a clear defence that the police acted independently in investigating the probable report of theft and in independently deciding to detain, charge and prosecute the plaintiff.

c) The award of Ksh.490,000/- as general damages was manifestly excessive.

d) The trial court acted on wrong legal principles and against the weight of evidence in such cases.

I have on my part carefully perused the appeal and the lower court record. There is no doubt, and the Appellants do not deny the facts that they made a report of theft of water and electrical apparatus and other items from their residential premises at Kibera. Their evidence was that the respondent was their caretaker who was originally recommended to them by Mahadia Wanjiru Issa who testified as the 5th Defence witness. There was adequate evidence on record to the effect that the respondent worked as caretaker for about two years before the incident. That he was collecting rent for the Appellants at a 4% commission and enjoying free two room accommodation, which would appear to account for about Ksh.4000/- a month. There was also evidence that almost all the tenants in the premises had quit because water and electricity had been disconnected due to non-payment arising apparently from using one joint meter by all tenants. The main issue however was whether or not the Appellants had a good and genuine reason to report to the police at Muthangari of the missing electrical and water equipment.

The evidence shows that they did so because the plaintiff/respondent who, they testified, was their caretaker, had not reported any theft of equipment which had disappeared or had been stolen from the premises. Their evidence was that as the caretaker, who had keys to each room and to the only entry gate, had a duty or at the minimum, courtesy to inform the landlords of their increasingly disappearing equipment. They on their part apparently became convinced that the plaintiff knew about the damage and should explain to the police how the equipment which he over saw generally, got vandalized. Otherwise who else would have explained if the respondent was the caretaker?

This court is aware that the trial magistrate disbelieved the Appellant on the main issue as to whether he was the caretaker or not, mainly because the Appellants failed to produce a written contract to that effect. However, the honourable trial magistrate failed to disregard or disbelieve the plaintiff in his claim of being a tenant although he also did not produce a written tenancy agreement. Clearly, the various contractual relationships concerning the premises, operated at the level of oral contracts. Accordingly, the trial magistrate erred in accepting an oral contractual relationship in respect to plaintiff's tenancy but rejected a similar contractual relationship in relation to caretaker oral contract.

A second important issue that was not adequately handled, was whether the plaintiff indeed proved malice, ill will or lack of reasonable or probable cause in making the report to the police by the Appellant. I have carefully perused the evidence report of the plaintiff/respondent in the lower court. In my view he made little or no effort to prove the above ingredients concerning the claim of malicious prosecution.

The evidence that there is in the plaintiff's testimony, is that the 1st Appellant just merely asked the Plaintiff to accompany him to the police station where he was suddenly detained and later charged and prosecuted. On the other hand, the Appellant's evidence was that she reported a probable criminal offence which led to the Plaintiff's arrest after the police carried out their independent investigation. Nowhere in the pleadings and in evidence, did the plaintiff testify and/or prove, that the police were not independent in their investigation or that they were all along acting under the direction and control of the complainants (Appellants). The fact that the Plaintiff was eventually acquitted would be in favour of the plaintiff but acquittal alone is not adequate to prove malice, ill-will or lack of probable cause in cases of malicious prosecution.

On the other hand, the Appellants' evidence was clearly superior in quality and more detailed as compared to the sketchy evidence of the plaintiff.

The final issue the court would like to clarify is that the pleadings for malicious prosecution were sketchy and vague. Perusal of the plaint do not confirm whether the plaintiff sought to prove malicious prosecution or merely damages for unlawful detention or defamation arising for tarnishing the plaintiff's good name and reputation as Church Pastor. Indeed the honourable trial magistrate, herself appeared not to be certain as to what tort had been proved before her and this court cannot blame her. However, she should have analysed the claim and the evidence for proof of malicious prosecution before abruptly awarding heavy general damages for a tort that was not clear.

Be that what it may, it is the view of this court that there was no sufficient evidence to prove the tort of malicious prosecution and the trial court erred in finding otherwise. The court should have dismissed the claim. This court hereby does so, with costs here and below to the Appellants. Orders accordingly.

Dated and delivered at Nairobi this 19th day of November 2012.

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D A ONYANCHA
JUDGE