



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVIL APPEAL CASE NO. 27 OF 2006

ELIZABETH KABURI APPELLANT

VERSUS

PETER MWIKA RESPONDENT

(An appeal against the judgment/Decree of the learned Senior Resident Magistrate Meru J. Ombura in CMCC No. 917 of 1993 delivered on 24th March 2006)

JUDGMENT

The respondent Peter Mwika (**Peter**) sued the appellant Elizabeth Kaburi (**Elizabeth**) and the Attorney General in Meru CMCC No. 917 of 1993. In that claim, he sought damages for defamation, unlawful arrest and confinement and malicious prosecution. The Chief Magistrate by the judgment dated 24th March 2006 found Peter had proved his case for unlawful arrest and malicious prosecution. Peter was awarded by that court Kshs. 50,000/= for unlawful arrest and Kshs. 100,000/= for malicious prosecution. This appeal is against that judgment. This is the first appellate court. That being so, it is my duty to reconsider the evidence of the lower court. That duty was well set out in the case **Eveready Batteries (K) Limited vs. Simon Kinyua** Civil Appeal No. 281 of 2004. The Court of Appeal set out that duty as follows:-

“This being a first appeal it is our duty to re-evaluate the evidence, analyze it and come to our own conclusions but in so doing we must give allowance to the fact that we have neither seen nor heard the witnesses – see Selle vs. Associated Motor Boat Company [1968] E.A. 123 and Jivanji vs. Sanyo Electrical Company Ltd [2003] KLR 425.”

Peter in evidence stated that on 18th September 1993 whilst he was at his place of work, a hotel, police officer arrived and arrested him. He was taken to the police station and placed in the cells for three days. He was charged at Tigania court with a criminal offence. He was subsequently acquitted. Elizabeth was the complainant in that case. Although he did not state so in evidence it is evident from the proceedings he exhibited before that court, that he was charged with assaulting Elizabeth. He continued in his evidence to say that as a result of his arrest and being detained in the police station his hotel business was interrupted. He did not elaborate to state what interruptions his business suffered. He stated further that he was ex-communicated from the church he used to attend due to that criminal charge. There was no evidence placed before court of such ex-communication. Although he said that he could not read or write he however stated that due to the criminal trial he missed attending bible school which he was scheduled to attend. On being cross examined by the state counsel, he stated thus:-

“I was arrested by two police officers..... They told me they were arresting me for assaulting the

1st defendant (Elizabeth) The police had agreed that the evidence of the witnesses was sufficient and they charged me (sic). The police were at fault to belief (sic) false statements. “

Elizabeth in evidence stated that she reported that Peter had assaulted her to the police on 3rd March 1993. She was aware that following her complaint, Peter was charged at Tigania court for that offence. She however was unaware that he was acquitted. She stated further that Peter had assaulted her and as a result, she injured her finger. She produced a P3 to prove that injury. She denied that she gave police false report. The Attorney General did not give evidence in the lower court. The grounds of appeal filed on behalf of Elizabeth faulted the judgment of the lower court for:-

- *Finding that Peter had proved malicious prosecution*
- *Awarding damages to Peter on insufficient evidence when Elizabeth had made an honest report to the police*
- *For the court failing to allow her counterclaim for injuries she suffered.*

Those grounds fall into two broad areas. Firstly, it is whether the lower court erred to have found that the claim for malicious prosecution was proved and secondly, was whether Elizabeth proved her counterclaim. The functions of the police force are found in section 14(1) of the Police Act Cap 84. That section provides as follows:

“14 (1) The Force shall be employed in Kenya for the maintenance of law and order, the preservation of peace, the protection of life and property, the prevention and detention of crime, the apprehension of offenders, and the enforcement of all laws and regulations with which it is charged.”

With those functions in mind, one should consider the evidence tendered before the lower court. Elizabeth stated that Peter assaulted her and she reported it to the police. The police with the functions of section 14(1) of Cap 84 in mind arrested Peter. It will be recalled that Peter when cross examined by the State Counsel confirmed that it was the police on believing the report made by Elizabeth arrested and charged him. In my view, there was no evidence before the learned trial magistrate that Elizabeth gave false or misleading information. Nor was there evidence that Elizabeth in any way directed the police or manipulated them in arresting and charging Peter with the criminal charge. Elizabeth in my view was very distant from the decision that was made by the police to arrest and prosecute Peter. The learned trial magistrate was at fault to have heavily relied on the evidence of Peter tendered before the criminal court which evidence was not tendered under oath. The learned trial magistrate also erred to have wholesomely accepted the judgment of the criminal trial. This is because in the criminal trial, the burden of proof was different to the burden of proof in a civil trial. The learned trial magistrate ought to have considered the evidence tendered before him on a balance of probability. With those shortcomings in mind, and also considering the case of **Murunga vs. The Attorney General** [1979]KLR 138, I find that Peter did not prove on a balance of probability his claim of malicious prosecution. In that case, **Murunga** (supra) the court set out what a plaintiff should show in a claim for malicious prosecution. It set the following tests.

“.....(1) That a prosecution was instituted by the defendant or by someone for whose acts he is responsible, (2) That the prosecution terminated in the plaintiff’s favour, (3) That the prosecution was instituted without reasonable and probable cause, and (4) That it was actuated by malice.”

The criminal case against Peter cannot be said to have been instituted without reasonable and probable cause. Elizabeth testified of how Peter approached her while she was in the company of PW2 and 3 and attacked her causing her injury. PW2 and 3 in that criminal trial gave evidence and supported the case of Elizabeth. With that evidence tendered before the criminal court in mind, would this court say that a prudent and a cautious man would have found that Peter was probably guilty of the offence. See **Murunga**(supra). My response is in the positive. Having found Peter did not prove malicious prosecution claim, grounds of appeal number 1, 3, 4 and 5 succeeds. Elizabeth called a doctor who gave evidence before the lower court. That doctor stated that he examined Elizabeth two years after the injury. He noted that her injury had been healed. As correctly stated by the trial court, Elizabeth should have produced treatment notes to prove that injury and much more she should have called witnesses to show that she was

injured by Peter. This she did not. She did not even state that Peter injured her when she gave evidence in chief. It was only when she was cross examined that she accepted that she was injured by Peter. The trial court found that Elizabeth did not prove her counterclaim. I find no reason to interfere with that finding. There was no evidence to support Elizabeth's counter claim. In the end, I grant the following orders:-

- 1. The judgment in Meru CMCC No. 917 of 1993 dated 24th March 2006 is hereby set aside and is substituted with an order dismissing that case Meru CMCC No. 917 of 1993 with no orders as to costs.**
- 2. The counterclaim in Meru CMCC No. 917 of 1993 is dismissed with no orders as to costs.**
- 3. This appeal succeeds to the extent of number 1 and 2 above. There shall be no orders as to costs in respect of this appeal.**

Dated, signed and delivered at Meru this 18th day of May 2011.

MARY KASANGO
JUDGE