

The appellant's case was presented by **David Kimutai Chepkwony**, (D.W.1). He recalled the 23rd October, 1990 when a lady informed him that there was a planned sale of the appellant's tarpaulins. D.W.1, acting on that information, reported to Eldoret Police Station to investigate the matter. Later, he learnt that the respondent had been arrested and charged but later acquitted because the items allegedly stolen were not identified as belonging to the appellant. He denied that the appellant was malicious or that it was guilty of any wrong doing.

The **A.G.** offered no evidence at the trial.

The learned Senior Resident Magistrate, on the above evidence, held that the respondent had established his claim. He so found, because the appellant's officers failed to check the report upon which the complaint to the police had been made. He then assessed general damages at Kshs 130,000/= plus special damages.

The appellant was dissatisfied with those findings and so preferred this appeal on some nine (9) grounds. The said grounds raise only two issues namely:-

- v That there was no basis for finding the appellant liable; and
- v That no damages should have been awarded to the respondent.

When the appeal came up before me for hearing on 26th July, 2011, counsel agreed to file written submissions which submissions were duly in place by 11th November, 2011. The basic submission of counsel for the appellant is that the acquittal of the respondent in the criminal case *per se*, was not conclusive of the fact that his arrest and prosecution were wrongful. In counsel's view, the servants of the appellant had good and /or reasonable cause to make the report they made to the police given that the subject of the complaint (the tarpaulin) was found in the respondent's possession. The report, according to counsel, was therefore not made with spite or ill will. Reliance was placed on the case of **Nzoia Sugar Company Limited =vrs= Fungututi [1988] KLR 399**, among others.

With regard to damages, counsel submitted that the learned Senior Resident Magistrate was wrongly influenced by the deposit which had been made earlier in the suit as a condition for setting aside a default judgment. The sum awarded was in the circumstances excessive.

The substance of the submissions of counsel for the respondent is that as the servants of the appellant had no basis for making the theft report, the same was false and the subsequent imprisonment and prosecution were thereby rendered wrongful and malicious. Counsel also argued that the testimony of P.W.2 had demonstrated that the respondent had been defamed. In support of those submissions, counsel invoked the case of **Joseph C. Mumo =vrs= A.G. & Another [Nairobi HCCC No. 250 of 2004] (UR)** and the **treatise on Torts by Winfield and Jolowicz. 16th Ed.] 2002.**

I have considered the pleadings, the grounds of appeal and counsel's submissions. I have also given due consideration to the authorities cited. Having done so, I take the following view of the matter. The respondent, in my view, proved that a servant of the appellant had made a report of theft of two tarpaulins to police officers. He also proved that that report led to his arrest and prosecution in the said criminal case. The respondent further proved that the said criminal case terminated in his favour.

There was also proof that before being arraigned in court, the respondent was held in police custody for some time.

The respondent had also to prove, on a balance of probabilities that his arrest was wrongful and the subsequent incarceration false. He had further to prove, again on a balance of probabilities, that the prosecution was instituted maliciously and without reasonable and probable cause or that the servants of the appellant acted with spite and ill will towards the respondent. Did the respondent do so?

With regard to the claim for wrongful or false arrest, the appellant's officer, D.W. 1 testified that on the

material date, a lady went to his office and reported that a sale of two tarpaulins belonging to the appellant was being planned. On receipt of that information, he made a report to the police. He was later informed that a suspect had been arrested but the resultant prosecution was unsuccessful. D.W. 1 denied directing the police to arrest the respondent as the appellant did not investigate the case. He expressly stated that the report to the police was not made out of malice or with spite. He therefore denied the respondent's claim.

The respondent produced copies of the proceedings in Eldoret Principal Magistrate's Criminal Case No. 6560 of 1990. The case was indeed, the foundation of his case before the lower court. The appellant was the complainant and the case was prosecuted by the police. They called three witnesses who included an officer of the appellant and two police officers. The appellant's officer, **Nobert Murema** (P.W.1), testified that during handing over as he was proceeding on transfer, two (2) tarpaulins were found missing, among other items. He then made a report to the Area Manager. Later, he was informed that one tarpaulin had been recovered. He went to the police and saw the respondent and another who had been arrested in connection with the missing tarpaulins.

