REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 527 OF 2000

FRANCIS MUKUNGI …… APPELLANT

VERSUS

SAMSON KIRERA & ANOTHER …….. RESPONDENTS

JUDGMENT

On 22nd June 1994 the respondents Samson Kirera and Margaret Kambura filed a suit in the court of the Principal Magistrate (Sheria House then) Nairobi to claim both general and special damages for false imprisonment and malicious prosecution. They alleged that they were, on 18th November 2002, arrested and detained by police in custody maliciously and without any reasonable couse and thereafter they were charged with causing malicious damage to the appellants' property known as KIIRUA/NKANDO/619 in Meru Criminal Case No. 3332 of 1992.

These averments were denied in a defence the appellant filed in the same court on 5th August 1994.
The case was heard on 4th March 1999, 6th April 1999 and the judgment delivered on 16th April 1999 by B. Rashid Principal Magistrate who awarded the respondents Kshs.75,000/= and 50,000/= respectively plus costs of the suit.
This decision did not go down well with the respondents who filed an appeal to this court in a memorandum of appeal dated 9th October and filed herein on 11th October 2000. This memorandum of appeal listed seven (7) grounds of appeal.
These were that the learned trial Magistrate erred in law and fact in entering judgment for the plaintiff's against the defendant based on proceedings which were totally defective by virtue of decided cases, that she erred in disregarding the defendants evidence and submissions on record, that she erred in awarding the plaintiff's Kshs.75,000/= and Kshs.50,000/= respectively without any basis, that she failed to decide the case on the basis of evidence on record; that the judgment was not dated and that the judgment delivered was not in compliance with the mandatory provisions of the law.

The appeal was fixed for hearing in this court on 27th March 2003 wherein counsel for both parties submitted thereon either for or against it.
According to counsel for the appellant the appeal was nonstarter as the Honourable the Attorney General was not enjoined thereon as it was the police officers who made the arrest, carried out detention and prosecution of the respondent.
The respondents' counsel submitted that the arrest, detention and prosecution of the appellants was proper and regular as there was a probable or reasonable cause for these events to be carried out.

That since the appellant's report was intended to tie itself to taking away 10 acres of the respondents' land without paying for it, this was malicious.
That if it was found there was no probable cause for the police being brought into the matter, this too imputed malice.
I heard and recorded these submissions. The parties agreed that there had been a prolonged dispute between them over the plot No.619. This plot borders another No.523.

There was also no dispute that the report of the incident was made to Kirua police station on 18th November 1992 and that a police Constable Cyrus Kiambi investigated the complaint.
In the criminal case No.3332/92 P.C Cyrus Kiambi said:
"I was called by the OCS. He requested me to accompany him to the scene of the crime.
At the scene, the complainant's wife showed us the uprooted poles. They were all eight since the barbed wire had been cut. Some hedge had also been cut down. I went out to look for suspects. We arrested the first and second accused. They were all identified to us by the complainant's wife. We collected three poles and some barb ed wire. We took them to the police station.
At the police station we kept them as exhibits. We could not carry all of them. We had no police vehicle. I then charged the accused with the offence".

This evidence shows police involvement in the case at the behest of the respondent.
The respondents argument appear to be that the case ought not to have involved the police and that the appellants knew this. That his involving police in the dispute was simply intended to enable him snatch the piece of land from the respondents without paying for it.
What this means is that there was no probable or reasonable cause for the appellants making a report to the police to implicate the respondents with the commission of the offence.
But this was upon the said respondents to establish. However, this is what the first respondent said when he testified in the case subject to this appeal;
"The defendant is known to me. He bought my neigbours land called Erustus Mutwiri Rutere. Its plot number 619 and mine is 52 4 ref. As per paragraph 4 of plaint. …… It is his plot No.619. He bought land there. I did not sell the defendant land. On 18.11.92 he reported me to the police unlawfully. I

stay in my home. He said I went to his land and removed his fence. Fence was on 524 and not on 619. I never went to 619 to destroy his fence. He had no right to report me to the police. We do not agree. Whoever sold him plot No.619 showed him my land of 524 instead of the seller's land. He has refused to go to land sold to him. We have other cases even in court of appeal. We have disputes and are not

friends. I was remanded in cells for two days and prosecuted at Kiirua police station. I was then taken to remand prison after …… for about 3 days in criminal case number 3332/92. Defendant came to court but did not prove his case. I was acquitted together with my wife ".

