



Armed Forces Canteen Organization (AFCO) (Now DEFCO) v Muchiri (Civil Appeal 760 of 2019) [2024] KEHC 8760 (KLR) (12 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8760 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL 760 OF 2019**

JN NJAGI, J

JULY 12, 2024

BETWEEN

ARMED FORCES CANTEEN ORGANIZATION (AFCO) (DEFCO) APPELLANT

AND

JAMES NJUGUNA MUCHIRI RESPONDENT

(Being an appeal from the judgment and decree of Hon. Grace Mmasi, SPM, in Milimani Commercial Courts CMCC No.12358 of 2005 delivered on 29/11/2019)

JUDGMENT

1. The appellant herein was the employer of the respondent. Sometimes in November 2001 the appellant reported to the police that the respondent had stolen a sum of Ksh.320,000/= from the appellant. The respondent was arrested by the police and charged with the offence of stealing by servant. He was tried of the offence and acquitted under section 215 of the Criminal Procedure Code.
2. Upon acquittal, the respondent filed suit No.12358 of 2005 against the appellant at the Chief Magistrate's Court at Nairobi seeking special and general damages for false imprisonment and malicious prosecution. In a judgement delivered on the 29/11/2019, the trial magistrate made a finding that the criminal charges were instituted without reasonable and probable cause and were malicious. The court awarded the respondent Ksh.2,500,00/= in general damages for unlawful arrest and malicious prosecution and Ksh.6,000/= in special damages. The appellant was dissatisfied with the judgment and lodged the instant appeal.
3. The grounds of appeal of appeal are that:
 1. The Learned Magistrate erred and was wrong in finding that the appellant had maliciously prosecuted the Respondent when it only reported loss of money in the hands of the Respondent to the police and the police had decided to prosecute the appellant for the said loss.



2. The Learned Magistrate completely misapprehended the evidence and misapplied and misdirected herself on the law relating to malicious prosecution and consequently arrived at a decision which was plainly wrong in the circumstances.
 3. The Learned Magistrate erred and was wrong in ignoring and disregarding the concurrent findings of the High Court and the Court of Appeal in Civil Case No. 1263 of 2005 and Civil Appeal 245 of 2010 (James Njuguna Muchiri Vs. Armed Forces Canteen Organisation (DEFKO) respectively, as to the Respondents responsibility in handling the moneys that had been entrusted to him by the Appellant which judgements were before her.
 4. The Learned Magistrate was wrong in awarding the Respondent the sum of Kshs. 2.5 Million as damages which sum was manifestly high and excessive and unsupported by the authorities cited to her.
 5. The Learned Magistrate was biased against the Appellant and did not handle the case impartially as was expected.
4. The appellant is in the appeal seeking for orders that the judgment of the trial court be set aside and substituted with an order dismissing the respondent's case.

Background to the case

5. The appellant herein runs shops under the name Armed Forces Canteen. The Respondent was working at the respondent's shop at Embakasi as a manager. Among his duties was to receive money from shop assistants. Sometimes in the month of November 2001, his area manager did a spot check on the respondent and the respondent could not account for some money received by him. An audit was conducted by a senior internal auditor that revealed that a sum of Ksh.1,010,854.80 was missing. The respondent could not account for the same. The respondent refunded Ksh.690,854.80 of the missing money but was unable to refund the rest amounting to Ksh.320,000/=. The appellant reported the matter to the police and the respondent was arraigned at Kibera Law Courts with the offence of stealing by servant the sum of Ksh.320,000/= contrary to section 281 of the Penal Code, among other offences.
6. The case was heard and the respondent eventually acquitted of the charges under section 215 of the Criminal Procedure Code in a judgment delivered on 15/2/2005. The reasons for the acquittal were that there was no sufficient evidence that the respondent stole the money or whether the money got lost by failure to make correct entries. That evidence was adduced that it was normal to incur shortages in the course of the respondent's work and therefore there was no evidence that the respondent stole the money. Further that since the appellant had recovered half of the missing money, the appellant should have let the respondent pay the rest of the money and deal with him departmentally.
7. It is upon acquittal that the respondent filed suit No.12358 of 2005 against the appellant seeking special and general damages for false imprisonment and malicious prosecution.
8. In the meantime, the appellant had suspended the respondent after he was charged with the criminal offence. The appellant refused to reinstate the appellant after he was acquitted in the criminal charges. The respondent thereupon filed Civil Suit No.1263 of 2005 at the High Court seeking for a declaration that his termination was unlawful. He sought for general damages for unlawful and wrongful termination of services, among other prayers. The appellant in the same case made a counterclaim of Ksh. 320,000/= against the respondent. The High court in a judgment delivered on 17th December 2009 entered judgment for the appellant in the sum of Ksh.320,000/= and dismissed the rest of the claim. The respondent was dissatisfied with the judgment of the High Court and moved to the Court of Appeal which in a judgment delivered on 29th January 2016 upheld the appellant's



