Maina v Meme t/a Nairobi Pacific Hotel (Civil Appeal E569 of 2021)
[2024] KEHC 6374 (KLR) (16 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6374 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL E569 OF 2021

DKN MAGARE, J

MAY 16, 2024

BETWEEN

SCHOLASTICAH WANJIRU MAINA ..... APPELLANT

AND

CORNELIUS MUTHURI MEME T/A NAIROBI PACIFIC HOTEL ..... RESPONDENT

JUDGMENT

(Being an Appeal from the judgment and orders of Hon Kagoni E.M. (MR) Principle Magistrate delivered on the 9th August, 2021)

1. This is an appeal from the judgment and decreed of the Hon. Kagoni E. M. (PM) delivered on 9th August, 2021 dismissing the appellant's suit in Nairobi Milimani CMC 6857 of 2018. The appellant filed 9 grounds of appeal.

    a. The learned magistrate erred in law and fact for not considering the fact that the 1st defendant is the one who set the law in motion against the appellant in his personal capacity and as a director for Nairobi Pacific Hotel by recording a complaint at the central police station.

    b. The learned magistrate erred in law and fact in not considering Hon S. N. Muchungi's (RM) finding in her judgment that the 1st defendant hurriedly and blindly followed allegations of a former employee against her colleagues and set the law in motion against them without conducting proper investigation thus leading to malicious prosecution 'mired' with dishonest and unreasonableness.

    c. The learned magistrate erred in law and fact in finding that there was reasonable and probable cause in prosecution of Criminal Case No. 1575 of 2014 in Chief Magistrate's Court at Nairobi.

d. The learned magistrate erred in law and fact in failing to consider material facts that the plaintiff was employed on or about May 2014 and worked until 6th November, 2014 while the alleged offences the appellant was charged with had been committed between 20th December, 2013 to 29th March 2014 during which period she had not been employed or worked with the first defendant.

e. The learned magistrate erred in law and fact by raising the burden of proof to strict proof and or to beyond any reasonable doubt far much beyond the required standard of balance of probabilities in the case to the to the appellants.

f. The learned magistrate erred in law and fact in failing to take cognizance that the criminal trial ended in appellant's favour.

g. The learned magistrate erred in law and fact in failing to find that the appellant had suffered damages and loss as a consequence of the criminal proceedings.

h. The honorable magistrate erred in law in finding that the claim for unlawful termination was time barred as per section 90 of the *Employment Act* as he wrongly implied that time started running from the date of institution of criminal proceedings instead of the date of acquittal thus reaching to a wrong decision.

i. The honourable magistrate erred in law and fact by not considering the submissions and authorities filed by the appellant.

2. The Appellant was the 1st Respondent's employee between May 2014 to 6.11.2014 when she was summarily dismissed. By dint of Articles 165 (5) and 162 (2), the issues of summary dismissal are not for this court.

3. This does not mean that the court may never consider the pre-dominancy test. However, where different causes of action are combined, the same cannot be dealt with as if the predominant issue is in question. Mohamed Ali Baadi and others v Attorney General & 11 others[2018] eKLR, the high court stated as doth: -

"

"105. Subsequent to the above decisions, our Courts have identified the correct approach to determine the appropriate superior Court to hear such hybrid cases. The Courts have resolved the issue by inquiring what the most substantial question or issue presented in the controversy is. For example in Suzanne Butler & 4 Others v Redhill Investments & Another[52] the Court stated the test in the following words:

"When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.

The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.

> Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue."

4. The First Respondent is said to have caused the appellant to be arrested and "imprisoned" at the police station. This appears to be lexographicide since there are no prisons at the police stations. It is stated that later she was maliciously prosecuted for stealing by servant contrary to section 268 (1) as read with section 281 of the Penal Code vide Nairobi CMCR NO. 1575 of 2015. The appellant was acquitted under section 215 of the penal code.

5. They claimed special damages of Ksh.82,400. They stated that they were unlawfully terminated from employment on 29th March 2014. They claimed compensation for malicious prosecution and imprisonment defendant awarded of and costs in CMCR 1578 of 2014.

