



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 779 of 2003

ZABLON MOSE.....1ST APPELLANT

ONSONGO ONDIEKI.....2ND APPELLANT

VERSUS

SULMAC (K) LIMITED.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

J U D G M E N T

Zablon Mose and Onsongo Ondieki (hereinafter referred to as the 1st and 2nd appellants), were the plaintiffs in CMCC No. 8485 of 1999. In that suit the appellants sought general and special damages from Sulmac Kenya Ltd and the Attorney General (hereinafter referred to as the 1st and 2nd respondents), for defamation, false imprisonment and malicious prosecution.

During the trial in the lower court, Francis Thenge Mwenje, Ondolo Panga, and the two appellants all testified in support of the appellants' case. The appellants' case was that they were arrested and subsequently charged pursuant to a report made by the 1st respondent. Their trial in Makadara SPMC.Cr. Case No. 2040 of 1998 resulted in their acquittal under section 210 of the Criminal Procedure Code. The appellants maintained that their arrest and prosecution was unjustified, illegal and malicious.

The 1st respondent filed a defence in which they denied the appellants' claim. They maintained that their premises was broken into and equipment worth Kshs.915,000/= stolen and that the theft was reported to the police by the Securicor officer on duty. The 1st respondent maintained that the police arrested the appellants pursuant to their own investigations. The 1st respondent denied that it was responsible for the prosecution of the appellants. The 1st respondent also denied the allegation that it was actuated by malice. During the trial one Thomas Onyango testified on behalf of the 1st respondent.

The 2nd respondent also filed a defence denying that the arrest of the appellants was unjustified, illegal, malicious or calculated to embarrass the appellants. The 2nd respondent also denied that the appellants' arrest and subsequent arraignment in court was illegal or malicious. The 2nd respondent maintained that the police acted within their scope as provided by law. During the trial the 2nd respondent did not call any evidence.

In her judgment the trial magistrate found no malice on the part of the 1st respondent and dismissed the case against the 1st respondent. The trial magistrate found the 2nd respondent liable in respect of false imprisonment and malicious prosecution. She awarded each of the plaintiffs general damages of Kshs.80,000/=. She made no award in respect of the claim for special damages which she found not proved. The appellants were also awarded costs and interests. Being dissatisfied with that judgment the appellants have now come to this court. In their memorandum of appeal, the appellants have raised four grounds as follows: -

- (i). That the learned magistrate erred in law in discharging/exonerating the 1st defendant from the claim.

- (ii). The learned magistrate erred in law and in fact by failing to appreciate that the 1st defendant was jointly and severally liable for the damage suffered by the plaintiffs.
- (iii). The learned magistrate erred in law in awarding low damages to the plaintiffs.
- (iv). The learned magistrate erred in law in not appreciating the extent of damage suffered by the plaintiffs.
- (v). The learned magistrate erred in law in condemning the plaintiffs to pay the first defendant costs of the suit.

It was contended by the appellants' counsel that the criminal case was instituted at the instance of the 1st respondent as the police relied on the complaint lodged by it and the witnesses who testified against the appellant were employees of the 1st respondent. In view of this, counsel maintained that it was illogical for the court to exonerate the 1st respondent.

Counsel for the appellant took issue with the failure of the lower court to award the appellant costs of the suit against the 1st respondent. He submitted that it was oppressive for the appellants to be condemned to bear the cost of the suit against the 1st respondent in view of Order I rule 7 of the Civil Procedure Rules which allows a plaintiff to enjoin any party perceived to have committed a wrong for the purposes of the court determining liability as between all the parties.

Counsel for the appellant further submitted that the award of Kshs.80,000/= to each of the appellants was not reasonable compensation considering that they had lost their employment and have suffered in their reputation. In this regard **HCCC. (Meru) No.19 of 2000 Patrick Murithi Mukuha vs Edwin Warui Munene** where Sitati J. awarded a sum of Kshs.700,000/= was relied upon.

For the 1st respondent it was submitted that it was clear from the evidence which was adduced in the lower court, that the 1st appellant was the one who reported the theft to the police and also called the police. It was maintained that the 1st respondent being the victim of the robbery he was under a civil obligation to report the theft to the police and assist the police. It was maintained that the 1st respondent's witness only testified to the fact of the robbery and what was actually stolen, and that this was after the police had already locked in the two appellants.

It was submitted that the evidence adduced in the lower court was not sufficient to prove the four ingredients required to be proved in a case of a malicious prosecution as pointed out in the case of **Patrick Murithi Mukua vs Edwin Muiruri Munene** (Supra). Relying on the case of **Nzoia Sugar Company Ltd vs Fungututi 1988KLR 399** it was submitted that the fact that the court acquitted the plaintiff was not sufficient to make the 1st respondent liable. It was maintained that there was no evidence of any malice on the part of the 1st respondent. On the issue of costs the court was urged to follow section 27 (1) of the Civil Procedure Act which has a proviso that the costs shall follow the event. It was maintained that the 1st respondent having successfully defended the appellant's claim against him there was no reason why the costs should not be accorded to it.

There was no representation on behalf of the 2nd respondent at the hearing of this appeal notwithstanding the service of the hearing notice on the 2nd respondent.

I have reconsidered and evaluated the evidence which was adduced in the lower court. It is not disputed that the two appellants were employed by Securicor (K) Ltd and were on the night of 28th February, 1998 guarding the premises of the 1st respondent. It is also not disputed that the 1st appellant reported to the police that a robbery had occurred on that night at the 1st respondent's premises. It is also clear that the appellants were arrested and subsequently charged with office breaking and committing a felony contrary to section 306 (a) of the penal code, with an alternative charge of neglecting to prevent the commission of a felony contrary to Section 392 of the Penal Code. The proceedings of **Makadara SPMCC. Cr.C.No.2420 of 1998**, show that the prosecution closed its case after calling two witnesses who were both employees of the 1st respondent. The appellants were subsequently acquitted under section 210 of the Criminal Procedure Code.

In the case of **Nzoia Sugar Co. Ltd vs Fungututi** (Supra) the court of appeal held:-

“Acquittal perse on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecutor. The mental element of ill-will or improper motive cannot be found in an artificial person like the appellant but there must be evidence of spite in one of its servants that can be attributed to the company.”

The question therefore is whether the evidence adduced by the appellants in the lower court was sufficient to prove that

the appellants were arrested without any reasonable cause and that the prosecution was actuated by malice. There is also a further issue as to whether the appellants were defamed by the respondents.

The evidence of the 1st appellant in this regard was as follows: -

“When I went to report the following morning I was locked up in the police cells for 3 days and later charged at Makadara Law courts. I was tried until 3rd November, 1998 and I was acquitted. I have sued because I lost my job and the first defendant defamed me and lowered my reputation. The employer dismissed me and did not pay me my dues.”

Under cross-examination the 1st appellant responded: -

“I am the one who reported the theft and the police told me to continue guarding until morning the following day. The police came and took me at 6.00 a.m. the following day. The officers of the 1st defendant were not present when I was arrested. The complainant was Sulmac Kenya Ltd I sued Sulmac Kenya Ltd as they are the complainant in this case.”

The above evidence does not reveal any ill-will or malice on the part of the 1st respondent or the 2nd respondent. There was a theft at the 1st respondent's premises which was reported by the 1st appellant. The 1st appellant was in fact arrested even before an officer of the 1st respondent came to the scene.

According to the 2nd appellant: ***“The 1st respondent went and reported the matter to the police and the following day I was locked up in cells. The owner of Sulmac Kenya Ltd reported that we had stolen a lot of goods and we were charged in court after 3 days.”***

Under cross-examination he conceded that: -

“the officers of Sulmac Kenya Ltd had not come when I was taken to the police station. It is the police who prosecuted and investigated the case. The court acquitted us. Sulmac Kenya Ltd are the ones who said we committed the offence of breaking and stealing from their premises.”

Clearly the 2nd appellant's evidence does not reveal any malice or ill-will. It is apparent that the 2nd appellant held the 1st respondent responsible for the arrest simply because the 1st respondent reported loss of its properties. However, it was a fact that the 1st respondent lost properties during the break in and that the incident occurred at the time the two appellants were guarding the premises. Moreover, the decision to arrest or charge the appellants was not made by the 1st respondents but was made by the police. In the light of the above the case against the 1st respondent was not proved and the trial magistrate was right in dismissing the suit.

As regards the 2nd respondent, it is evident that the appellants were arrested and charged by the police and that criminal prosecutions were initiated against them by the police and that the criminal proceedings ended in the appellants' favour. Although the 2nd respondent denied liability there was no evidence adduced to explain the basis of the decision to arrest and charge the appellants. The proceedings of the criminal trial also indicate that no police officer testified before the criminal court to explain who arrested the appellants or why they were charged. Thus there was no evidence to show any reasonable or probable cause justifying the arrest and prosecution of the appellants. The inference that the same was actuated by malice cannot be ruled out. In the circumstances the finding of the trial magistrate that the 2nd respondent was liable cannot be faulted. I therefore find no substance in the appeal against liability.

The appellants were each awarded damages of Kshs.80,000/= in respect of general damages for false imprisonment and malicious prosecution. The case of **Patrick Murithi Mukua vs Edwin Warui Munene** (Supra) was relied upon for the contention that the award was inadequate. However, I find that authority distinguishable as it included damages for personal injuries which was not the case herein. The appellants attributed their loss of employment to their arrest and prosecution. However, no evidence was adduced from their employer to confirm that such was the case. The appellants also claimed damages for defamation. However, the trial magistrate was not convinced that the appellants had suffered any serious injury in this regard. This was an error of principle as actual damage was irrelevant. The appellants were accused of being involved in a crime and this had a negative impact on their reputation and the injury to their reputation must be presumed. There is therefore sufficient justification for this court to interfere with the quantum of damages awarded.

Accordingly I would award each of the plaintiffs an additional sum of Kshs.50,000/= in respect of general damages

taking into account the element of defamation.

With regard to the issue of costs the trial magistrate in exercise of her discretion awarded the 1st respondent costs of the suit. Given that the 1st respondent had successfully defended the suit, the trial magistrate exercised her discretion judiciously and there is no justification for interfering with the order for costs.

For the above reasons, I find no merit in the appeal against liability but allow the appeal on quantum to the limited extent of awarding an additional sum of Kshs.50,000/= in respect of general damages. I make no orders as to costs.

Orders accordingly.

Dated and delivered this 13th day of May, 2008

H. M. OKWENGU

JUDGE