



**Kenya Copyright Board v Said (Civil Appeal E210 of 2022)
[2024] KEHC 3218 (KLR) (5 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3218 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E210 OF 2022
DAS MAJANJA, J
APRIL 5, 2024**

BETWEEN

THE KENYA COPYRIGHT BOARD APPELLANT

AND

SAID ALI SAID RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. J.B. Kalo, CM dated 14th November 2022 at the Magistrates Court at Mombasa in Civil Case No. 1770 of 2017)

JUDGMENT

Introduction and Background

1. In the Subordinate Court, the Respondent filed suit against the Appellant and the Attorney-General claiming that on or about 21.11.2014, the Appellant without justification of reasonable cause made a complaint to Central Police Station, Mombasa and subsequently on the same day the Respondent was arrested, detained and arraigned in Court charged with the offence of being in possession of contrivances used for the purposes of receiving and transmitting infringing broadcast signal contrary to section 38(1) (f) as read with section 38 (4) of the Copyright Act (Chapter 130 Laws of Kenya) through Chief Magistrate's Court Criminal case No 2143 of 2014. The Respondent averred that he was acquitted on 27.04.2017 under the provisions of section 215 of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya) and the court in Criminal Case No 2143 of 2014, ordered that the exhibits to be returned to the accused persons within 14 days from the date of delivery of the judgement. However, the Respondent stated that the Appellant had failed, refused and/or neglected to return the same despite numerous attempts to reach out to it.
2. The Respondent claimed that the Appellant's action was actuated by malice meant to defame him in that the Appellant made complaints to the police purporting that he was found distributing infringing DSTV broadcast signal while the copyright subsists in the name of Multichoice Kenya Limited.



- That the Appellant made a complaint to Central Police Station, Mombasa when it knew or ought to have known or had reason to believe that it was untrue, malicious and done in bad faith and that the Respondent was arrested in broad daylight thus causing embarrassment and humiliation and in the circumstances lowering his dignity in the eyes of right thinking members of the society. The Respondent claimed that his integrity and that of his family members was lowered and that the harassment lowered his esteem in the eyes of friends, family members and members of the public.
3. The Respondent further claimed that he incurred expenses in defending himself. That he suffered material loss and that as a result, he was unable to join a Master's Degree in Professional Practice in Digital Forensics and Security in De Montfort University, Leicester where he had been admitted in September 2014. That as a result of the criminal case, he lost income of Kshs 90,000.00 per month net of taxes from the colleges he was lecturing. He therefore claimed exemplary, partial and several damages from the Appellant, special damages of Kshs 255,000.00 and return of the exhibits and/or money equivalent to the exhibits.
 4. In its defence, while admitting that the Respondent was acquitted under section 215 of the Criminal Procedure Code, the Appellant denied making a complaint as alleged. It stated that it was never a complainant in Criminal Case No 2143 of 2014. It further denied the claims of malicious prosecution as well as the damages set out by the Respondent.
 5. At the hearing before the trial court, the Respondent (PW1) testified on his own behalf. The Appellant did not call any witness or produce any evidence. The Subordinate Court rendered its judgment on 14.11.2022. It determined whether the Appellant was liable for the Respondent's claim and if so, how much damages would compensate the Respondent for the loss suffered. It was found that the Appellant admitted that it prosecuted the Respondent and that he was acquitted on both counts of the charges he faced.
 6. From the evidence tendered in Criminal Case No 2143 of 2014, the Subordinate Court found that the case was instigated at the behest of Multichoice Kenya and that one Fredrick Saramba conducted the background investigation and determined that the Respondent was selling a Box Plus, which is said to be a program that is used to receive control words through internet. He informed the Appellant who assigned him officers who raided the Respondent's house at Majengo where they confiscated several decoders and dream boxes. That it was on the basis of the said recovery that a decision was made by the DPP to charge the Respondent. That during the proceedings, it emerged that the date on the inventory for the recovered items differed with the date on which the raid is said to have taken place. That the inventory bore the date of 13.11.2014 while the witness informed the court that the seizure was done on 21.11.14. The Subordinate Court noted that this is one of the points on which the criminal case was decided. Secondly, that the court in the criminal case found that no expert on how DSTV operates was called as a witness to demonstrate how the Respondent's activity infringed on the DSTV signal. The forensic examiner who testified on behalf of the prosecution admitted that he was not competent to testify on the operations of DSTV and thus the court found and held that the software/program that the Respondent was accused of infringing was not exclusively from DSTV and can be obtained free online. The criminal court further found that the prosecution did not produce a document from Multichoice to prove that it enjoyed copyright that is alleged to have been infringed.
 7. The Subordinate Court thus stated that the issues relied on by the court to acquit the Respondent in the criminal case were in its view so glaring that a proper investigation would have determined that a criminal charge based solely on the evidence in the police file would not stand scrutiny, especially so where officers of the Appellant, who are presumed experts in the area of copyright protection were involved. The Subordinate Court concluded that prosecution of the accused was therefore not reasonable and did not have probable cause. As to whether the Respondent was maliciously



