



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Appeal 265 of 2004

*[Being an appeal from the Judgment of the Hon. D. K. NGOMO – SPM in Nyahururu Senior*

*Principal Magistrate’s Court SPMCC No. 153 of 2002]*

EMILY NDUTA KIREGI ..... APPELLANT

VERSUS

MONICA MUTHONI KANYORA ..... RESPONDENT

JUDGMENT

The genesis of this appeal can be traced to a complaint of assault made by the appellant against the respondent to the police. As a result of that complaint the respondent was arrested by the police and charged with the criminal offence of assault and causing body injury together with another *Esther Wariga Kanyora* in Criminal case number 442 of 2001 at the Nyahururu Principal Magistrate’s Court.

After a full trial the respondent was acquitted of the charge. The respondent filed a civil suit before the same court against the Attorney General, Bernard Murunga and the appellant being the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants respectively. The respondent sought for special damages of Kshs.37,459/- and general damages for malicious prosecution. Interlocutory judgment was entered against the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The 1<sup>st</sup> and 2<sup>nd</sup> defendant’s statement of defence was also struck off but according to the records from the trial court nothing more seems to have happened as against the 1<sup>st</sup> defendant. The appellant defended the case and the respondent suit was heard fully. The respondent gave evidence in support of her claim and detailed how she was arrested by the 2<sup>nd</sup> defendant who was attached Kipipiri police station crime branch on 19<sup>th</sup> February 2001. The respondent said the arrest was as a result of a malicious and false information given to the police by the appellant against the respondent.

On 22<sup>nd</sup> February 2001, the respondent was arraigned before the Principal Magistrate’s court in Nyahururu where she was charged with the offence of assault and occasioning actual bodily harm contrary to **Section 251 of the Penal Code**. Before the respondent was taken to court she complained that she was mistreated at the police station where she had to spend a night in a cold cell. The respondent denied that she had assaulted the appellant and according to her the appellant knew that the information she gave to the police was false. Secondly, the 2<sup>nd</sup> defendant who was a police officer in the course of the investigation of the complaint, ought to have known that the respondent was not involved in the assault and to also know the report was not only false but also laced with malice.

Thirdly, there was no reasonable or probable cause of preferring the charge against the respondent. On 15<sup>th</sup> January 2002, the plaintiff said she was acquitted after going through a torturers trial and the prosecution was terminated in her favour.

The appellant in her statement of defence denied that the prosecution was malicious. She contended that the report to the police regarding a complaint of assault was made in good faith. It was supported by a P3 form issued by the police and filled by a doctor.

The respondent was also put on her defence and gave evidence in her defence after which she was acquitted under **Section 215 of the Criminal Procedure Code**.

After evaluating the evidence before the trial court, the learned trial magistrate found that the plaintiff was able to prove a case of malicious prosecution against the 2<sup>nd</sup> and 3<sup>rd</sup> defendant and judgment on liability was entered against them jointly and severally. On the issue of quantum, the respondent was awarded general damages of Kshs.80,000/- and special damages of Kshs.37,439/- with costs and interests.

The appellant was aggrieved by the said judgment and has appealed and raised the following grounds of appeal: -

- 1. That the learned trial magistrate erred in both law and in fact by failing to appreciate that the respondent totally failed to satisfy all the requisite ingredients on a claim for damages for malicious prosecution.**
- 2. That the learned trial magistrate erred in both law and in fact for finding that a claim for malicious prosecution had been established against the appellant herein whereas at the same time absolving the Honourable the Attorney General of any blame whereas all criminal prosecution as are initiated and authorized by the latter.**
- 3. That the learned trial magistrate erred in both law and in fact by attributing evidence not on record to the appellant and subsequently using the same to find wrong doing on her part. By doing this a miscarriage of justice was occasioned.**
- 4. That the learned trial magistrate erred in both law and fact in making a finding in favour of the respondent on special damages when he principles on the grant of the same were not satisfied.**
- 5. That the learned trial magistrate erred in both law and fact in failing to find that the respondent had failed to substantiate her claim on a balance of probability.**
- 6. That the learned trial magistrate erred in both law and fact by considering the evidence of the appellant in isolation to that of the respondent thus occasioning a miscarriage of justice.**

In further exposition of the above grounds of appeal, learned Counsel for the appellant, **Mr. Ndegwa** invited this court to consider that there was no evidence to support the finding that the institution of the criminal proceedings against the respondent were unjustified. It is clear that after the appellant was assaulted. She made a report to the local chief; she was also treated for the injuries sustained as a result of the assault. She was issued with a P3 form which was duly completed by a doctor. Afterwards the matter was wholly taken over by the police and all the witnesses who testified before the trial court confirmed that the appellant was assaulted. Even the respondent said that she saw a fight between the appellant and one **Emily Nduta Kiregi** but she denied that she hit the appellant with a stick. The police officer who took a statement from the appellant, must have been convinced that there was a reasonable complaint and thus, preferred the charges against the respondent. The fact that the trial magistrate found that there was a case to answer by the respondent is a clear demonstration that there was probable reason for the complaint.

