Kababi v Attorney General & 3 others (Civil Appeal 37 of 2019)
[2023] KEHC 19143 (KLR) (14 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19143 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL 37 OF 2019

LM NJUGUNA, J

JUNE 14, 2023

BETWEEN

KENNETH KABURI KABABI ..... APPELLANT

AND

THE HON ATTORNEY GENERAL ..... 1ST RESPONDENT

THE COMMISSIONER OF POLICE ..... 2ND RESPONDENT

WILSON MUNYINYI MACHARIA ..... 3RD RESPONDENT

CORPORAL PIUS TAMA ..... 4TH RESPONDENT

JUDGMENT

1. The appeal herein arose from the judgment of Hon. Nyakweba (P.M.) delivered on 25.06.2019 in CMCC number 7/2008 at Embu Law Courts.

2. The appellant's case is premised on the fact the appellant was arrested for no apparent reason and that the arrest was effected at the hospital where he was under treatment for a fractured leg; that later, he was confined in the cells at Kerugoya Police Station. That the appellant was later discharged on 30.04.2007 and consequently charged vide Kerugoya SRMC Criminal Case No. 606 of 2007 with the offence of stealing a motor vehicle contrary to section 278 (a) of the *Penal Code*. It was his case that the matter proceeded for trial but at the close of the prosecution's case, he was acquitted under Section 210 of the *Criminal Procedure Code* for lack of evidence. He averred that he did not just bring this case because he was acquitted but because the decision to arrest, charge and prosecute him was actuated by malice. He contended that he suffered a lot more so because he was arrested from Machakos District Hospital bed where he had been admitted after suffering a fracture of the leg. The trial court heard his case and delivered a judgment on the 25.6.2019.

3. Being dissatisfied with the said judgment, the appellant filed the appeal herein in which he listed seven grounds of appeal in the memorandum of appeal dated 08.07.2019.

4. When the appeal came up for hearing, the parties took directions to dispose the same by way of written submissions and which directions were complied with.

5. The appellant argued the appeal as follows: Grounds 1, 4 and 6 of the appeal separately and Grounds 2, 3, 5 and 7 all together. On whether the trial magistrate erred in law and in fact in finding that none of the advocates for the parties in their submissions set out the issues for determination, the appellant submitted that he did set out four principles that govern a claim founded on malicious prosecution and proved the same in respect of the appellant's claim. That the appellant was able to submit on each principles relying on the statement by the appellant, in which, he explained how he was arrested for no apparent reason, and that the arrest was effected while at the hospital. That upon discharge on 30.04.2007, he was consequently charged vide Kerugoya SRMC Criminal Case no. 606 of 2007 with the offence of stealing a motor vehicle contrary to section 278 (a) of the *Penal Code*. That the case went for trial but at the close of the prosecution's case he was acquitted under section 210 of the *Penal code* for lack of evidence.

6. On ground 4, that the learned trial magistrate erred in law and fact in finding though wrongly that the appellant had brought this case just because he was acquitted; it was submitted that the appellant's statement is clear that the decision to arrest, charge and prosecute him was all actuated by malice and that he suffered a lot, more because, he was arrested from Machakos District Hospital bed where he had been admitted after fracturing a leg. That after the trial, the court did not find the slightest evidence to link the appellant with the offence and the court indeed wondered why the appellant was charged.

7. On ground 6, that the learned trial magistrate erred in law and fact in failing to consider the appellant's evidence and case law relied upon and therefore reached at wrong decision; it was submitted that the appellant's evidence was in his statements and his documentary evidence both of which had been filed. That had the trial court considered the appellant's evidence in his statement, the documentary evidence and the case law cited, then it would have reached a determination in favour of the appellant.

8. On grounds 2, 3, 5 and 7, it was submitted that the trial magistrate failed to appreciate that the appellant had filed his statements and list of documents which all the parties agreed to rely on under Order 11 Rule 2 (c) of the *Civil Procedure Rules*. That the appellant did prove that as a result of the malicious arrest, confinement and prosecution all of which were not warranted, his reputation was injured and he suffered a lot of psychological trauma for which he ought to be compensated. This court was therefore urged to allow the appeal herein as prayed, together with costs and interest.

