



**West Kenya Sugar Co. Ltd v Shikanga & 2 others (Civil Appeal
E132 of 2022) [2024] KEHC 3859 (KLR) (19 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3859 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E132 OF 2022**

DK KEMEL, J

APRIL 19, 2024

BETWEEN

WEST KENYA SUGAR CO. LTD APPELLANT

AND

EMMANUEL NGANASA SHIKANGA 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

**THE INSPECTOR GENERAL OF THE NATIONAL POLICE
SERVICE 3RD RESPONDENT**

*(Being an appeal against the Judgement and decree of the Senior Principal
Magistrate's Court at Webuye (Hon. M Munyekenye) dated and
delivered on 30th November, 2022 in Webuye Civil Suit No. 96 of 2018)*

JUDGMENT

1. The appeal herein arises from the decision of the Honourable M. Munyekenye (Senior Principal Magistrate) dated 30th November, 2022 in Webuye Senior Principal Magistrate's Court Civil Suit No. 96 of 2018 – *Emmanuel Nganasa Shikanga v The Attorney General, the Inspector General of the National Police Service and West Kenya Sugar Company Limited* and in which the 1st Respondent had sought for general damages for malicious prosecution. The said civil case had been triggered by the Webuye SPMC Cr No. 289 of 2016 wherein the 1st Respondent had been charged with an offence of stealing by servant contrary to section 281 of the [Penal Code](#) and in which the 1st Respondent was the accused while the Appellant was the complainant. In that criminal case, the 1st Respondent was acquitted under section 202 of the [Criminal Procedure Code](#). This prompted the 1st Respondent to lodge a civil suit for damages for malicious prosecution against the Appellant. After trial, the 1st Respondent succeeded and was awarded special damages of Kshs 220, 420/ and general damages of Kshs 800, 000/ plus costs of the suit which thus prompted the filing of the present appeal.



2. The Appellant as per the further amended Memorandum of Appeal dated 24th April, 2023 being dissatisfied with the impugned judgement and decree appealed against the whole judgment on the following grounds; that the learned magistrate misdirected herself by failing to evaluate the evidence presented by the appellant that clearly demonstrated that there was a probable cause to prosecute the 1st Respondent of stealing by servant contrary to section 281 of the Penal code in Criminal Case no. 289 of 2016 and in so doing arrived at an erroneous decision ; that the learned magistrate erred in law and in fact by failing to properly analyze the evidence on record and in finding that the key ingredients of the tort of malicious prosecution had been proved on the balance of probabilities; that the learned magistrate erred in law and in fact in finding the Appellant 100% liable for malicious prosecution; that the learned magistrate erred in law and in fact in entering judgement against the appellant and in exonerating the 1st and 2nd defendants from blame when it was very clear from the evidence on record that it is the office of the Director of Public Prosecutions that plays an oversight role over the police by reviewing the file tabled before it and making a decision as to whether there is sufficient evidence to prosecute the accused or not; that the learned magistrate erred in law and in fact in awarding the 1st Respondent Kshs. 220,420.00 as special damages given that only Kshs. 120,420.00 was proved and pleaded; that the learned magistrate erred in law and in fact in awarding the 1st Respondent Kshs. 800,000.00 in general damages. The same are excessive on account the 1st Respondent was arraigned in court within the 24 hours constitutional timeline upon arrest; that the learned magistrate erred in law and in fact in the award of damages arrived at as it was erroneous or inordinately high; that the learned magistrate erred in law and in fact by failing to consider the submissions of the Appellant and in so doing misdirected herself; that the judgement of the learned magistrate is a miscarriage of justice and an affront to the constitutional right to the appellant to enjoy protection of law.
3. The Appellant thus sought for orders that the Appeal be allowed; the Judgement of the Honourable M. Munyekenye (Senior Principal Magistrate) delivered on the 30th day of January, 2022 at the Senior Principal Magistrate’s Court Webuye be set aside; the costs of the appeal and those of the lower Court be awarded to the Appellant; and such further or other reliefs as this Honourable Court may deem just and fit to grant in the circumstances of this appeal.
4. The appeal was canvassed by way of written submissions. by Both parties duly complied.
5. Learned counsel for the Appellant *vide* submissions dated 15.1.2024 raised three issues for determination *inter alia*; whether the grounds or ingredients of malicious prosecution were proved against the Appellant; whether the award of special and general damages were justified; whether the trial magistrate considered the submissions of the Appellant in making her determination.
6. As regards the first issue, it was submitted that the 1st Respondent failed to prove all the essential ingredients in a claim of malicious prosecution namely; that the prosecution was instituted by the Appellant; that the prosecution was terminated in the 1st Respondent’s favour; that the prosecution was instituted without reasonable and probable cause; that the prosecution was actuated by malice. Learned counsel cited a plethora of cases and submitted that the trial court failed to analyze the case critically since the Appellant made an honest complaint which was investigated by the police and later had the 1st Respondent charged with the offence of stealing by servant. It was also submitted that the Appellant availed the witnesses who recorded statements but who late left employment with the Appellant and thus it was the responsibility of the police to pursue and bond them. It was finally submitted that there was no malice on the part of the Appellant.
7. As regards the second issue, it was submitted that the 1st Respondent failed to avail evidence to the effect that he was subjected to inhuman conditions while in custody before being arraigned in court. It was also submitted that the 1st Respondent was granted bond during the criminal proceedings and