Lastly, Counsel argued that the appellant was not in control of the prosecution and cited authorities in **Hccc No. 1816 of 1990 – Nairobi – Philemon E.L. Ngogoto Vs Teachers Service Commission** and

**Civil Appeal No.59 of 19987 – Jadiel Nyaga Vs Silas Mucheke** in support of that proposition.

Learned Counsel for the respondent **Mr. Njogu** argued that the prosecution against the respondent was perperpetuated by malice. It is clear from the evidence that the respondent was not at the scene of assault and there was no probable reason why the appellatant gave information which she knew to be false to the police. Counsel invited this court to consider the authority in the case of **Murunga Vs Attorney General KLR page 138** where it was held

***“In proceedings for malicious prosecution, the plaintiff must show (1) that a prosecution was instituted by the defendant or by someone for whose acts he is responsible, that the prosecution terminated the plaintiff’s favour, that the prosecution was instituted without reasonable and probable cause, and that it was actuated by malice. The test whether the prosecution was instituted without reasonable and probable cause is whether the material known to the prosecutor would have satisfied a prudent and cautious man that the plaintiff was probable guilty of the offence.”***

Counsel further invited this court to uphold the decision of the trial court.

This being a first appeal, this court is mandated to evaluate the evidence before the trial court while bearing in mind that it never saw or heard the witnesses and therefore make due allowance for that. The principles governing the consideration and evaluation and findings of an appeal court have well been established particularly in the case of **Kiruga Vs Kiruga & Another [1988 KLR page 348]** where the Court of Appeal held

***“An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but his is a jurisdiction which should be exercised with caution.”***

The principle issue for determination in this appeal is whether the prosecution against the respondent was malicious. In establishing whether the prosecution was malicious, the test to be applied as been set out in several decisions among them, the case of **Kagane and Others Vs Attorney General and Another [1967] E.A page 643**. The test to be applied is whether there was reasonable and probable cause for prosecution and whether on the facts a reasonable person would honestly have believed that the prosecution was likely to succeed. The principles were further expounded in the case of **Katerega Vs Attorney General [1973] E.A 287** where it was held that

- (i) “A person instituting legal proceedings is not responsible for imprisonment which is the result of an order of the court;***
- (ii) The plaintiff has to prove that the person instituting the proceedings was actuated by spite, ill-will or improper motives;***
- (iii) Lack of reasonable and probable cause cannot be relied upon by itself to show malice.”***

The Court of Appeal in a recent decision **Standard Chartered Bank Kenya Ltd Vs Intercom Services Ltd and 5 others Civil Appeal No. 37 of 2003 page 46** it was held that

***“Where the complainant reports a commission of crime to the police and police upon independent investigations initiate a prosecution the reporter is not liable for the tort of malicious prosecution unless the report is made falsely and maliciously.”***

According to the records especially the proceedings of the criminal trial, the appellatant was assaulted. She was treated and issued with a P3 form and the respondent was charged and put on her defence. She was however acquitted under **Section 215 of the Criminal Procedure Code**.

It is clear from the records that there was a probable cause which led the appellatant to file a complaint

with the police. Once the matter was with police the appellant had nothing to do with the cause of events. The police must have formed an opinion that there was reason to charge the respondent.

However after a full trial, the court concluded and I quote;

*“There exists a possibility as stated by DW 3 corroborating that accused 1 was not present at the scene of the scuffle. I give the benefit of doubt to both accused and acquit them of the present offence under Section 215 of the Criminal Procedure Code.”*

I am not persuaded that from the evidence before the trial court which was based on the material from the criminal case, that this prosecution was instituted without reasonable or probable cause. There is also no material to support the allegation that the prosecution was actuated by malice. The respondent said that she arrived at the scene of the scuffle, although it was after the assault. The fact that the prosecution failed to prove the case to the required standard can not be taken to mean that the prosecution was without probable cause and was with malice. For those reasons, the learned trial magistrate was in error and there is no material before the court which supports the case of malicious prosecution.

The upshot of the above analysis and evaluation, the appeal herein is allowed, the judgment of the trial court is set aside and substituted with an order dismissing the suit. Bearing in mind the nature of this litigation, each party should bear their own cost both in the lower court and before this court hopefully this will bring this litigation to an end.

It is so ordered.

**Judgment read and delivered on 16<sup>th</sup> day of March 2007.**

**MARTHA KOOME**

**JUDGE**