counterclaim of Ksh.320,000/= but ordered the appellant to pay the respondent terminal benefits, salary in lieu of notice and accumulated salary.

Submissions

9. The appeal proceeded by way of written submissions.

Appellant's submissions

10. The appellant referred to the elements of the tort of malicious prosecution as stated in the case of *Murunga v Attorney General* (1979) KLR 139 and in *Mbowa v East Mengo District Administration* (19720 EA 352. They submitted that there is no dispute that the report to the police was instituted by the appellant who reported the loss of the money to the police as a result of which the respondent was arrested and charged. That there is no dispute that the proceedings terminated in favour of the respondent. The questions were whether the proceedings were instituted without reasonable and probable cause and whether there was malice.
11. The appellant relied on the definition of reasonable and probable cause as stated in the case of *Kagane and others v Attorney General & another* (1969) EA 643 and submitted that the respondent herein failed to account for the money so received from the shop assistants. That the money was not in the safe where he was keeping it. That he started to refund the money when audit was underway. That an ordinary and cautious accuser would have reached the conclusion that the respondent had probably stolen the money. Therefore, that there was reasonable and probable cause for the appellant to have made the complaint against the respondent.
12. On malice, the appellant submitted that the fact of acquittal of a person of a criminal offence is not evidence of malice nor is prosecution of a person prima facie evidence of malice. It was submitted that it is only when the prosecution is done dishonestly or unreasonably that it can be inferred that there was malice. The appellant in this respect relied on the case of *James Karuga Kiiru v Joseph Mwamburi & others*, Nrb.CA No. 171 of 2000 (2002) eKLR and submitted that the act of the police in charging the respondent in this case was reasonable and was not dishonest. That in any case the trial magistrate in the criminal case had found that a prima facie case of theft had been made out against the respondent and had put him to his defence. Therefore, that there was no malice on the part of the prosecution.
13. The appellant submitted that for a court to award damages for malicious prosecution, the plaintiff must prove his loss. That the trial magistrate in this case did not state the loss suffered by the respondent that led to the award of Ksh.2.5 million. That the Court of Appeal in Civil Appeal No. 245 of 2010 awarded the respondent money for the period he had been under suspension when the criminal case was going on until his services were terminated and was thus compensated for the salary he had during that period. Therefore, that there was no basis for the award of general damages in the sum of Ksh.2.5 million.
14. The appellant urged this court to dismiss the respondent's case with costs and award the appellant the costs of this appeal.

Respondent's submissions

15. The respondent submitted that the trial court appreciated the role of the police and the Attorney General in the prosecution of the respondent and proceeded to enter judgment jointly and severally against the Attorney General.



16. The respondent submitted that he had proved before the lower court that the case was instituted without reasonable and probable cause. He placed reliance on the book of Salmond on the Law of Torts where the author defined the same as:

“..... a genuine belief, based on reasonable grounds, that the proceedings are justified”.

