



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI(MILIMANI LAW COURTS)**

**CIVIL APPEAL 200 OF 2004**

**PETER NAGWEYA CHAGOME ..... APPELLANT**

**VERSUS**

**THE HONOURABLE ATTORNEY GENERAL....RESPONDENT**

**JUDGMENT**

The appeal herein challenges the decision of the Chief Magistrate at Milimani Commercial Courts, in CMCC 2291 of 2002, delivered on 20/2/04, on the following grounds:

- 1. The Lower Court erred in law in failing to find that the ingredients of any reasonable and probable criminal prosecution is the *actus reus* and *mens rea* in the face of express finding of the Criminal Court that no motive and therefore no *mens rea* the basis of the Plaintiffs arrest, confinement and prosecution had been disclosed by the prosecution.**
- 2. The Learned Magistrate prejudicially and selectively made findings on the Plaintiffs arrest without addressing her mind as to why his assailant was not equally arrested even if not charged and prosecuted if any complaint should result in arrest and confinement.**
- 3. The Lower Court's finding as to the test to be adopted and that is whether a reasonable man deemed the Plaintiff guilty was an erroneous finding of law as the test is the evidence adduced and the outcome thereof.**
- 4. The Learned Magistrate failed to address her mind to the detailed Notice of Intention to Sue the A.G. which notice would have aided her in her findings as the same contributed part of the Plaintiffs evidence.**
- 5. The Learned Magistrate having appreciated the failure on the part of the investigating officer to give evidence proceeded to hold that a reasonable mind would have deemed the Plaintiff guilty without any evidence from the investigating officer.**
- 6. The Lower Court erred in law and in fact in holding that particulars of malice are required in a claim for malicious prosecution when what is required is the evidence to suggest malice.**
- 7. The Lower Court completely failed to address itself to the Plaintiffs claim for conspiracy to defeat the course of justice.**
- 8. The Learned Magistrate failed to address her mind to the authorities statutory precedents and**

**leading authors of law as cited by the Plaintiff in his submissions.**

**9. The Learned Magistrate failed to make a finding as to what quantum of damages would be payable to the Plaintiff had he succeeded in his case.**

Wherefore the appellant/prays that the appeal be allowed; set aside the judgment of the Subordinate Court; uphold the appellants submission on quantum of damages as filed in the Subordinate Court; then costs of this appeal.

The brief facts in the suit are that on 8/5/00 the Plaintiff was charged in Kibera Criminal Case No. 3839/00 with assault yet he had not beaten anybody. He was tried and subsequently acquitted. He contended that his arrest and prosecution was a cover up for a complaint which he himself had lodged at Muthangari Police Station. He had in fact gone to the said police station to procure a P3 form in his own assault when he was locked up. He stayed there for two days and at Industrial Area Remand Prison for 5 days. As a result he lost his job at a certain butchery and incurred legal fees in the sum of 80,000/=. He contended that he suffered loss of esteem even in the church where he is an elder. He seeks compensation. The defendant did not call any witnesses.

I have carefully gone through the pleadings and the evidence in the Subordinate Courts file. I have also considered the submissions of the learned counsels in this appeal and the authorities cited and relied upon. With the above in mind, my finding and conclusions on the grounds of appeal herein are as follows.

Ground of appeal number one seems to stress on *actus reus* and *mens rea*. True these are the ingredients that must be proved to constitute a crime. But the civil case, from which this appeal originated, has to be clearly differentiated from the criminal case with which the appellant had been charged, but acquitted. To succeed in establishing the alleged unlawful confinement and prosecution, the appellant has to show that there was no reasonable cause for his arrest and prosecution by the Respondent.

That, the appellant failed to prove since the record is clear that a complaint for assault by the appellant had been made by a complainant, who actually gave evidence at the criminal proceedings. Upon the complaint, the Respondent [police officers, had every reason to believe that a crime had been committed] and they took the necessary steps pursuant to their legal obligations, and arrested the appellant and commenced the investigations.

“*Mens rea*” is one of the two ingredients of a crime. And I believe *mens rea* is very different from motive. “*Mens rea*” is the intention with which the act is committed, whereas motive is the reason behind the intention. The appellant’s confusion of the two concepts is quite apparent.

Ground of appeal number two shows a failure in the appellants understanding of the basic fact that the criminal court deals and dealt with the case before it, not who might/should/ought to have been prosecuted, but was not so prosecuted or charged. The appellant faults the lower courts, both, criminal and civil, for not demanding, and getting the reason why the appellants assailant was not arrested and charged, as was the appellant. That is what the appellant labels *selective arrest and prosecution*.

Again, with due respect, that is not the role nor the place of this court. The court deals with those brought before it. The court does neither prosecute or sue.

Ground of appeal number three (3) is not substantiated by the material – evidence on record. Indeed, the last six words in that ground of appeal, as per the Memorandum, are contradictory of what the appellant intends to put forward, *vis-à-vis*, the evidence on record.

It is after hearing the prosecutions evidence, that the Criminal Court said, and concluded, that the appellant had a case to answer, and was put on his defence.

To hold that the accused has a case to answer does not mean guilt. The verdict of guilty is only after the accused has given his evidence in defence. In the present case, the defence evidence, and applying the standard of proof in criminal matters, led to the appellant's acquittal.

This ground of appeal has neither substance, no merit, and I dismiss the same as untenable.

The challenge that the investigating officer's evidence was crucial, but was not given, or produced, does not in my view, add any value to the appeal before me, or the judgment of the Subordinate Court, either at the criminal or civil level. This is because, it is the right of the prosecution to call whatever evidence it deems useful and in support of their case. The court cannot force any party to call any particular witness. If the court deems a particular witness essential, however, the court has the power to summon such evidence, on its own motion. But that evidence or witness, is not assigned to any of the parties.

May be, and this is just an idea, failure to call the evidence of the investigating officer is what led to the prosecution losing their case, at the criminal level. But that is purely guess work. There is no evidence to support that.

At this juncture I need to point out that the grounds of appeal place too much emphasis on the criminal, at the expense, of the clarity of the real grounds of appeal.

From the submissions by the learned counsel for both sides, the two main issues that were ventilated are whether or not the Subordinate Court erred on the issue of malicious prosecution and or conspiracy, by the Respondent, to defeat the cause of justice. To those main issues in this appeal, I now turn my attention and analysis.

On malicious prosecution, as per the decision in MURUNGA V. A.G. (1982-88) KLR 133, the following must be established for a case to be sustained on malicious prosecution:

- a) **that the prosecution was instituted against the Plaintiff by the Defendant,**
- b) **that the prosecution was terminated in favour of the Plaintiff;**
- c) **that the prosecution was instituted without reasonable and probable cause, and**
- d) **that the prosecution was actuated by malice.**

In the appeal before me, there is no dispute that tenets (a) and (b) have been met by the appellant.

It is however for the appellant to satisfy the other two conditions. From the record before me, it cannot be said that there was no reasonable and probable cause for the Appellant's prosecution, nor has the tenet of malice been established.

In KAGANE & OTHERS V. A.G. & ANOTHER, [1969] E.A. 643, it was held that "whether there was reasonable and probable cause for the prosecution is primarily to be judged on the objective basis of whether the material known to the prosecutor would satisfy a prudent and cautious man that the accused was probably guilty ---- in the guilt of the accused ---."

Here, complaint had been received and recorded with the police that the appellant had committed assault on the complainant. That was the basis of the action in arresting and ultimately charging the appellant with the crime of assault.

From the record before me, one of the risks in overliance on the criminal case and the subsequent acquittal of the appellant herein, is that it was not clearly established as to assault by whom and on whom. Those are the doubts that led to the acquittal of the appellant at the criminal court. That however, does not, and did not, mean that the prosecution had no reasonable and probable cause to arrest and

prosecute the appellant. And so long as reasonable and probable cause is shown, that satisfies the third tenet towards a defence against malicious prosecution. Further, there is no evidence to suggest that the prosecution did not believe in the truth of their case.

On that ground, the appeal on the malicious prosecution must surely fail and be rejected. Malice was not even pleaded or particularized in the Plaintiff.

I turn to the final ground of the challenge against the Judgment of the Lower Court – that the issue of conspiracy to defeat the course of justice.

My close perusal of the record before me discloses no evidence of this innocuous tort, long absorbed in the tort of malicious prosecution.

For there to be conspiracy, even under Section 117 of the Penal Code, Cap. 63, Laws of Kenya, there must be more than one person involved. One cannot conspire with oneself to defeat the ends, or course of justice. If that be the case, the Appellant has not shown who conspired with whom, in his Plaintiff, or the Appeal. The Respondent could not, and did not, conspire with himself. And if there was any other person, that other “conspirator” must, but was not, enjoined as a party in this or suit and appeal.

In my view, no unnecessary energy need be expended on this issue. I reject the challenge as unsubstantiated and untenable both in the pleadings and the evidence on record before me.

All in all therefore, and for the reasons given above, the appeal herein fails and is dismissed with costs to the Respondent and against the appellant.

**DATED** and delivered in Nairobi this 11<sup>th</sup> day of December, 2006.

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**O.K. MUTUNGI**

**JUDGE.**