prosecuted, the Subordinate Court found that the Respondent testified that after his arrest and on arraignment before court, the Appellant threatened to ruin his life by informing the management of Technical University of Mombasa about the incident so as to cause him to lose his employment with the university. That the Respondent testified that an officer of the Appellant visited the university where he met the Head of Department ICT. As a result, the matter was covered in the media on 25.11.2014 where an article was published in the Daily Nation newspaper with regard to the arrest. The Subordinate Court noted that the Respondent's evidence remained unchallenged hence the actions of the Appellant could only have been actuated by malice. That the Appellant went beyond mere arrest and arraignment of the Appellant by causing its officer to visit his work place and emphasise to his superiors about the arrest. The Subordinate Court concluded that the Respondent had proved that he was maliciously prosecuted.

8. On the quantum of damages payable, the trial court noted that whereas the Respondent stated that he missed out on a Master's Program at Leicester University because of this case, the reason given was that of delay, and not whether the university got wind of his prosecution and cancelled his admission. Thus, the Appellant could not be said to be the sole authors of the delay in the prosecution of the criminal case and that a perusal of the proceedings show that the delay was caused by a combination of factors some of which may be attributed to the Respondent and his counsel. Further, other than stating that an officer of the Appellant visited the Respondent's employer, no clear nexus was demonstrated between the said visit and the loss of employment and thus, the claim for exemplary and aggravated damages was dismissed.
9. The Subordinate Court dismissed the prayer for special damages as the same was neither specifically pleaded nor strictly proved as required by the law. It awarded the Respondent Kshs 1,000,000.00 as general damages for wrongful arrest, detention and malicious prosecution, costs of the suit and interest from the date of judgment until payment in full.
10. This decision by the subordinate court has precipitated the filing of the present appeal by the Appellant, which appeal is grounded on its memorandum of appeal dated 07.12.2022.

Analysis and Determination

11. The Appellant is aggrieved by the Subordinate Court's findings on both liability and quantum of damages. In essence, it is urging the court to look at the record again and come to a different conclusion that will set aside the subordinate court's judgment. In other words, the court is called upon to determine whether the Respondent proved its case. Since this is the first appeal, this court is mandated to re-evaluate the evidence before the subordinate court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand (see *Selle & another v Associated Motor Boat Co. Ltd. & others* (1968) EA 123).
12. The predecessor of the Court of Appeal in *Kagane and others v Attorney General and another* [1969] EALR 643 laid down the principles governing a claim founded on malicious prosecution as follows;
 - a. The Plaintiff must show that the prosecution was instituted by the Defendant, or by someone for whose acts he is responsible;
 - b. The Plaintiff must show that the prosecution terminated in his favour;
 - c. The Plaintiff must demonstrate that the prosecution was instituted without reasonable and probable cause;