17. It was submitted that for the police to charge a person they must have sufficient information justifying any arrest made in connection with an offence alleged to be committed. That in this case it was acknowledged by the appellant at the trial court that it received Ksh.690,000/= geared towards clearing the outstanding sum. Had the prosecution conducted proper and efficient investigations it would have knowledge that the respondent was allowed to pay back the missing money including the balance of Ksh.320,000/=.

18. The respondent submitted that the criminal proceedings against him were unjustified and instituted recklessly and or indifferently. That the circumstances under which he was charged pointed to the fact that the police or the prosecution acted prematurely and without basis before verifying all the facts of the case. That the trial magistrate was right in finding that there was no reasonable or probable cause to warrant a criminal prosecution. The prosecution cited the case of James Karuga Kiiru (supra) where it was held that:

“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.”

19. On malice the respondent cited the case of James Kahindi Simba v Director of Public Prosecutions & 2 others (202) eKLR where it was defined as:

The presence of some improper and wrongful motive that is to say, an intent to use the legal process for some other than its legally appointed and appropriate purposes.

20. It was submitted that the appellant had improper motive in causing the arrest and prosecution of the respondent over money that he had been allowed to pay and had indeed paid more than half of it to avoid losing his job. The respondent relied on the case of Pwani Oil Products Ltd v Josiah Omondi Olang (2020) eKLR where the court stated that:

Clearly, from the evidence presented, the police solely acted on the basis of the Appellant's purported investigations without carrying out their own independent investigations in order to verify the appellant's claim. The failure to carry out independent investigations so as to confirm the veracity of the appellant's claim as against the respondent, amounts to malice.

21. It was submitted that the prosecution of the respondent was selective and in serious breach of the tenets of fair trial. Therefore, that the trial magistrate arrived at the correct decision.

22. On the amount of damages awarded by the trial magistrate, it was submitted that this court can only interfere if it is shown that the award is inordinately low or high and is a wholly erroneous estimate of the damages, as was held in the case of Butt v Khan (1981) KLR 349. It was submitted that the trial magistrate's assessment of the damages was fair and reasonable and there is no reason to interfere with the award.

23. On the submission by the appellant that the trial court ignored and disregarded the concurrent findings in the High Court and Court of Appeal in case No.1263 of 2005 and Court of Appeal No.245 of 2010



-James Njuguna Muchiri v Armed Forces Canteen (DEFECO). It was submitted that the determination of those cases involved issues of employment between the parties in which the court held that the respondent was entitled to terminal dues following termination of his employment. That these were employment issues that did not touch on the criminal proceedings in the trial court. That no appeal was preferred against the decision of the trial magistrate and therefore the determination stands. The respondent urged this court to dismiss the appeal with costs.

Analysis and Determination

24. The duty of a first appellate court was explained in the case of Kenya Ports Authority vs Kuston (K) Limited [2009] 2EA 212 where the court held:-

“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

25. In Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates (2013) eKLR, the Court of Appeal stated as follows regarding the duty of a first appellate Court:-

“This being a first Appeal, we are reminded of our primary role as a first appellate Court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

26. I have considered the grounds of appeal, the evidence and the rival submissions by counsels for the parties. The elements for the tort of malicious prosecution were stated in the case of Murunga v Attorney General (1979) KLR 138 to be as follows:

- a. The plaintiff must show that prosecution was instituted by defendant, or by someone for whose acts he is responsible;
- b. That the prosecution terminated in the plaintiff's favour
- c. That the prosecution was instituted without reasonable and probable cause and
- d. That the prosecution was actuated by malice.

27. There is no dispute that the criminal case was instituted by the appellant who is the party who reported the matter to the police upon which the respondent was arrested and charged with the offence of stealing by servant. There is no dispute that the proceedings terminated in favour of the respondent as he was acquitted of the criminal charge. The elephant in the room was whether the prosecution was instituted without reasonable and probable cause and whether the prosecution was actuated by malice. I have considered the issues as hereunder.



Whether the prosecution was instituted without reasonable and probable cause

28. The test for whether a case was instituted with a reasonable and probable cause was laid out by the Court of Appeal in *Kagane & Other v The Attorney General & Another* (1969) EA 643, where Rudd J held 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 an ordinary reasonable prudent and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for the prosecution.”