6. The case proceeded before the honorable Kagoni who then found no merit in the suit and dismissed it. I am surprised that when such a deal composite claim was filed, no one noted the litigation that goes with it.

7. Half of the claim deals with employment and labor relations case with whose cause of actions arose on 29.3.2014. It will serve no purpose to refer the part of the claim to the employment and labour relations by dint of section 89 of the *employment Act* which provides as doth;

   Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act* (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.

8. The matter having been dismissed this appeal was filed. The 1st Respondent and the appellant filed submissions. Respondent filed its submissions since the attorney general had been struck out for being time barred.

9. Parties were absent on 8.4.2014. I directed this matter so issues on judgment on 16.5.2021. The judgment was ready but I redirected that another date be taken and service be effected for today.

Analysis

10. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

11. This was aptly stated in the case of Peters vs Sunday Post Limited [1958] EA 424 where, the court of Appeal therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

12. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

13. The matter involved both employment and malicious prosecution. This court will not deal with the questions of employment. Not just for the sake but sue to reasons I shall indicate shortly. The courts have settled that in composite claims a predominant matter will considered. In the case of Mohamed Ali Baadi and others v Attorney General & 11 others[2018] eKLR, the high court stated as doth: -

> "
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> " 105. Subsequent to the above decisions, our Courts have identified the correct approach to determine the appropriate superior Court to hear such hybrid cases. The Courts have resolved the issue by inquiring what the most substantial question or issue presented in the controversy is. For example in Suzanne Butler & 4 Others v Redhill Investments & Another[52] the Court stated the test in the following words:
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> Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue."

Evidence

14. There are 3 cases referred to in this judgment. The first one is criminal 1575 of 2014 which I shall call the criminal case. The second matter is the matter appealed from that Milimani CMCC 6857 of 2018. The last one is this appeal E569 of 2023. I shall refer to them as the criminal case, civil case and the appeal.

15. However, parties shall be referred to as per the names indicated in the appeal to separate. The magistrate in the criminal case shall be referred to as the trial court while the magistrate in the civil case, shall be referred as the learned magistrate.

16. The appellant filed a witness statement filed on 27.7.2081. It is detailed and vivid. The same is a replica of the plaint which I have summarized above. The appellant produced exhibits, some of which have several exhibits. This includes exhibit 4 which has assorted receipt for legal fees. As a result, these are two sets of proceedings. The first set are proceedings in the criminal case, which were produced as evidence. They are thus exhibited and not produced. The exhibits are located from pages 19-142. I have also seen a strange document in relation to the Attorney General. It is at page 143. Judgment in default of appearance was entered against the Attorney general.

17. Nevertheless, the Attorney general entered appearance and filed defence on 5.12.2014. They raised a preliminary objection based on Section 3(1) of *Public Authorities Limitation Act* Cap 39. An application for default judgment was made on 25.8.2020. A considerable amount of time was spent on preliminaries, the story of procrastination and plight of long knives emerges. The court finally delivered its ruling on 11.12.2020 at 2.30 pm. The ruling was to the effect that the defendant was allowed to enter appearance and file defence subject to certain conditions.

18. Another ruling had been delivered on 30.10.2020. The effect of this ruling was to dismiss the suit against the Attorney General pursuant to the preliminary objection. Having struck out the 2nd appellant, they are not and cannot be parties in this Appeal.

19. The court heard the primary case and dismissed the same. The court raised 4 issues and answered them as follows;

    a. The court dismissed the Respondent's allegations thus it does not trade as Pacific Hotel. The court found that the 1st Respondent misfiled the complaint against the appellant. He found that this prosecution ended in favour of the appellant. The court relied on the case of Kagane v Attorney-General (1969) EA 643, where the prosecutor will ask himself a question whether the material known to the prosecutor, would satisfy a prudent and cautious man that the plaintiff was probably guilty.

