



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CIVIL APPEAL CASE NO. 91 OF 2008

WILFRED WAKARIRU MACHARIA.....APPELLANT

VERSUS

MURANG'A WHOLESALERS LTD.....1ST RESPONDENT
THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

(Being an appeal from the judgment of T. W. Murigi, Senior Resident Magistrate, in Senior Resident Magistrate's Civil Case NO. 460 of 2006 dated 6th December 2007 at Murang'a)

JUDGMENT

WILFRED WAKARIRU MACHARIA the appellant herein, filed an action against Murang'a Wholesalers Ltd. and the Hon. Attorney General, the 1st and 2nd Respondents herein, at the Murang'a Principal Magistrate's Court. The suit was by way of the Plaint dated 24th November 2006 in which the Appellant prayed for judgment in the following terms:

- (i) General damages for false arrest, detention and malicious prosecution.
- (ii) Special damages in the sum of Ksh.65,000/=.
- (iii) Costs of the suit.

The Respondents each denied the Appellant's claim by filing a defence. The suit was heard and dismissed by T. W. Murigi, learned Senior Resident Magistrate on 6th December 2007. The Appellant was aggrieved hence he preferred this appeal.

On appeal, the Appellant put forward the following grounds in his Memorandum of Appeal:

- 1. The Learned Magistrate erred in law and in fact in dismissing the appellant's suit against the Respondents without any credible and/or sufficient reasons.***
- 2. The Learned Magistrate erred in law and in fact by failing to appreciate that the Respondent failed to tender any evidence to controvert the Appellant's evidence and no reason was given why the Respondents failed to testify and arrived to an erroneous decision.***
- 3. The Learned Magistrate erred in law and in fact in failing to consider the Appellant's oral and documentary evidence as a whole.***

- 4. The Learned Magistrate erred in law and in fact in refusing to make a finding that the Appellant was falsely arrested, confined and maliciously prosecuted by the Respondents and arrived at an erroneous decision.**
- 5. The Learned Magistrate erred in law and in fact in delivering a judgment which was contrary to law and against the weight of the pleadings, submissions and binding authorities.**
- 6. The Learned Magistrate erred in law and in fact in delivering a judgment not supported by the evidence adduced and was occasioned by extraneous considerations which were irrelevant.**
- 7. The Learned Magistrate ought to have found that on the evidence on record and submissions advanced tilted in favour of the Appellant.**
- 8. The Learned Magistrate wrote a judgment that was erroneously wrong without following the issues conversed in the pleadings.**
- 9. The Learned Magistrate erred in importing her own version of evidence in the judgment which evidence was not adduced by any party thus favouring the Respondent which evidence should not be in judgment.**
- 10. The Learned Magistrate failed to analyze the evidence adduced to support the issues involved and therefore arrived at an erroneous decision.**
- 11. The learned Magistrate erred in law and in fact in holding that the Appellant did not plead and prove special damages yet the requisite documents were tendered.**
- 12. The Learned Magistrate erred in law and in fact in failing to hold that the appellant had proved his case on a balance of probabilities.**
- 13. The appellant prays that for the reasons stated above that the appeal be allowed and the judgment of the Senior Resident Magistrate in PMCC No.460 of 2006 be set aside and the appellant be awarded the costs of this Appeal and those of the lower court.**

When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions. I have carefully re-considered the case that was before the trial court. I have also considered the written submissions filed by both sides. Before delving deeper into the merits or otherwise of the appeal, let me set out in brief the case that was before the trial court.

It was the evidence of the Appellant that he was in the employment of Murang'a Wholesalers Limited from 1st May 2001 until 25th December 2005. On 26th December 2005, the Appellant is said to have been summoned to visit the offices of the 1st Respondent whereupon he was arrested and later charged with the offence of office breaking and committing a felony. He was tried for the aforesaid offence vide **Muranga S.R.M. CR. Case No. 68 of 2006**. The aforesaid criminal case was terminated upon its withdrawal on 3rd May 2006. The Appellant then filed a suit before the same court claiming to have been falsely arrested, detained and maliciously prosecuted. The criminal charge which the Appellant faced was office breaking and stealing Ksh.3.9 Million the property of the 1st Respondent. The trial Magistrate dismissed the Appellant's suit on the basis that he failed to prove that his arrest was actuated by malice on the part of the Police and that he had failed to show that he had been falsely detained.

Let me now consider the merits or otherwise of the appeal. Though the Appellant listed thirteen (13) grounds of appeal the same may be summarized to four (4) grounds namely:

- (i) That the trial Magistrate dismissed the Appellant's case without credible and sufficient reasons.
- (ii) That the trial Magistrate failed to appreciate that the Respondent had failed to tender evidence to controvert the Appellant's evidence.

- (iii) That trial Magistrate considered extraneous matters in arriving at his judgment.
- (iv) That the trial Magistrate erred when he ruled that the Appellant did not plead and prove special damages.