29. In *Simba vs. Wambari* (1987) KLR 60 it was stated that:

“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”

30. From the above authorities, reasonable and probable cause refers to a situation where the defendant genuinely believed, based on reasonable grounds, that the criminal proceedings against the accused were justified. Reasonable and probable cause is characterized by an honest belief in the guilt of the accused, formed upon reasonable grounds and a conviction resulting from a state of circumstances. Assuming these circumstances to be true, an ordinary prudent and cautious person in the accuser's position would reasonably conclude that the person charged was likely guilty of the alleged crime. The test for reasonable and probable cause is an objective test.

31. In this case, the question is whether the facts relied on to charge the respondent with the offence disclosed reasonable and probable cause that the respondent had committed the offence.

32. The respondent used to receive money from shops that were being operated by the appellant, sign for it and keep it in the safe. When an audit was carried out on the money that was in the safe a huge amount to the sum of Ksh. 1,010,854.80 was found missing. The respondent did not explain how the money went missing.

33. The trial court in finding for the respondent in the civil matter stated that evidence was adduced in the criminal proceedings that it was normal to incur shortages and that workers who incurred shortages were required to refund the money. That the evidence adduced in the criminal trial exonerated the respondent and he had in fact refunded some of the money. The court then stated that the casualness with which the investigation and the prosecution of the criminal case was conducted left the court in serious doubt as to whether the defendants honestly believed in the probable guilt of the accused and truth of the prosecution. The court then concluded that reasonable and probable cause had not been shown.



34. The test of reasonable and probable cause is an objective one. One has to place himself in the shoes of the prosecutor and consider the evidence that was before the prosecutor and decide whether there was cause to prefer the criminal charges against the defendant.
35. In the case at hand, the respondent had lost a huge amount of money totaling to over one million Kenya shillings. He was keeping the money in a safe. According to the witnesses who testified for the prosecution, he could not explain how the money got lost. The witnesses further stated that though shortages would be incurred and workers would be allowed to refund the money, it was usually small amounts of money and not the magnitude lost by the respondent. In view of the huge amount of money lost by the respondent and his failure to explain how the money got lost while in his custody, there was every reason for a prudent prosecutor to believe that the respondent had probably stolen the money. The fact that the respondent refunded some of the money did not absolve him from probable guilt. The appellant could not be blamed for reporting the matter to the police because he had failed to explain how he lost the money. The prosecution cannot be blamed for charging him with the offence since he did not explain how the money which was secured in a safe got lost.
36. The case for the respondent is based on the fact that he was acquitted of the criminal charges. However, the fact that a person has been acquitted in a criminal trial does not mean that there cannot have been reasonable and probable cause to charge him in the first place. The duty lies on the plaintiff to prove such an assertion. The court in *Robert Okeri Ombeka v Central Bank of Kenya*, Civil Appeal No. 105 of 2007 [2015] eKLR stated as follows:

“Comparative judicial experience in other jurisdictions also shows an emerging legal principle that an acquittal or discharge in a criminal prosecution should not necessarily lead to a cause of action in malicious prosecution law suits. A malicious prosecution plaintiff cannot establish lack of probable cause based on having obtained in an earlier action an acquittal based on insufficiency of the evidence. Successfully defending a prosecution or a law suit does not establish that the suit was brought without probable cause. It is the state of mind of the one commencing the arrest or imprisonment, and not the actual facts of the case or the guilt or innocence of the accused which is at issue. Probable cause is determined at the time of subscribing a criminal complaint and it is immaterial that the accused thereafter may be found not guilty.”

37. There was no evidence that the prosecution acted recklessly in charging the respondent with the offence. In my view, there was strong basis for the prosecution of the respondent in the case. Consequently, I find that there was reasonable and probable cause to charge the respondent with the offence and therefore there was justification in charging the respondent. I find that the trial magistrate erred in holding that there was no reasonable and probable cause for charging the respondent with the offence.