20. They also relied on the case of Egbema vs. West Nile Administration. The same Court held:

> "False imprisonment and malicious prosecution are separate causes of action; a plaintiff may succeed on one and fail on the other. If he established one cause of action, then he is entitled to an award of damages on that issue...For the purposes proof that the criminal proceedings have been determined in the appellant's favour it is enough that the criminal proceedings have been terminated without being brought to a formal end. The fact that no fresh prosecution has been brought, although five years have elapsed since the appellant was discharged, must be considered equivalent to an acquittal, so as to entitle an appellant to bring a suit for malicious prosecution...There was no finding that the prosecution instituted by Uganda Police was malicious, or brought without reasonable or probable cause. The Uganda Police, unlike Administration Police, are not servants or agents of the Respondent...The decision whether or not to prosecute was made by the Uganda Police, who are not servants of the Respondents after investigation. There is no evidence of malice on the part of the Respondent. The appellant was an obvious suspect as he was responsible for the security of the office from which the cash box disappeared. It cannot be said that there was no reasonable and probable cause for the Respondent instigating a prosecution against the appellant. The actual decision to do so was taken by the Uganda Police. As the Judge has made no finding as to whether the instigation of the prosecution was due to malice on the part of the Respondent, this Court cannot make its own finding. The circumstances of this case reasonably pointed to the appellant as a suspect and there was not sufficient evidence

that in handing the appellant over to the Uganda Police for his case to be investigated and, if necessary, prosecuted, the Respondent was actuated by malice".

21. In Gitau Vs. Attorney General,Trainor, J had this to say:

> " To succeed on a claim for malicious prosecution the plaintiff must first establish that the defendant or his agent set the law in motion against him on a criminal charge. Setting the law in motion" in this context has not the meaning frequently attributed to it of having a police officer take action, such as effecting arrest. It means being actively instrumental in causing a person with some judicial authority to take action that involves the plaintiff in a criminal charge against another before a magistrate. Secondly he who sets the law in motion must have done so without reasonable and probable cause...The responsibility for setting the law in motion rests entirely on the Officer-in-Charge of the police station. If the said officer believed what the witnesses told him then he was justified in acting as he did, and the court is not satisfied that the plaintiff has established that he did not believe them or alternatively, that he proceeded recklessly and indifferently as to whether there were genuine grounds for prosecuting the plaintiff or not. The Court does not consider that the plaintiff has established animus malus, improper and indirect motives, against the witness".

22. In James Karuga Kiiru –vs- Joseph Mwamburi and 3 Others, the court held:-

> " To prosecute a person is not prima facie tortuous, 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."

23. Rudd, J in Kagane –vs- Attorney General, set the test for reasonable and probable cause, Citing Hicks v Faulkner, Herniman vs. Smith and Glinski vs. McIver the learned Judge stated thus:-

> " Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed...Excluding cases where the basis for the prosecution is alleged to be wholly fabricated by the prosecutor, in which the sole issue is whether the case for the prosecution was fabricated or not, the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of objective test. That is to say, to constitute reasonable and probable cause the totality of 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 insofar as that material is based on information, the information must be reasonably credible, such 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...If it is shown to the satisfaction of the judge that a reasonable prudent and cautious man would not have been satisfied that there was a proper case to put before the court, then absence of reasonable and probable cause has been established. If on the other hand the judge considers that prima facie there was enough to justify a belief in an ordinary reasonable prudent and cautious man that the accused was probably guilty then although this would amount to what I call primary reasonable and probable cause the judge may have to consider the

further question as to whether the prosecutor himself did not believe in the probable guilt of the accused, and this is obviously a matter which is to be judges by a subjective test. This subjective test should only be applied where there is some evidence that the prosecutor himself did not honestly believe in the truth of the prosecution...Inasmuch as this subjective test only comes into operation when there were circumstances in the knowledge of the prosecutor capable of amounting to reasonable and probable cause, the subjective test does not arise where the reason alleged as showing absence of reasonable and probable cause is merely the flimsiness of the prosecution case or the inherent unreliability of the information on which the case was based, because this is a matter for the judge alone when applying the objective test of the reasonable prudent and cautious man. Consequently the subjective test should only be applied where there is some evidence directly tending to show that the prosecutor did not believe in the truth of his case. Such evidence could be afforded by words or letters or conduct on the part of the prosecutor which tended to show that he did not believe in his case, as for example a failure or reluctance to bring it to trial, a statement that he did not believe in it and, I think possibly, an unexplained failure to call an essential witness who provided a basic part of the information upon which the prosecution was based."

