



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**HIGH COURT CIVIL CASE NO. 2463 OF 1993**

**BENJAMIN KASWII.....PLAINTIFF**

**V E R S U S**

**CAPITAL CONSTRUCTION LTD.....DEFENDANT**

**J U D G M E N T**

On 21st January, 1991, the Defendant made a complaint to the police against the Plaintiff which resulted in the latter being charged and prosecuted for the offence of office breaking contrary to section 306(a) of the Penal Code (Cap. 63). When the Plaintiff appeared before the trial magistrate, he was acquitted of the charge for lack of evidence. As a result of the charge, the Plaintiff was arrested and remanded in police custody for more than two months. The Plaintiff has now sued the Defendant claiming that he was greatly injured in his credit, character, reputation and that he had been brought into public scandal, ridicule and contempt as a result of that prosecution.

He brings this action claiming general damages and costs. Without going into the details of the testimony at trial the question in this action is whether the Defendant is liable for the Plaintiff's claim. In an action for malicious prosecution, it is incumbent upon the Plaintiff to prove the following matters:-

- (a) That he was prosecuted by the defendant;
- (b) that the prosecution was determined in his favour;
- (c) that it was without reasonable or probable cause; and
- (d) that it was malicious.

Although there is no doubt that the criminal prosecution was determined in the Plaintiff's favour, the Plaintiff has been unable to establish the other elements. It cannot be said that the Plaintiff was prosecuted by the Defendant. The evidence on record shows that the Defendant only made a complaint to the police. He was not involved in what happened after that. It was the police who prosecuted the Plaintiff and not the Defendant. On this holding alone, it is unnecessary to determine whether the prosecution was with reasonable or probable cause and whether or not it was malicious. The fact is that the Defendant is not the person liable for the Plaintiff's claim.

I, therefore, dismiss this suit with costs.

DATED and DELIVERED at NAIROBI this 9th day of May, 2001.

**ALNASHIR VISRAM**

**JUDGE.**