



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

Civil Appeal 41 of 2004

ELIZABETH NYAWIRA WARUI.....APPLICANT

VERSUS

MATHEW GICOBBI KARANI.....RESPONDENT

JUDGMENT

This appeal arose from the Judgment of P.T. Nditika Senior Resident Magistrate in Wanguru RMCC No. 3 of 2003 delivered on 13/8/2004.

The appellant has set down 5 grounds of Appeal thus:-

1. The Judgment was not supported by law facts or evidence.
2. The trial Magistrate erred in holding that the appellant was liable for arrest and prosecution of the Respondent.
3. The Trial Magistrate did not appreciate the Judgment or reasoning in the Kerugoya Criminal Case No. 13 of 2002.
4. The trial Magistrate erred in law when he did not appreciate the implication of an acquittal under section 215 Criminal Procedure Code.
5. The Trial Magistrate erred in finding that the respondent had proved his case on a balance of probabilities.

The background of this dispute between the parties is well summarized in the Judgment of the court (page 14 of the record). The appellant made a report at the police station near her home. As a result the Respondent was arrested prosecuted and acquitted in ***Criminal Case No. 13 of 2002 at Kerugoya***. The acquittal was under Section 215 Criminal Procedure Code Cap 75. That Section of Criminal Procedure Code provides “215. The court having heard both the complainant and the accused person and evidence shall either convict the accused and pass sentence upon or make an order against him according to law, or shall acquit him.”

In this case the trial court heard both parties and their witnesses. The court decided to acquit the accused. It is not denied that at the complaint of the appellant the police concerned investigated the claim

and decided to arrest and to prosecute the Respondent. Malicious prosecution is a tort. The remedy is in damages. But the plaintiff has to prove the initiation or continuation of a law suit, criminal or civil. In this case it was criminal. Malicious prosecution consists in maliciously causing process to be issued. In addition it is necessary to prove that there was no probable cause but that the Defendant acted with Malice and that the termination of the suit was in favour of the plaintiff. The plaintiff was able to prove the initiation of the suit and its outcome but never proved malice. There is no evidence that the Appellant acted without probable cause. The record shows that the Respondent was in the Appellants compound and then there was confrontation and the Appellant must have felt threatened and decided to report to the police as she was entitled to do under the law.

It is therefore clear that the trial magistrate misdirected himself in finding that the Respondent was entitled to damages and that he had proved the case on a balance of probabilities. The evidence is that he had not and was not entitled to any damages. The appeal is allowed and the Judgment in Wanguru Civil Suit No. 3 of 2003 is hereby set aside.

Costs in this appeal and in the trial court to be paid to Appellant by Respondent.

Dated this 10th April, 2008.

J. N. KHAMINWA

JUDGE

10/4/2008

Khaminwa- Judge

Solomon – Clerk

Mathew Gicobi Karani – Present

Read in open court.

J. N. KHAMINWA

JUDGE