REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 595 OF 2000

SOCFINAF KENYA LTD. ……..APPELLANT

VERSUS

PETER GUCHU KURIA & ANOTHER…….RESPONDENT

JUDGMENT

This appeal arises from the judgment of the Chief Magistrate, Thika in the Chief Magistrates Court Civil Case No. 620 of 1996 delivered on 16th May, 2000.

In the case the plaintiff's, now respondents herein had on or about 7th July 1996 filed a suit against the defendants, now appellants, to claim from them both special and general damages for unlawful arrest, malicious prosecution and false imprisonment.

It was alleged that on or about 12th August 1994 the appellant caused the respondent to be arrested and charged before the Senior Principal magistrate's Court Thika vide Criminal Case No. 2522 of 1994 with the offence of stealing by servant contrary to Section 283 of the Penal Code.

According to the respondents, this arrest and charge was malicious and without any reasonable and/or probable cause.

The respondents averred that as a result of their arrest and prosecution, they were greatly injured in their credit character and reputation and that they suffered severe mental anguish and pain and that they incurred expenses inform of advocates fees hence they suffered loss and damage.

Particulars of special damages were stated in paragraph 5 of the plaint and the respondents claimed these as well as general damages in the prayers.

A defence filed to this claim on 2nd October 1996 stated that on the day in question shafts to two tractors belonging to the defendant were stolen.

That the respondents were drivers of these tractors and that when the theft was reported to the police, the latter carried out independent investigations and then charged the respondents.

That on the premises, the appellants did not admit any of the allegations in paragraphs 3,4 and 5 of the plaint.

The case was placed before the said Chief Magistrate on 15th September 1998, 27th October 1998 and 17th November 1998 when evidence was adduced and submissions made. Judgment was delivered on 16th May 2000 wherein the appellant was ordered to pay the respondents a total of Kshs.64,400/= being special and general damages for malicious prosecution; hence the present appeal.

The memorandum of appeal listed 9 grounds of appeal, namely that the learned magistrate erred in failing to find that the whole suit was incompetent and bad in law for failure to join the state in the suit which was principally for malicious prosecution, that she erred in the failing to take into account Court of Appeal authorities adduced by counsel for the appellant on the issue of non-joinder of the state to the suit; that she erred in holding that the report made by the appellant to the police was without any justification, false and malicious, that she erred in holding that the appellant acted without reasonable or probable cause in reporting the issue of the stolen shafts to the police, that she did not take into account the evidence of the appellant, the issue of stolen shafts, police independent investigations and interrogation of 4 suspects and that the appellant did not instruct the police to arrest the respondents;

The grounds of appeal further stated that the learned Chief Magistrate failed to take into account that the respondents had not met the ingredients for malicious prosecution; that she failed to make a finding on whether the respondents cause of action on libel was time barred by virtue of Section 4 of the Limitation of Actions Act, that the award of general damages was excessive and that she erred in upholding the respondents claim.

The appeal was placed before this court on 17th April 2002 when counsel for both parties submitted for or against this appeal.

Counsel for the appellant stated that arrest and prosecution of the respondents was the work of police, hence state had to be included in the plaint.

That the evidence of respondents and defence as to the former's arrest and prosecution tallied but the magistrate then ignored defence submission on this point.

According to counsel, the report to the police was neither false nor malicious.

That the appellant had an obligation to report the theft of its shafts to police and there was no malice in making such report.

That there was no evidence that the appellant's manager mentioned respondents to police as the thieves of the shafts or that he asked the police to arrest them. That police action should not be attributed to the appellant.

Counsel for the respondents submitted that the magistrate dealt with the appellant responsibility in this matter. That there were no grounds for suspecting the respondents.

That a grudge which existed between the management and the second respondent was evidence of malice.

That the manager acted hastily and emotionally and that where the appellant caused the arrest and prosecution of the respondent, it was not necessary to join the police to the suit.

Counsel stated that the award of special and general damages was not excessive and that the lower court judgment should be upheld.

These are the submissions on this appeal which I have heard and recorded for consideration and decision.

What seems to have been at the back of the learned magistrates mind as she wrote her judgment was the man behind the respondent's being arrested and charged; namely the manager of the appellant by the name Francis Chege.

That he was the one who reported the matter to the police at Kirwara Police Station and actually directed that they be arrested and charged with the theft of the shafts.

The respondent said so in their evidence in chief but in cross examination the first respondent stated that in fact the person who reported the matter to police and even took them to the police station was one Njuguna and that Chege came later.

The second respondent confirmed during cross examination that infact the manager was not on the farm on that day.

Contrary to what the first respondent said about who reported the theft at Kirwara Police Station this respondent stated that infact it was one Patrick Mwangi who did so.

The appellants witness called Patrick Mwangi admitted being the first person to get the report of the theft of the shafts and that he sent an askari called Nandwa to go and report the incident to the police.

And because Kirwara Police Station had no motor vehicle, the appellant must have provided one to bring policemen and that it is this Nandwa who must have caused the report to be entered in the occurrence book.

This occurrence book was not called for to see who actually made the report and/or what it said. Francis Chege testified in the case and said he was away from the farm on 12th August 1994 and that he reported back on duty on 14th August 1994.

In my view this evidence was actually supported by that of the respondent and DW1 and established that the 2nd defence witness was actually not on the farm on 12th August 1994 and could not have taken part in instigating the arrest and prosecution of the respondent.

Moreover, when there is a case of suspected theft the first step is to report the matter to police, who in their own way find out how to carry out investigations.

Like in this case, whether it was Patrick or Nandwa who made the report of theft of the shafts to Kirwara Police, no issue should arise over this.

And it is up to the police to take further steps like taking a suspect to court if they have sufficient evidence against such suspect to warrant such action.

This then is the action by police and the state should be involved or joined in such suit and that the complainant should not blame be blamed for making such report to police. What is of great significance in such case is whether or not there is a reasonable and/or probable cause for the arrest and/or prosecution of the culprit. And the onus of proving that there was no reasonable and probable cause for the arrest and prosecution of the suspect lies on him/her who queries such arrest or prosecution.

In the case subject to this appeal did the respondents prove on a balance of probabilities that the report made to Kirwara Police Station about the theft of shafts was false and malicious?

Who would dare design such a scheme to involve police that tractor shafts had been stolen when they had not? Did the respondents prove such design? From my reading of the record of the lower court, there was no such proof.

An attempt to do so by the respondents by saying the grudge between DW2 and one of them over the latter's wife who worked for the former or that the 2nd respondent thought that no shafts were ever stolen were not backed by evidence.

As to the prosecution of the respondents, the complainant could not force police to do so when there was no evidence to take them to court. Police carry out investigations before taking suspects to court and there are various incidents when police have declined to prosecute a suspect when investigations have disclosed no offence to warrant this.

If the respondent's case fell in the latter category then I am sure they would not have taken to court.

That a suspect was acquitted of a criminal case is not sufficient ground for filing a civil suit to claim damages for malicious prosecution or false imprisonment. Evidence of spite, illwill, lack of reasonable and probable cause must be established.

On the other hand, it has been said time and again that in order to award special damages to a plaintiff, he/she must have specifically pleaded and strictly proved them. This is not what was done in respect to Kshs.2200/= awarded to each of the respondents in the case subject to this appeal.

In view of the observations made herein before, I am not satisfied the respondents proved their claim against the appellant on a balance of probabilities. I allow this appeal and set aside the lower court order, with costs.

Delivered this 6th day of June 2002.

D.K.S. AGANYANYA

JUDGE