9. The 1st 2nd and 4th respondents argued grounds 1, 2, 5 and 6 together and grounds 3, 4 and 7 of the appeal separately. It was their submission that the learned trial magistrate did not misapprehend the facts and law on the issue regarding evidence in the case herein. That a cursory perusal of record of appeal shows that indeed both parties were given an opportunity to defend themselves, with all parties filing their respective pleadings. The parties, by consent, agreed to file written submissions hence no hearing took place. On grounds 4 and 7, it was submitted that it is not disputed that prosecution was terminated in favour of the appellant but the same did not translate to the fact that the prosecution against the appellant was instituted without reasonable and probable cause. On ground 3 it was submitted that the trial magistrate did not misapprehend the facts and law by holding that there was a reasonable cause to prosecute .Reliance was placed on the case of Hicks Vs Faulkner (1878) 8 Q.B.D 167. It was submitted that, the fact that the police proceeded to forward the file to the O.D.P.P who then prosecuted the appellant, the same did not necessarily amount to malicious prosecution since the police were discharging their lawful mandate as provided for under *N.P.S*. Act. On whether the

appellant is entitled to damages, if any, it was submitted that it is trite in law that special damages must not only be specifically pleaded but also strictly proved. Reliance was placed on the case of *Pwani Oil Products Ltd Vs Josiah Omondi Olang' [2022]* eKLR. Thus the respondents argued that the appeal herein is destitute of any merit and therefore should be dismissed.

10. The 3rd respondent in his submissions in reference to ground 2 stated that it is trite that the legal burden of proof lies with the party alleging any facts. Reliance was placed on Sections 107, 108 and 109 and the case of *Alice Wanjiru Ruhiu Vs Messiac Assembly of Yahweh [2021]* eKLR. That pleadings contain averments of the parties concerned and cannot be considered as evidence until they are proved. Reliance to support this proposition was placed on the case of Charterhouse Bank Limited (Under statutory Management Vs Frank N. Kamau [2016] eKLR. On grounds 1, 3, 4 5, 6 and 7, it was submitted that the 3rd respondent was only a complainant who exercised his legal right to report a crime. He had no control or discretion over the decision to investigate the crime or the decision to charge the appellant and therefore, he was not liable for the alleged malicious prosecution. Reliance was placed on the case of *Bethwel Omondi Okal Vs Attorney General & Another [2018]* eKLR. It was submitted that despite the appellant proving that he was acquitted, he failed to prove that the proceeding were actuated, by malice and that the prosecution was instituted without probable cause. That the appellant failed to discharge his burden of proof and therefore, this court has only one obligation and that is to dismiss the appeal with costs to the 3rd respondent.

11. It's now settled that the role of the first appellate Court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See Selle & Ano. Vs Associated Motor Boat Co. Ltd (1968) EA 123). The first appellate court ought not to ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings.

12. I have read through and considered the memorandum of appeal and the submissions filed by counsel for both parties. Further, I have read and evaluated the record and evidence adduced therein by the appellant before the trial court but most importantly, the procedure that was adopted by the trial court, in "hearing" the matter.

13. This court has perused the court record and the same shows that, the plaint the subject matter of this appeal was amended on 11.06.2010. Upon service of the summons and the amended plaint, the 1st, 2nd and 4th respondents filed their amended statement of defence on 22.06.3016 while the 3rd respondent filed his amended statement of defence on 30.10.2014.

14. When the matter came up before the court for hearing, counsel for the appellant prayed that the matter be disposed of, by way of written submissions and the court allowed the matter to be canvassed by way of written submission.

15. The parties thereafter agreed to exchange their submissions and the court thus pronounced itself judgment dated 25.06.2019 whereupon the plaintiff's case was dismissed. Before this court indulges in considering the merits of the appeal, the court feels compelled to address the manner and the procedure that the trial court adopted in disposing of the matter.

