REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO 9 OF 2003

MARGARET NDUTA KIRAGU …….....……. APPELLANT

VERSUS

CATHERINE MURIUKI ……..…… 1ST RESPONDENT

ZIPPORAH GIKONYO …….…….…… 2ND RESPONDENT

THE ATTORNEY GENERAL ……...…….. 3RD RESPONDENT

JUDGMENT

This appeal emanates from the Judgment of the Senior Resident Magistrate, Mr Nyakundi (SRM) at Milimani, Nairobi delivered on the 10th December, 2002.

Briefly, the facts are that on the 10th December, 1998, the Appellant, a neighbour of the 1st Respondent complained to the police that the 1st Respondent had damaged her plastic carpet and two curtains then hanging on the fence at Otiende Estate, Langata. This led to the arrest of the 1st Respondent.

The 1st Respondent was charged in court with malicious damage to property contrary to Section 339 (1) of the Penal Code, Cap 63, Laws of Kenya, and subsequently acquitted for lack of evidence.

Being aggrieved by the arrest and prosecution, the 1st Respondent sued the Appellant and two others namely the Attorney General and Zipporah Gikonyo (The Police Officer who arrested the 1st Respondent) jointly and severally for damages arising out of malicious prosecution that had made her suffer anguish, injured her reputation and exposed her to considerable anxiety.

The Appellant in her defence (in the lower court) stated that she was not in control of the investigation that led to the arrest or prosecution of the 1st Respondent, that all she did was to complain first to the village elder and later to the Police with a view to seeking compensation. The 2nd and 3rd Respondents denied liability, pleading that the suit was bad in law as it offended Section 13 A of the Government Proceedings Act, Cap 40 Laws of Kenya.

At the conclusion of the trial, the learned trial Magistrate found the Appellant and the 2nd and 3rd Respondents jointly and severally liable for malicious prosecution and entered Judgment in favour of the 1st Respondent and awarded her Kshs.200,000/= general damages. Hence, this appeal based on the following grounds of appeal:

> ***1. THAT the Learned Magistrate erred in law and in fact in the manner he analyzed the evidence tendered before him.***

2. THAT the Learned Magistrate erred in law and in fact in finding that the Criminal prosecutio n against the 1 st Respondent was instituted without reasonable and probable cause.

3. THAT the Learned Magistrate erred in law and in fact in finding that the prosecution of the 1 st Respondent was actuated by malice.

4. THAT the Learned Magistrate erred in law a nd in fact in finding that the Appellant was jointly liable together with the 2 nd and 3 rd Respondents for the criminal prosecution of the 1 st Respondent.

5. THAT the Learned Magistrate erred in law and in fact in failing to find that the 1 st Respondent did no t prove that the Appellant in instituting the criminal proceedings was actuated by spite, ill -will or improper motive.

6. THAT the Learned Magistrate erred in law and in fact in failing to find that the criminal prosecution of the 1 st Respondent was initiated after investigations were conducted by the 2 nd and 3 rd Respondents and which investigations the Appellant did not have control of.

7. THAT the Learned Magistrate erred in law and in fact in failing to find that there was an honest belief by the Appellant in the guilt of the 1 st Respondent based upon a full conviction founded upon reasonable grounds of the existence of state of circumstances, which assuming to them to be true, would reasonably lead an ordinary prudent and caution man placed in the position of the Appellant to the conclusion that the 1 st Respondent was probably guilty of the crime imputed.

8. THAT the Learned Magistrate erred in law and in fact in failing to find that lack of reasonable and probable cause cannot be relied upon to impute malice.

9. THAT the Learned Magistrate erred in law and in fact in failing to find that the Appellant honestly believed in the probable guilty of the accused.

10. THAT the Learned Magistrate erred in law in fact in failing to find that the prosecution of the 1 st Respondent was instituted by the 2 nd Respondent on the advice of the 3 rd Respondent.

11. THAT the Learned Magistrate erred in law and in fact in failing to find that the Appellant did not advice, direct, order, induce or use undue influence on the 2 nd and 3 rd Respondent to institute prosecution against the 1st Respondent.

12. THAT the Learned Magistrate erred in law and in fact in finding that the 1st Respondent had proved her case on a balance of probabilities.

13. THAT the Learned Magistrate erred in law in awarding damages to the 1st Respondent.

Mr Ngugi, Counsel for the Appellant, argued that the Appellant saw the 1st Respondent tearing her curtains and carpet and reported the matter to the Police. She did nothing more. She did not pursue the case. She did not even record a statement, indicating that there was no malice on her part. She had even attempted to seek redress through a village elder, and when that failed she went to the Police. Her aim, she said, was simply to get compensation for the damage. He relied on the case of J***ediel Nyaga vs Silas Mucheke C A 59 of 1987 Nyeri*** to demonstrate that the simple act of reporting to the police, does not constitute malice.