P.C. Peter Isaboke, (P.W.2) in the criminal case, testified that in the company of **Sammy Kiprotich** (P.W.3, in the same case), they received information that a suspect was selling property belonging to the appellant herein. They went to the house of one suspect (Accused in the criminal case) who led them to the respondent's house. There, the respondent attempted to sell to them one tarpaulin and they arrested him and charged him.

P.C. Samuel Kiprotich, (P.W.3 in the Criminal case), supported P.W.2's evidence that when they were led to the house of the appellant, he attempted to sell to them a tarpaulin which he removed from his house.

The respondent was acquitted under the provisions of section 210 of the Criminal Procedure Code. The trial magistrate found that the tarpaulin which was produced before him had not been positively proved to belong to the appellant and that there were contradictions in the evidence adduced by the prosecution.

With regard to the tarpaulin produced before him, the trial magistrate ordered that it be "forfeited to the state for auction".

On the above evidence, it is plain that D.W.1 herein only made a report to the police of a planned sale of two tarpaulins suspected to belong to the appellant. He gave the source of his suspicion. He did not even know the respondent. On receiving the report, the police acting on information they received, visited the house of the respondent who attempted to sell to them tarpaulins which unfortunately was not positively identified to belong to the appellant.

In view of the above evidence, I find and hold that D.W.1 herein demonstrated satisfactorily that he had cause for making the complaint regarding the tarpaulin. Indeed, the subsequent attempt by the respondent to sell a tarpaulin to police officers vindicated D.W.1's action. In the premises, the appellant in making its complaint, was not actuated by malice, spite or ill-will towards the respondent. Infact, the respondent did not make such allegation. The appellant therefore had reasonable and probable cause for making its report to the police.

The prosecution of the respondent was undertaken by the police. The appellant merely supplied the witnesses as the police prosecutor directed. The appellant had no control of who to summon as witnesses. It was not an investigation agency and did not control the direction the criminal case could take. As the applicant cannot be said to have acted without reasonable or probable cause, the prosecution of the respondent by the police cannot be said to have been malicious. As was held in the case of ***Nzoia Sugar Company Limited =vrs Fungututi (supra)***, "***acquittal per se on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecution***".

The respondent did not demonstrate malice, spite or ill will against the appellant. But the appellant on its

part discharged its burden of showing that it had reasonable and probable cause to make the report it made to the police. The case of **Joseph C. Mumo –vrs Attorney General & Anther** (Supra), on which the respondent relied, is clearly distinguishable from the case before me. There, **Nambuye J.** expressly found that the 2nd defendant had made a false allegation against the plaintiff and that spite, ill-will and improper motive could be implied which is not the position in our case.

I have also read the treatise of **Winfield and Jolowicz** on Tort, cited by counsel for the respondent. The treatise correctly discusses the torts of false arrest, unlawful imprisonment and malicious prosecution. The treatise does not advance the respondent's case in my view, given the special facts of this case.

With regard to the respondent's claim for defamation of character, I have come to the inevitable conclusion that the same was not proved on a balance of probabilities in view of my finding that the appellant in making its report to the police did so with reasonable and probable cause.

In the end, I have found and so hold that the respondent's claims for false arrest, wrongful imprisonment, malicious prosecution and defamation of character were not proved on a balance of probabilities.

I allow this appeal and set aside both the judgment which adjudged the appellant liable to the respondent in the torts of false arrest, wrongful imprisonment, malicious prosecution and defamation of character and one which awarded damages in the respondent's favour. In lieu thereof, I dismiss the respondent's claim in its entirety with costs.

For completeness of the record, If I had dismissed this appeal, I would not have interfered with the damages of Kshs 130,000/= awarded to the respondent as, in my view, the same are not so high as to represent an erroneous estimate of the damages. See **Butt =vrs= Butt [1982-88] (KAR)**. I further order that if the damages have been paid, the same should be refunded to the appellant.

Orders accordingly.

**DATED AND DELIVERED AT ELDORET
THIS 15TH DAY OF NOVEMBER, 2011.**

**F. AZANGALALA
JUDGE**

Read in the absence of the parties and their advocates the date having been given in Court.

**F. AZANGALALA
JUDGE**