16. The procedure of hearing of suits and examination of witnesses is provided for in Order 18 of the *Civil Procedure Rules* (2010), Cap 21 Laws of Kenya. The said order is very comprehensive on how a trial should proceed in court including the recording and production of evidence. Of importance to this court is Order 18 Rules 1 and 2 which provide as follows: -

    1. The plaintiff shall have the right to begin unless the court otherwise orders.

2. Unless the court otherwise orders—

    1. On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

    2. The other party shall then state his case and produce his evidence, and may then address the court generally on the case. The party beginning may then reply.

    3. After the party beginning has produced his evidence then, if the other party has not produced and announces that he does not propose to produce evidence, the party beginning shall have the right to address the court generally on the case; the other party shall then have the right to address the court in reply, but if in the course of his address he cites a case or cases the party beginning shall have the right to address the court at the conclusion of the address of the other party for the purpose of observing on the case or cases cited.

        1. In view of the above provisions, can the procedure that was adopted by the parties and the trial court be said to have complied with the procedure as laid down in the *Civil Procedure Act*?

        2. Before the trial court, the counsel consented to have the parties adopt the evidence without having to testify; they further agreed to adopt the witness statements as evidence. It is of importance to note that the law provides for the mode of hearing and even if the parties were to agree between themselves on how they wish to proceed with the hearing, the same is a nullity since the law and practice is elaborate on how the same should be done. [See *Kenneth Nyaga Mwige Vs Austin Kiguta and 2 others [2015]* eKLR].

        3. The Court of Appeal further stated: -

            > Once a document has been marked for identification it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for is authenticity and relevance to the facts of the case. Once the foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit; it is not part of

> the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an authenticated account.

20. In the case of Des Raj Sharma Vs Reginan [1953] EACA 210, the court held that there is a distinction between exhibits and articles marked for identification and that the term exhibit should be confined to articles which have been formally proved and admitted in evidence.

21. Order 18 of the *Civil Procedure Rules* is clear on how a hearing should proceed and how evidence should be recorded and produced. In this case, parties substantially deviated from the laid down procedure. This court is alive to the provisions of Order 11 and in particular Rule (7) which gives the court the discretion to order admission of statements without calling the makers as witnesses where, appropriate. The challenge this court has is; when a court exercises such discretion "how does it interrogate the veracity of the evidence contained in such statements which are produced without calling the makers?"

22. It is my considered view that, such substantial deviation from a well laid down procedure is not acceptable and if indeed parliament intended to give such wide discretion to the trial court to so substantially deviate, then it would have clearly so stated.

23. It is my further considered view that the discretion given to the court in Order 11 Rule (7) is not absolute but only limited, and that explains the use of the words "where appropriate". That discretion cannot be taken to override the provisions of Order 18 on the recording and production of evidence. By so doing, the parties herein opted for a short-cut.

24. In the case of *James Njoro Kibutiri Vs Eliud Njau Kibutiri 1 KAR 60 [1983]* KLR 62; [1975-1985] EA 220, the court had some advice to give on short cuts;

> " That the ingenious lawyers are advised that short cuts are fine, as long as you are absolutely sure that they won't land you in a ditch".

25. In the case of Lehmann's (East Africa) Limited Vs R Lehmann & Co. Limited [1973] EA 167, the court held that:

> The supposed short cuts in procedure almost always confuse and obscure the true issues and almost always result in prolonged litigation and unsatisfactory decision. However, if the parties to a civil suit agree to adopt a certain procedure and the judge, however wrongly permits such a course, then there is little that a Court of Appeal can do other than to seek to make the best of an unsatisfactory position.

26. In view of all the foregoing and since the documents referred to in the list of documents were not formally produced and their veracity tested in support of the suit, coupled with the fact that the correct procedure for recording and production of evidence as laid down in Order 18 Rules 1 and 2 was not complied with, the learned magistrate, with tremendous respect, fell into error and the whole trial was rendered a nullity. There was no trial at all as contemplated by the law.

27. In the end, the order that commends itself to me and which I hereby grant is that:

    i. The judgment in Embu CMCC No. 07 of 2008 is hereby set aside.

    ii. The matter is hereby remitted to the trial court for hearing and determination in the manner stated hereinabove.

iii. Each party should bear its own costs of the appeal.

28. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 14TH DAY OF JUNE, 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondents