



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 107 of 2004

(From the Judgment and Decree of the Hon. Kaikai M. Senior Resident Magistrate, in

RMCC No.5597 of 2001 at Milimani Commercial Courts.)

ARCADE STATIONERS LIMITED.....APPELLANT

VERSUS

JOHN WANYONYI WAFULA.....RESPONDENT

J U D G M E N T

Arcade Stationers Ltd (hereinafter referred to as the appellant), was one of the defendants in the lower court where John Wanyonyi Wafula (hereinafter referred to as the respondent), sued the appellant, jointly and severally with Joseph Mungai, Zachary Turuka and the Hon. Attorney General, for general damages for unlawful arrest, wrongful confinement, malicious prosecution and defamation. The respondent, who was at the material time employed by B.M. Security Company Ltd as a security guard, claimed that he was unlawfully arrested, confined and prosecuted pursuant to a false and malicious report made by the appellant's agents to the police. The appellant filed a defence to the respondent's suit denying the respondent's claim, maintaining that the report made was a true and accurate report in respect of a burglary which took place at the appellant's premises on the weekend of 9th to 12th October, 1999. The appellant contended that the respondent's suit was misguided, bad in law and unattainable. The other defendants also filed a joint defence denying the respondent's claim and contending that the police had reasonable cause to arrest and prosecute the respondent. The defendants also contended that the respondent's claim against them was statute bad.

During the hearing before the lower court, the respondent testified in proof of his case, whilst Patel Ashwin Gordhanders, an accountant with the respondent, testified on behalf of the respondent. Zachary Turuku, and PC David Ndiritu, both CID officers from Central Division also testified in support of their defence.

The respondent testified that on the 12th October, 1999, he reported on duty in the morning. At about 9.00 a.m., he learnt that there had been a theft at the premises. The police carried out investigations and arrested three night guards. On the 25th October, 1999, the respondent was arrested and taken to the police station where he was charged with resisting arrest and theft. He was subsequently tried and acquitted under Section 210 of the Criminal Procedure Code. Subsequently, his employer who was BM Security Services Ltd terminated his employment. The respondent maintained that there was no theft at the appellant's premises and that the padlocks which were alleged to be damaged were not actually damaged. He maintained that the appellant's agents were malicious in making the report and that the CID officers did not properly investigate the case.

Patel Ashwin Gordhanders testified that the respondent was a guard at the appellant's Uganda house premises. On 12th October, 1999, one of the witness's colleagues discovered that there was a break in at the premises. The police and the insurance company were informed. Later, one Girish prepared the list of the items which were missing from the premises whose value was over Kshs. 2 million. The witness maintained that no specific complaint was made against the respondent.

Constable Zachary Turuka testified that he received a report of store breaking and stealing from an officer of the appellant Girish Palmar, who was a caretaker at Uganda house. Accompanied by one Mungai, they visited the premises and confirmed that the padlock had been cut off and the door forced open. Three of the guards were taken to the police

station for interrogation. On 25th October, 1999, the respondent was arrested and charged. Subsequently the respondent was tried and acquitted. The witness maintained that the arrest was not malicious as the respondent ought to have known who committed the crime.

PC David Ndiritu testified that he was present at the time of the arrest of the respondent. He explained that the respondent ducked into the lift and disappeared. He came back 30 minutes later when the officers wrestled him and took him to the police station.

Counsel for the appellant and the respondent each filed written submissions urging the court to find in favour of his client.

In his judgment, the trial magistrate found that the respondent was arrested and charged, and that he was subsequently acquitted of the charge. The trial magistrate also found that the investigations done were shoddy and that there was no reasonable or probable cause for the arrest and confinement of the respondent. Arising from his findings the trial magistrate held all the defendants vicariously liable to the respondent. Noting that the respondent had since lost his job, the trial magistrate awarded general damages of Kshs.180,000/= for malicious prosecution and Kshs.180,000/= for unlawful arrest and unlawful confinement.

Being dissatisfied with that judgment, the appellant has now filed an appeal raising 9 grounds as follows: -

- (i) The learned magistrate gravely erred in law and fact by finding that the appellant was liable for the respondent's loss, if any, when in fact the appellant had a duty to report the theft to the relevant authority.
- (ii) The learned magistrate erred in law and fact by coming to the conclusion that in deed there was no theft the basis of the respondent's arrest when he was in fact not called upon to make that determination.
- (iii) The learned magistrate erred by completely ignoring the overwhelming evidence of the appellant and other defendants in the case who positively confirmed that there was theft at the appellant's premises.
- (iv) The appellant's role in the whole case was not properly evaluated by the trial magistrate for if he did, he ought to have come to the conclusion that the appellant was not liable for the alleged loss and damage occasioned on the respondent.
- (v) The learned Magistrate's decision is full of conjectures.
- (vi) There was no proof at all by the respondent of the ingredients of the respondent's claim least of which that the respondent was maliciously prosecuted.
- (vii) Little or no regard was taken at all to the appellant's submission.
- (viii) The respondent did not prove his case on a balance of probability and the learned magistrate ought to have dismissed the case.
- (ix) The quantum of damages as assessed by the trial magistrate was excessively high and completely unjustified.

Mr. Kandere who argued the appeal on behalf of the appellant submitted that the respondent did not establish some of the key ingredients necessary to establish a claim for malicious prosecution as provided in the case of ***Katerrega vs the Attorney General (1973) EA 287***. In particular, it was submitted that the respondent did not prove that the appellant acted without reasonable or probable cause or that the respondents acted maliciously. It was maintained that there was no malice on the part of the police officers in effecting the respondent's arrest as the arrest was done by the officers during the course of their duties under powers conferred on them by the Police Act. Relying on the case of ***James Karuga Kiiru vs the Attorney General and 2 Others Civil Appeal No.171 of 2000***, it was submitted that there was no evidence of malice on the part of the appellant as all they did was to report a crime to appropriate authorities and the appellant therefore could not be held responsible for any action taken thereafter.

Mr. Njenga who appeared for the respondent maintained that the trial magistrate's judgment was based on sound legal principles. Mr. Njenga submitted that the respondent had demonstrated that the appellant reported a case of theft to the police, but that the magistrate trying the criminal case found that no theft had taken place. It was further maintained that the appellant was unable to establish loss or ownership of the alleged goods. In the circumstances it was contended that their report against the respondent could only have been actuated by malice. The court was urged to distinguish this case from the case of ***James Karuga Kiiru vs the Attorney General*** (Supra), as the arrest and prosecution were not based on reasonable suspicion that a criminal offence had been committed. On quantum, it was submitted that the amount

awarded were reasonable and commensurate with the authorities which were cited by the counsels in the lower court.

Regarding the respondent's claim for unlawful arrest, unlawful confinement and malicious prosecution, it was not disputed that the respondent was arrested, confined and subsequently charged and acquitted. As regards the appellant, the question is whether the prosecution was instituted by the appellant or by someone for whose action the appellant is responsible. The appellant's witnesses who testified before the court denied having mentioned the respondent or having given any adverse report against him. The CID officers on the other hand maintained that they arrested the respondent because they had reasonable cause to do so. The witnesses did not however, lay any evidence before the court in support of such reasonable cause. The evidence regarding the alleged theft which was adduced both before the trial magistrate and the criminal court was contradictory and there was doubt regarding the break in and the alleged stolen items. Further, there was no evidence implicating the respondent with the alleged offence. The only reason why the respondent appears to have been arrested was the fact that he was a guard in the premises. However, there was no evidence to confirm that the respondent was on duty at the time when the theft allegedly took place. Indeed, the fact that the respondent was arrested almost two weeks after the alleged theft, is clear evidence that his arrest was actuated by other factors which have not been disclosed. The report which precipitated the arrest of the respondent was made by the appellant's officers who alleged that a breaking in and theft had taken place in their premises. However, it was for the police to investigate the report and satisfy itself that the material before it was sufficient to satisfy a prudent and cautious man that the respondent was probably guilty of the offence before taking action against him. The action taken by the police in arresting and charging the respondent was not justified as there was no reasonable or probable cause established for arresting or charging the respondent. Nonetheless, the appellant cannot be blamed for the decision made by the police to arrest and charge the respondent almost two weeks after the report made by the appellant's officers. There was a suggestion that the respondent was arrested because of his refusal to record a statement with the insurance company so as to facilitate the compensation of the appellant. No evidence was however laid before the magistrate in support of this allegation. Indeed, there was no evidence at all of any malice on the part of the appellant, nor was there any evidence to support the particulars of malice with regard to the appellant. There was therefore no basis for the trial magistrate's finding of liability against the appellant.

With regard to the quantum, there were appropriate authorities cited before the trial magistrate which guided the magistrate in arriving at his award. There is no evidence that the trial magistrate proceeded on wrong principles in assessing quantum or that the award was so excessive as to justify the intervention of this court.

The upshot of the above is that I allow the appeal to the extent of setting aside the judgment against the appellant only. To this extent only does the appeal succeed.

Orders accordingly.

Dated and delivered this 3rd day of November, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Kandere for the appellant

Ms Mambo for the respondent