Whether the prosecution was actuated by malice

38. The element of malice is what constitutes the tort of malicious prosecution. In the case of *Silvia Kambura v George Kathurima Japhet & 2 others* [2021] eKLR it was stated that:

“The element of malice is the epitome of malicious prosecution. Malice connotes the use of justice for some other motive other than bringing the Plaintiff to justice upon a reasonable belief that he is guilty.”



39. In Halsbury's Laws of England, Fourth Edition, Volume 45 (2) Para 472 at page 314, the following was established: -
- “...Although malice may be inferred from want of reasonable and probable cause, want of reasonable and probable cause is not to be inferred from malice...”
40. The mere fact that a person has been acquitted of criminal charges does not necessarily connote malice on the part of the prosecution. In the case of *Nzoia Sugar Company Ltd v. Fungututi* (1988) KLR 399 where the Court of Appeal held that:
- “Acquittal person on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecutor.....”
41. In the case of *Bethwel Omondi Okal vs. Attorney General & another* [2018] eKLR the court stated that:
- “A party who suspects that there has been a violation of the law, has an obligation to report the matter to the police who carry out investigations and decide whether or not to charge and prosecute the person depending on the strength of the evidence. The fact that an accused person, though charged and prosecuted, was acquitted is not proof of malice. There must be proof of existence of malice in making the report. In other words, the petitioner must prove that there was no reasonable basis for making the report. The decisions referred to above be clear that there must be unreasonable basis for reporting a complaint to the police and that the report was actuated with malice. In the present petition the petitioner did not even show that the complaint was false and that it was full of spite or malice.”
42. The appellant in this case reported the respondent to the police after money entrusted to him went missing. The police investigated the case and charged the respondent with the theft of the money. There is nothing to show that the report was made to the police out of spite or ill-will. Similarly, there is nothing to show that there was ill-will or spite in the prosecution of the respondent.
43. It is also important to note that the appellant suspended the respondent from work pending the hearing of the criminal case. It is not until after the determination of the case that the appellant terminated his services. The law was therefore complied with in suspending the respondent and terminating his services. This is an indication that the appellant was not actuated by malice in having the respondent being prosecuted of the offence.
44. It is also to be noted that the trial court found that a prima facie case of theft had been established against the appellant and the court put him to his defence. The fact that the court found that there was a prima facie case established dispels the allegation that the prosecution was actuated by malice. It is therefore my finding that malice was not proved.
45. In view of the foregoing, I find that there was reasonable and probable cause in prosecuting the respondent of the offence. I find that there was no basis in the trial court holding that the arrest and prosecution of the respondent was malicious. I thus find the appeal to be merited. The judgment of the lower court is for dismissal.

Damages

46. The law requires a court which dismisses a case on damages to assess the amount of damages it would have awarded the plaintiff had the case been successful. The trial magistrate in this case awarded



Ksh.2,500,000/= in general damages and relied on, inter alia, the following cases:Chrispus Karanja Njogu v Attorney General (2008) eKLR where Ksh.800,000/= was made to the appellant who was an Acting Senior Assistant Registrar with the 2nd Respondent.Thomas Mutsotso Bisembe v Commissioner of Police & another [2013] eKLR where Ksh.800,000/= was made to a businessman for malicious prosecution.Chrispine Otieno Caleb v Attorney General [2014] eKLR where a City Hall worker was awarded Ksh.2,000,000/= for malicious prosecution.

47. The respondent herein was working with the appellant as manager/accountant. The fact that he was paid back the salary for the period he was under suspension did not disentitle him general damages for malicious prosecution. I would have awarded him Ksh.2,000,000/= in general damages had his case been successful.

Disposition

48. The upshot is that respondent's case was not proved on the usual balance of probabilities. The appeal is therefore allowed and the case for the respondent is dismissed with costs to the appellant.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 12TH JULY 2024

J. N. NJAGI

JUDGE

In the presence of:

Mr. Keyonzo for Appellant

Miss Mathenge for Respondent

Court Assistant – Mokeira

30 days Right of Appeal.