Mr Kariuki, Counsel for the 1st Respondent argued that the 1st Respondent had made out a case in the lower court for malicious prosecution in that all the four ingredients needed to establish the same had been proved. These are:

1. that a prosecution was instituted against the Plaintiff by the Defendant;

2. that the prosecution was terminated in the Plaintiff's favour;

3. that the prosecution was instituted without reasonable and probable cause; and

4. that the prosecution was actuated by malice. [See *Murunga vs Attorney General (1982 – 88) KLR 138].*

It is not in dispute that the Appellant made the complaint that led to the 1st Respondent's prosecution, and that the same was terminated in the 1st Respondent's favour. The only issue then is whether there was reasonable and probable cause in instituting the prosecution, and whether the same was actuated by malice.

Let us examine the evidence presented to, and relied upon, by the lower court. The presiding magistrate found as a fact the following:

1. The Aption of the Appellant's demeanour is consistent with the evidence on record (page 15) where the Appellant stated "I am sure she has learnt something."

2. Although the Appellant claimed in her evidence (See page 15) that she wanted compensation, and wanted the matter settled out of court, and that is why she had first approached the village elders, this intent is not consistent with the fact that she reported to the police, knowing full well that she could not get compensation through the police. Clearly, this is a civil matter, and the police are not debt collectors. Why, then, did she not file a civil action for compensation? Isn't it obvious that she wanted to do exactly what she said "teach the 1st Respondent a lesson?"

3. The Plaintiff and the 1st Defendant (Appellant) did not enjoy good neighbourly relationship.

4. At the conclusion of the criminal trial, the case against the 1st Respondent was thrown out without even putting her to her defence. The court found that there was no evidence to support a conviction. pellant while in the witness box displayed anger and pain that the Plaintiff was acquitted. This observa

Based on the above, the trial court came to the conclusion, correctly, I am satisfied, that the prosecution against the Appellant was actuated by malice.

In the case of ***Kagane & Others vs A G & Another 1969 E A 643*** the court laid down the test to determine whether or not there was reasonable and probable cause for the Plaintiff's prosecution and whether it was actuated by malice. In that case, RUDD, J held that:

"Whether or not there was reasonable and probable cause for the prosecution is primarily lodged on th e objective basis of whether the material known to the prosecutor would satisfy a prudent and cautious man that the accused was probably guilty. Once the objective test is satisfied, it may be necessary to consider whether the prosecutor did honestly beli eve in the guilt of the accused; but this subjective test should be applied only where there is evidence directly tending to show that the prosecutor did not believe in the truth of his case …

The facts show that no reasonable person could honestly have b elieved that the prosecution was at all likely to succeed then malice would have been established and malice in that case meant that the prosecution was motivated by something more than a sincere desire to vindicate justice."

Taking the objective test outlined by Rudd, J into account, I am satisfied that based on the material evidence available to the prosecutor, no prudent or cautious person would say that the accused was probably guilty. Equally, the Appellant's conduct showed that she was actuated by malice and that her intent was not to seek compensation (which she never did through any civil suit) but to teach the 1st Respondent "a lesson".

The case of ***Jediel Nyaga vs Silas Mucheke*** ***(C A 59 of 1987 Nyeri)*** and the decision of **this** Court in ***Ngogoto vs A rchers Service Commission (HCCC 1816 of 1990)*** are clearly distinguishable. I, therefore, agree with the Judgment of the lower court on liability. As for quantum, Counsel for the Appellant argued that the award of Kshs.200,000/= was excessive.

The Court of Appeal in the case of ***Kivati vs Coastal Bottlers Ltd C A No 69 of 1984*** laid down the following principle upon which an appellate court would interfere with the award of general damages:

> ***"The Court of Appeal should only disturb an award of damages when t he trial judge has taken into account a factor he ought not to have or failed to take into account something he ought to have or if the award is so high or so low that it amounts to an erroneous estimate."***

There were no reasons outlined by the lower court for this huge award. No cases were cited. The court failed to take into account that the 1st Respondent was unemployed, and that the damages she suffered were fairly minimal. I believe the award is manifestly excessive, and I hereby reduce it to Kshs.100,000/=.

Accordingly, I shall set aside the lower court's award of Kshs.200,000/= for general damages and substitute the same for an award of Kshs.100,000/= for general damages, together with costs at the lower court. As this appeal has partially succeeded, I order that each party bear its own costs at appeal. Those shall be the orders of this Court.

Dated and delivered at Nairobi this 28th day of October, 2004.

ALNASHIR VISRAM

JUDGE