- that the said proceedings were not actuated by any malice and thus the award of general damages was inordinately high and ought to have been in the region of about Kshs 250, 000/ had the suit been proven to the required standard. As regards the award on special damages, it was submitted that the trial court made an award wherein the claim had not been specifically pleaded and strictly proved.
8. As regards the last issue, it was submitted that the trial court ought to have considered the Appellant's submissions which raised pertinent issues inter alia; that upon lodging the complaint, the appellant ceased to be in control over it; that the Appellant had no control over witnesses who had left its employment; that the Appellant did not target any specific person as a culprit but made a complaint to the police to investigate and hence no malice on its part; that the trial court ought to have considered the fact that the 2nd and 3rd Respondents' duties could not be performed by the Appellant and hence the apportionment of liability against it at 100% was erroneous.
 9. *Vide* submissions dated 23rd day of May 2023 and filed in court on 26th May, 2023, the 1st Respondent's counsel raised two issues for determination namely, whether the trial magistrate correctly analyzed the evidence on record in finding the 1st Respondent's claim for malicious prosecution merited and whether the trial court's awards of both special and general damages were appropriate in the circumstances.
 10. As regards the first issue, it was submitted that all the essential ingredients for the claim for malicious prosecution were duly proved by the 1st Respondent namely; that the claimant was prosecuted at the instance of the defendant or put in another way that the prosecution was instituted by the defendants; that the prosecution was terminated in the claimant's favour; that the prosecution was instituted without reasonable and probable cause and that the prosecution of the claimant was actuated by malice. Learned counsel relied on the case of *Susan Mutheu Muiu v Joseph Makau Mutbua* (2018) eKLR where the above factors were restated.
 11. It was further submitted that all the four conditions were duly proved by the 1st Respondent to the required standard and hence this court should uphold the judgement of the trial court.
 12. As regards the second issue, it was submitted that the trial court had applied the correct principles in arriving at the awards made and hence the same ought to be upheld by this court. Reliance was placed in the case of *Pyramid Hauliers Limited v James Omingo & 3 Others* [2019] eKLR.
 13. I have considered this appeal as well as the record and the rival submissions. This court being the first appellate court must analyze the record of the lower court and subject the same to an independent evaluation and arrive at its own conclusion whether or not to uphold the decision of the trial court but to bear in mind that it did not have the advantage of seeing and hearing the witnesses during their testimonies and to give an allowance to the same. (See *Selle v Associated Motor Boat Co. Ltd* [1968] EA 123). The genesis of the 1st Respondent's case is that he had been an employee of the Appellant herein and that he was arrested and charged with an offence of stealing by servant contrary to section 281 of the *Penal Code* vide Webuye SPMC Cr No. 289 of 2016 wherein he was eventually acquitted under section 202 of the *Criminal Procedure Code*. He later lodged a civil suit being Webuye SPMCC No. 96 of 2018 wherein he sought for both special and general damages for malicious prosecution. During the hearing of the civil case, he testified and called one witness. His brief testimony is that he had been acquitted of the criminal charge and further that prior to his arraignment, he had been kept at the police cells for ten days. He contends that the case had been actuated by malice and thus sought damages against the Appellant. He produced receipts all totaling Kshs 200, 000/. He called one of the court staff (Pw2) who produced the criminal case file number 289 of 2016 plus the court proceedings. The Appellant called two employees who had worked with the 1st Respondent as drivers as well as the OCS Webuye police station. Dw1 and Dw2 testified and gave their versions concerning