I will consider the aforesaid grounds in their chronological manner as set out hereinabove. It is argued by the Appellant that the trial Magistrate dismissed his case without credible and sufficient reasons. The Respondents are of the view that the trial Magistrate gave credible reasons to justify his decision to dismiss the case. This being the first Appellate court, the Appellant is entitled to a re-evaluation of the case. The Appellant has argued that the 1st Respondent's act of withdrawing the criminal charge against the Appellant was in itself a manifestation that the criminal proceedings were instituted and actuated by spite, ill will and improper motives. The Appellant further argued that the 1st Respondent's agents acted on the 1st Respondent's untrue, false and malicious report. The Appellant further alleged that the Police never carried out any investigations before arresting the Appellant and his co-accused. I think it is important at this stage to reconsider what happened before the criminal court. The record shows that the 1st Respondent through one Peter Kamande told the trial Magistrate that the complainant (1st Respondent), wished to withdraw the complaint against the Appellant when their investigations revealed that the Appellant and his co-accused were not involved in the commission of the offences of office breaking and theft. There is no doubt that in order to establish liability for false arrest, imprisonment and malicious prosecutions, the following ingredients must be established:

- (a) That the proceedings were instituted by the defendants.
- (b) That the said proceedings were terminated against the Plaintiff.
- (c) That the defendant acted without reasonable or probable cause.
- (d) That the defendants acted maliciously.

There is no dispute that the Appellant was arrested and charged on the basis of a complaint lodged by the 1st Respondent. It is also not in dispute that the 1st Respondent terminated the criminal case. The questions which must be answered are twofold:

First, whether or not the 1st Respondent acted without a reasonable or probable cause?

Secondly, whether or not the 1st Respondent was actuated by malice?

The 1st Respondent found its offices broken into on the nights of 25th and 26th December 2005. A sum of Ksh.3.9 Million was found missing. The 1st Respondent booked a report at the Murang'a Police Station. The complaint made the Police swing into action wherein the Appellant and one Sakundu Gathogo Muthoni were arrested as prime suspects. The Appellant did not dispute that he was one of the custodians of the 1st Respondent's key to the safe. There was no evidence that the safe was broken. It is therefore only logical in such circumstances for a complainant to suspect the person in possession of the key to the safe to be the person who opened the safe. In the circumstances, I am convinced the 1st Respondent made a reasonable complaint. Having disposed of the first question, it is important to answer the second question which is to the effect as to whether or not the 1st Respondent was actuated by malice to make the report. The recorded evidence indicates that the 1st Respondent's complaint was not false but true. There is no dispute that the 1st Respondent's safe was opened and a sum of Ksh.3,900,000/= was lost. I am convinced the 1st Respondent was not actuated by malice. It goes without saying that the 2nd Respondent received a genuine complaint from the 1st Respondent hence he cannot be faulted for whatever lawful action he took against the Appellant to facilitate investigation of the complaint.

The second ground argued on appeal is to the effect that the Respondents did not tender evidence to controvert the Appellant's case. It is true that the Respondents did not tender any evidence to answer that tendered by the Appellant. The onus to prove his case was placed on the Appellant. It is not a must for a defendant evidence to controvert the evidence of a Plaintiff. The recorded evidence shows that the trial Magistrate considered the Appellant's evidence and came to the conclusion that the same did not establish his case to the required standards. I have also reconsidered the Appellant's aforesaid

evidence. There is no dispute that the Appellant was employed by the 1st Respondent as an accountant. He was entrusted with one of the keys to the safe. That safe was opened and a sum of Ksh.3.9 Million was lost in the nights of 25th/26th December 2005. A report was made to the Police who arrested him as a suspect. I have come to the conclusion that there was no cogent evidence proving malice on the part of the Respondents. In fact the 1st Respondent's act of withdrawing the criminal case against the Appellant was a testimony that it acted in good faith. It immediately withdrew the criminal charge when its investigations exonerated the Appellant of the offence. Had the 1st Respondent continued to press on with the charges, I would come to the conclusion that it was actuated by malice. I see no merit on this ground.

In the third ground, the Appellant complained that the trial Magistrate considered extraneous issues. It is said that there was no evidence to show that a sum of Ksh.3.9 Million was lost. I have carefully looked at the recorded evidence and it is clear that the Appellant acknowledged in cross-examination that the aforesaid sum disappeared before he was arrested. I have perused the judgment and I find no evidence that shows that the trial Magistrate introduced extraneous matters. The trial Magistrate simply relied on the evidence presented before him.

The last point argued on appeal is to the effect that the trial Magistrate erred when he concluded that the Appellant did not plead for special damages. With respect, I agree with the Appellant in this respect. It is obvious that the Appellant had specifically pleaded for special damages in paragraph 10 of the Plea hence the trial Magistrate arrived at an erroneous conclusion. Of course the award of damages is dependent on the success of the action. The suit was lawfully dismissed.

In the end, I see no merit in the appeal. The same is ordered dismissed with costs to the Respondents.

Dated and delivered at Nyeri this 18th day of March 2011.

J. K. SERGON
JUDGE

In open court in the presence of Mr. Wairoma for 2nd Respondent. No appearance for Appellant and Kingori holding brief Kimwere for 1st Respondent.