- d. He must also show that the prosecution was actuated by malice.
13. The court in *Mbowa v East Menngo District Administration* [1972] EA 352 went on to state that, “The plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must “unite” in order to create or establish a cause of action. If the plaintiff does not prove them he would fail in his action.”
 14. From the record and as I have stated in the introductory part, it is not lost that the Appellant never called any witnesses or produced any evidence in as much as it filed a statement of defence. In *CMC Aviation Ltd. v Cruisair Ltd (No 1)* [1978] KLR 103; [1976-80] 1 KLR 835 it was held that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. This also has the effect of leaving the other party’s evidence unchallenged (see *Motex Knitwear Limited v Gopitex Knitwear Mills Limited* [2009] eKLR). However, even though a plaintiff’s case is unchallenged, the plaintiff still has a duty to prove their case on a balance of probabilities as is required by law hence in *Gichinga Kibutha v Caroline Nduku* [2018] eKLR the Court held that, “It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.”
 15. The Respondent stated that his prosecution was caused or instigated by the Appellant. However, the Appellant disputed this claim and put the Respondent to strict proof. Going through the record, I agree with the Subordinate Court, that the Appellant’s arrest and prosecution was at the instance of Multichoice Kenya Limited who, as per the charge sheet, claimed infringement of copyright. However, whereas the Subordinate court stated that the Appellant admitted in its amended statement of defence that it prosecuted the Respondent, a perusal of the said defence does not reveal any such admission. The Appellant only admitted to the Respondent’s acquittal was under section 215 of the *Criminal Procedure Code*. Whereas the Appellant did not rebut the Respondent’s assertion that he was prosecuted by the Appellant, the Respondent still had the burden of proving that he was prosecuted by the Appellant. From the charge sheet, the complainant is stated as “Fredrick Saramba c/o Multichoice Kenya Limited”. In the criminal case proceedings, the witness Fredrick Saramba stated that Multichoice had been carrying out its own investigations into the Respondent and it informed the Appellant who gave them officers to facilitate the raid on the Respondent’s premises leading to the Respondent’s arrest. One of these officers also testified in the criminal case as being the one who prepared the inventory duringS the raid. I hold that in as much as the Appellant was not the complainant in the case, it definitely facilitated the arrest and prosecution of the Respondent. I therefore find that the Respondent proved the first ingredient that the prosecution was instituted by the Appellant. I also find that since it was not disputed that the prosecution was terminated in favour of the Respondent, the Respondent has also proved the second ingredient.
 16. As to whether the prosecution was instituted without reasonable and probable cause, I note that the criminal court acquitted the Respondent under section 215 of the *Criminal Procedure Code*. An acquittal under this provision occurs after the court has heard both the complainant and the accused person and their witnesses and evidence. A perusal of the record of the criminal case indicates that after the prosecution’s case, the court found that it had established a *prima facie* case against the Respondent and thus placed the Respondent on his defence pursuant to section 211 of the *Criminal Procedure Code*. In making this ruling, the criminal court was in effect affirming that the prosecution had a reasonable case with a chance of success against the Respondent that demanded an explanation and rebuttal from him. It should not be lost that for one to be arrested, all the police have to establish is reasonable suspicion and the rest is left to the trial court (See *Hassan Ali Jobo v Inspector General of*



Police & 3 others [2017] eKLR and *Republic v Commissioner of Police ex- and another ex-parte Michael Monari & another* [2012] eKLR).

17. In establishing probable cause to arrest or prosecute, the prosecution need not to demonstrate that it has evidence beyond reasonable doubt that will lead to a suspect's conviction. The measure of the weight of evidence is upon the trial court and the prosecuting entity cannot be faulted or accused of maliciously prosecuting someone simply because its evidence was not beyond reasonable doubt. This is the error committed by the trial magistrate in this case as he focused more on the sufficiency and technicality of the prosecution's evidence rather than its probability which the criminal court had already determined. There was reasonable and probable cause to arrest, charge and prosecute the Respondent and the prosecution had established a *prima facie* case against the Respondent as was held by the criminal court. Apart from embarrassment, the Respondent never pleaded that he had been mistreated or mishandled in the process of his arrest, arraignment and charging. My finding collapses the Respondent's case that he was maliciously prosecuted because as has been stated above, all ingredients for a claim of malicious prosecution must unite and be proved conjunctively.
18. Having found that the Appellant was not liable for malicious prosecution, it follows that the award of Kshs 1,000,000.00 as general damages cannot stand.

Disposition

19. The Appellant's appeal succeeds for the reasons I have set out above. The judgment of the Subordinate Court against the Appellant is set aside and is substituted with an order dismissing the suit with costs. The Respondent shall bear the costs of the appeal assessed at Kshs 40,000.00.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT MOMBASA THIS 5TH DAY OF APRIL 2024.

OLGA SEWE

JUDGE