their findings regarding the tractor that the 1st Respondent had driven on the material date before it ended up with strange worn out tyres from the ones belonging to the Appellant. Dw3 who was the OCS stated that they received a complaint report of theft of two tyres belonging to the Appellant and that they commenced investigations and later charged the 1st Respondent with an offence of stealing by servant contrary to section 281 of the Penal Code. The witness further added that they recorded statements of witnesses and that the said witnesses failed to turn up in court to testify wherein the 1st Respondent was acquitted under section 202 of the Criminal Procedure Code. According to the said Dw3, the police had done their best by recording statements of witnesses but who failed to honour the summons to attend court. The learned trial magistrate held the Appellant solely liable in damages to the 1st Respondent at 100% and proceeded to award the 1st Respondent special damages of Kshs 220, 420/ as well as general damages of Kshs 800, 000/ plus costs of the suit.

14. After analyzing the entire evidence, I find the issues necessary for determination are firstly, whether the 1st Respondent proved his case on a balance of probabilities in the lower court and secondly whether the trial court's awards were appropriate in the circumstances.
15. As regards the first issue, it is incumbent upon a party seeking a claim for malicious prosecution to prove or establish four ingredients of the tort *inter alia*; that the plaintiff must show that the prosecution was instituted by the Defendant or someone for whose acts he is responsible; that the prosecution terminated in the Plaintiff's favour; that the prosecution was instituted without reasonable and probable cause; and that the prosecution was actuated by malice. These ingredients were earlier quoted in the case of *Mbowa v East Menyo District Administration* [1972] EA 352 as follows:

“Its essential ingredients are: (1) the criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority; (2) the defendant must have acted without reasonable or probable cause i.e there must have been no facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified; (3) the defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, with an intent to use the legal process in question for for some other than its legally appointed and appropriate purpose; and (4), the criminal proceedings must have been terminated in the plaintiff's favour, that is, the plaintiff must show that he has been acquitted of the charge.”

16. As to the institution of prosecution, the record of appeal shows that the Appellant's tractor tyres were found to have been replaced and or stolen at a time when the 1st Respondent was the driver thereof and thus it lodged a complaint with the police who commenced investigations and thereafter fingered the 1st Respondent as a suspect and who was subsequently charged with an offence of stealing by servant contrary to section 281 of the Penal Code vide Webuye SPMC Cr No. 289 of 2016. Hence the complaint was initiated by the Appellant.
17. As to the issue of termination of the case in favour of the 1st Respondent, it is noted from the record that the case aforesaid was terminated when the 1st Respondent was acquitted under section 202 of the Criminal Procedure Code.
18. As to the fact that the prosecution of the 1st Respondent was without reasonable and probable cause, the 1st Respondent has maintained that he was prosecuted without any probable or reasonable cause. The Appellant on the other hand has contended that no such thing took place since it genuinely had



a complaint of stolen tyres and lodged it with the police who conducted investigations and found the 1st Respondent as the culprit and whom they prosecuted before a court of law. The question of whether the prosecution was without probable reasonable cause is a subjective matter and that the rule of thumb must be a reasonable man's standard. In the case of *Kagane & Others v the Attorney General & another* [1969] EA 643 the court held that the test whether the prosecution was instituted without reasonable and probable cause is whether the material known to the prosecution would have satisfied a prudent and cautious man that the Plaintiff was probably guilty of the offence. Again, in *James Karugu Kiiru v Joseph Mwamburi & 3 Others* [2001] eKLR the court held as follows:

“... To prosecute a person is not prima facie tortious but to do so dishonestly or unreasonably is. And the burden of proving that the prosecutor did not act honestly or reasonably lies on the person prosecuted.”

Also, in *Silvia Kambura v George Kathurima Japhet & 2 Others* [2021] eKLR it was held that in determining whether there was any probable and/or reasonable cause, the reasonable man's standard applies. The court went on further to add as follows:

“the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of an objective test. That is to say, to constitute reasonable and probable cause, the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material consisted of facts discovered by the prosecutor or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty. If and so far as that material is based upon information, the information must be reasonably credible, such that that an ordinary reasonable prudent and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for the prosecution.”

Looking at the above authorities as against the lower record, it is clear that the Appellant had honestly presented its complaint of theft of some tractor tyres to the police and who conducted their independent investigations and arrived at a decision to charge the 1st Respondent with the offence of stealing by servant contrary to section 281 of the *Penal Code*. Indeed, the Appellant provided the requisite witnesses who duly recorded statements. I find the fact that the prosecution failed to avail the witnesses leading to the acquittal of the 1st Respondent under section 202 of the *Criminal Procedure Code*, the same does not amount to the initial charges being lodged to be deemed as without reasonable and probable cause. It is instructive that had the witnesses turned in court to testify, a different verdict might have been reached by the trial court. Again, the Appellant has explained that it did not have control over the issue of witnesses some of whom had left its employment and that the responsibility to bond them lay with the 2nd and 3rd Respondents. Further, the duty to charge the 1st Respondent was upon the 2nd Respondent in liaison with the Director of Public Prosecution and not the Appellant and further that it was not the Appellant who approved the charges before they were laid against the 1st Respondent in court. It is on that ground that I find that the learned trial magistrate erred in holding that it was the Appellant who had instituted the case without probable and reasonable cause against the 1st Respondent.

19. As to whether the prosecution of the 1st Respondent had been actuated by malice, the 1st Respondent has contended that he was eventually acquitted of the charge by the trial court under section 202 of the *Criminal Procedure Code* and that he holds the Appellant as the one who had been actuated by malice in mounting the prosecution. As noted above, had the witnesses been availed then there would



probably have been a different verdict. Hence, the mere fact of an acquittal is not of itself reason to suggest that the complaint that had been lodged had been actuated by malice. It is possible for a genuine complaint to be lodged and then the prosecution takes a different tangent. In the case of *Dickson Chebuye Ambeyi v National Police Service; Peter Sifuna Wesonga & another (Interested parties)* [2020] eKLR it was held as follows:

“It is trite law that the prosecution ended in her favour because she was acquitted of the charge. Even with these, there was a duty to prove that there was malice in making the report that led to the arrest and prosecution. Acquittal alone cannot amount to proof of malice. There must be something more than just acquittal.”

From the foregoing, what emerges is that there must be unreasonable basis for reporting a complaint to the police and that the report was actuated with malice. The Appellant herein duly lodged a report and left the police to investigate and who approved charges against the 1st Respondent herein. Witnesses duly recorded statements but who did not turn up to testify as by then they had left employment with the Appellant. I find the failure of those witnesses to turn up and testify should not be blamed upon the Appellant who had no control over the prosecution of the criminal trial. As earlier noted, it is possible that had the witnesses turned up and testified, probably a different decision other than an acquittal might have been reached by the trial court. It is on that basis that I find that the trial magistrate erred when it blamed the Appellant for the turn of events yet no evidence of malice on the part of the Appellant was availed by the 1st Respondent. The only evidence availed is the issue of acquittal but that is not enough to justify that the report and prosecution had been actuated by malice on the part of the Appellant. The 1st Respondent was under duty to go beyond the fact of the acquittal and show that the complaint was false and full of spite or malice. Further, the trial magistrate erred when it heaped blame upon the Appellant for the turn of events yet the Appellant had no control over the prosecution of the case. A perusal of the criminal trial proceedings in *Webuye SPMC Cr No.289 of 2016* reveals that there was no malice on the part of the complainant since the case was terminated for lack of witnesses. It was not a verdict that arose after an analysis of evidence of witnesses which could then indicate whether or not the prosecution's case had merit. Hence, in the absence of malice on the part of the Appellant, the trial court ought to have held that the claim of malicious prosecution had not been proved. The finding by the learned trial magistrate on liability of 100% against the Appellant was thus in error and must be reversed as the 1st Respondent failed to prove his case against the Appellant on a balance of probabilities.

20. Even though the issue of liability has been determined, this court must proceed to determine the issue of quantum of damages both special and general damages. The Appellant has faulted the trial court's awards on the ground that the amount of special damages awarded had not been pleaded and strictly proved while the general damages are inordinately high. On the other hand, the 1st Respondent supports the awards and has urged this court not to interfere with them. It is trite law that the award of damages is at the discretion of the trial court and that an appellate court can only interfere where the trial court, in assessing the damages, either considered an irrelevant factor or left out a relevant factor or that the award is too high or low as to amount to an erroneous estimate of damages or that the assessment is not based on any evidence. Starting with the issue of special damages, it is noted that the sums prayed for in the plaint dated 25.6.2018 is Kshs 120, 420/ while the total amounts *vide* the receipts produced amounted to Kshs 200, 000/. As per the rule of thumb, the amounts to have been awarded ought to be those specifically pleaded and proved. The amount pleaded do not tally with that specifically proved and hence the trial court ought to have awarded the sum of Kshs 120, 420 as specifically pleaded and prayed for. Hence, the sum of Kshs 220, 420 was erroneous and ought to be set aside. Had the claim been proved then the special damages would have been Kshs 120, 420/. As



regards the award of general damages in the sum of Kshs 800, 000/, I find the same to be on the higher side considering the fact that the 1st Respondent was arrested on 11.4.2016 and arraigned in court the following day. He did not suffer any prejudice since it is standard practice for suspects to be processed at the police station before being presented to court to take pleas and further the incarceration was within the twenty-four hours as dictated by *the constitution*. The 1st Respondent's claim that he was detained in police custody is not true since the charge sheet is quite clear that he was arrested on 11.4.2016 and presented to court on 12.4.2016. Further, he was granted bond the same day and was thus able to continue with his case while out on bond. I am of the considered view that had the 1st Respondent proved his case, a sum of Kshs 300, 000/ would have been reasonable in the circumstances as general damages.

21. In view of the foregoing observations, it is my finding that the Appellant's appeal has merit. The same is allowed. The judgement of the trial court dated 30.11.2022 is hereby set aside and substituted with an order dismissing the 1st Respondent's case as against the Appellant with costs. The Appellant is awarded the costs of the appeal.

DATED AND DELIVERED AT BUNGOMA THIS 19TH DAY OF...APRIL 2024

D.KEMEI

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JUDGE

In the presence of :

Miss Kahui for Appellant

Abok for 1st Respondent

No appearance for 2nd Respondent

No appearance for 3rd Respondent

Kizito Court Assistant