24. The decision in Simba vs. Wambari defines what constitutes a reasonable and probable cause as:

> " The plaintiff must prove that the setting of the law in motion by the inspector was without reasonable and probable cause....if the inspector believed what the witnesses told him then he was justified in acting as he did and I am satisfied the plaintiff has not established that he did not believe them or alternatively that he proceeded recklessly and indifferently as to whether there were genuine grounds of prosecuting the plaintiff or not"

25. The court found that there was no evidence of malice by the prospection. It was not shown that the prosecutor did not act. The court found that if a prima facie case was established then the appellant could not have been put on defence. The court found that the case was poorly prosecuted and not maliciously so. He stated that the case against the state was dismissed hence the case depended wholly on the prosecutor.

26. The court found that the claim against the state was time barred by dint of section 3(1) of the public authorities limintion act which provides as follwos: -

> " 3.
>
> (1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued."

Analysis

27. I have reads this whole written judgment of the learned magistrate. He exhibited a lot of patience. The question this court should have been alive to is that the entire case of malicious prosecution terminated on 30.10.2020. Before we ask whether the prosecution was malicious we must ask whether there can be any prosecution without a prosecutor.

28. The Respondent was not a public prosecutor or even a private one. Secondly investigations were conducted by the public. The public received information which they found to be credible. The trial court found that there was a case to answer. It is the prosecution who made a decision to charge. The Respondent was a witness. Their evidence was enough to put the appellant to defence. The same did

not reach a threshold of beyond reasonable doubt. Most oft quoted English decision of by Viscount Sankey L.C in the case of H.L. (E) Woolmington vs. DPP [1935] A.C 462 pp 481 , comes in handy in describing the legal burden of proof in criminal matters, that;

> " Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

29. In the case of R vs. Lifchus {1997}3 SCR 320 the Suupreme court of Canada explained the standard of proof as doth:-

> " The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

30. According to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

31. The standard of proof required in such cases was addressed by Brennan, J in the United States Supreme Court decision in Re Winship 397 US 358 {1970}, at pages 361-64 stated that:-

> " The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because

> of the certainty that he would be stigmatised by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

32. The effect is that there was a differentiation between the prima facie case and the standard of proof required in the criminal cases. The Appellant was placed on his defence. Immediately the appellant was placed on her defence her goose was cooked. It is a waste of judicial time when a person who has been released because of a benefit of doubt to allege malicious prosecution.

33. The standard for malicious prosecution and its defences are of civil in nature. It is on a balance of probability. Therefore, being put on the defence removed to a largest possible extent the burden on the complainant and the state.

34. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows:

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

35. In Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR, the judges of Appeal held that:

> " Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -
>
> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."

36. On the standards of proof, to claim malicious prosecution. There was no evidence of malice whatsoever. Indeed, there was a probable cause to have her charged. From the evidence on the record there is enough to sustain a civil claim for conversion. The appeal is therefore unmerited.

37. Equally I find that what is left is the claim that the dismissal is time barred. The court cannot transfer a time barred claim to the Employment and Labour Relations Court by dint of pertinent sections of the *Employment Act*.

38. In spite of copious amounts of submissions, I find no merit in the issues raised. The only order commending itself is to save the appeal from the ignominy of its own incompetence by dismissing the same with costs of Ksh.75,000 payable within 30 days. In default execution to issue.

Determination

39. In the circumstances I make the following orders: -

a. The appeal therefore lacks merit and is hereby dismissed with costs of 75,000. The costs shall be paid within 30 days in default execution to issue.

b. The file and the matter and the first matter court below are closed.

DELIVERED, DATED and SIGNED at MOMBASA on this 16th day of May, 2024. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

Miss. Wanjiru for the Appellant

Mr. Odek for the Respondent

Court Assistant- Brian/Michael