The first respondent then went on to enumerate the number of cases the two parties have been disputing in and said "he tried to have me jailed so tha t he could move into my land".

And that

"He caused me to be arrested in malice. I am praying for damages for malicious prosecution, false imprisonment".

He continued

"He is threatening me with cases in order to take the acres from my plot without any payment".

The second respondent also testified denying that she, as well as her husband ever destroyed the appellants' posts (fence).

All this evidence was not saying the respondents did not destroy the fence, but that the appellant had encroached on the respondents' plot number 524.

The implication here would be if the appellant encroached on the respondents said plot and fenced it off then there was nothing illegal if it was pulled down.

This is why the Magistrate in the criminal case said

"Firstly there is established grudge between the accused and complainants, a long standing family dispute.

Secondly the prosecution has not proved that the damaged poles were on the complainant's side of the shamba. There being a land dispute, it was not proved w hether the complainants were trespassers or otherwise".

In the Magistrates mind, the question was not whether the fence was damaged or not but that there being a long standing land dispute between the two families this act was bound to occur but that the Magistrate could not determine who of the two was the cause.

If that was the case was the appellant driven by ill will by reporting the matter to the police, if he believed, as he did, that the land on which he lived and which he had fenced was the one he had bought from Mutwiri Rutere?

And once he reported the matter to police, what part had he to play in the investigation, arrest and prosecution of the respondents?

None at all.

If the police carried out investigations and found the report made by the appellant had no substance, they would not proceed to arrest, detain and/or prosecute the respondents and that they did this meant they felt the report was based on reasonable grounds.

And if the respondents had any quarrel with their arrest, detention and prosecution then in this case the main culprits were the police and that the Attorney-General should have been enjoined to the suit subject to this appeal.

Police action cannot be attributed to the appellant who had no authority over them. The respondents did not adduce evidence to establish on a balance of probabilities that their arrest, detention and prosecution was without any reasonable cause and as was said in the case of Jediel Nyaga and Silas Mucheke (C.A. No.59 of 1987) and Egbema v. West Nile District Administration [1972] E.A. 60,

"The appellant having reported the matter to the police about the respondents' action in damaging his

fence, the police took over the matter to investigate the respondent for a possible offence. There was evidenc e they visited the scene and took some exhibits. Once the appellant gave the report, he ceased to have anything to do with the matter and the respondent became a natural suspect. There was no evidence of malice on the part of the appellant or absence of reasonable and probable cause against the police".

This is the position in the case subject to the present appeal. In my view the appellant who made the report to the police was not responsible for the arrest, detention and prosecution of the respondents. That he was a prosecution witness did not render him responsible for the arrest and subsequent prosecution of the respondents by the police.

The police (through their authorized officer) were not party to the suit subject to this appeal and no finding could be made against them.

And even if they were, no evidence was adduced to show absence of reasonable and probable cause to warrant any finding against them for false arrest and/or detention.

The mere fact that the appellant made a report to the police or that there is along standing land dispute between the parties was not sufficient to establish malice.

The respondents' acquittal in the criminal case constituted a determination of the prosecution in his favour and this fact may very well have rendered the police liable for malicious prosecution but that the Attorney General was not enjoined to the case no such finding could have been made.

I allow this appeal and set aside the lower court order and direct that any moneys released to the respondents be refunded to the appellant failing which the appellant to institute appropriate proceedings for the recover thereof.

Delivered this day of 2003.

D.K.S AGANYANYA

PRINCIPAL JUDGE