



REPUBLIC OF KENYA



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Mbure v Kimani (Civil Appeal 69 of 2017)
[2023] KEHC 22773 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22773 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 69 OF 2017
A MSHILA, J
SEPTEMBER 22, 2023

BETWEEN

DAVID GACHIRA MBURE APPELLANT

AND

DAVID MUNYUI KIMANI RESPONDENT

*(Being an appeal from the Judgment and Orders of Hon. S.K.Arome
(R.M) delivered on 4th June, 2015 in CMCC No 103 of 2013 - Kiambu)*

JUDGMENT

Background

1. By a Plaint filed on 19/08/2013, the Respondent herein sued the Appellant claiming for judgment against the Appellant for special damages for Kshs. 50,000/=, general damages for malicious prosecution, costs and interest.
2. The Respondent averred that on or about 24/1/2011 the Appellant fully aware that the Respondent had been acquitted in Criminal Case No. 376 of 2008 at Kiambu Chief Magistrate's Court where he had been charged with the offence of malicious damage made a report at Rweno Police Post that the Respondent had maliciously destroyed the fence causing the Respondent to be charged in Criminal Case No. 376 of 2011-Kiambu. Once again the Respondent was acquitted. The said report was said to be false, unlawful and without reasonable case as such malicious.
3. The Appellant filed his Defence on 3/10/2013 where he affirmed that indeed the Respondent maliciously damaged the live fence by cutting the cedar posts and the kei apple fence and was only acquitted for lack of proof in regard to ownership.



4. The matter was heard and determined, the Honourable Trial Magistrate held that the Appellant was liable to the Respondent for general damages for malicious prosecution and awarded Kshs. 700,000/= for general damages, Kshs. 50,000/= as special damages plus costs and interest thereon.
5. The Appellant being dissatisfied with the lower Court's judgment preferred the present Appeal. In his Memorandum of Appeal, he has listed eighteen grounds of appeal as follows:
 - a. The Learned Magistrate erred in fact and Law in finding that the Appellant is liable to the Respondent for general damages for malicious prosecution.
 - b. The Learned Magistrate erred in fact and Law by awarding an inordinately high amount for general damages.
 - c. The Learned Magistrate erred in fact and Law by failing to consider that the Honourable Attorney General was a key party to a suit for malicious prosecution arising from a Criminal Case.
 - d. The Learned Magistrate erred in fact and Law by failing to find that the office of the Deputy Public Prosecutor is in charge of matters arising from malicious prosecution.
 - e. The Learned Magistrate erred in fact and Law by failing to consider that the appellant was not a complainant and witness in Chief Magistrates Criminal Case No. 376 of 2008-Kiambu and not the authority that preferred charges as against the proposed respondent.
 - f. The Learned Magistrate erred in fact and Law in failing to find that the appellant played no roles in drafting of a charge as against the proposed respondent in Chief Magistrates Criminal Case No. 376 of 2008-Kiambu.
 - g. The Learned Magistrate erred in fact and Law by disregarding the fact that previous Criminal Cases as against the proposed respondent does not guarantee the proposed respondent immunity when he commits a similar offence.
 - h. The Learned Magistrate erred in fact and Law by disregarding the fact that previous criminal cases as against the proposed respondent did not restrain the proposed appellant from lodging a complaint as against the proposed respondent when he commits an offence.
 - i. The Learned Magistrate erred in fact and Law by assuming that the appellant should have known the outcome of the criminal case afore mentioned.
 - j. The Learned Magistrate erred in fact and Law by overlooking the true reason why the respondent was acquitted in Chief Magistrates Criminal Case No, 376 of 2008 Kiambu which was who should have been the proper complainant(owner of the damaged fence) and not that the proposed appellant did not cause malicious damage to a fence.
 - k. The Learned Magistrate erred in fact and Law by awarding the respondent damages for malicious prosecution yet he had indeed damaged the fence on several occasions.
 - l. The Learned Magistrate erred in fact and Law by disregarding the fact that there currently pending a similar case in court as the Kiambu matter being HCCC No. 511 of 2009, Nairobi dealing with similar facts.
 - m. The Learned Magistrate erred in fact and Law by disregarding the evidence of the District Land Registrar on use of the road of access and the fact that the respondent should have sought an access road to his property from the person who sold him his property.



- n. The Learned Magistrate erred in fact and Law by failing to find that there was probable and reasonable cause for instituting the above mentioned criminal case.
 - o. That the Learned Magistrate erred in law by disregarding the numerous binding authorities cited by the Appellants Counsel and thereby basing the ruling on wrong principles.
 - p. All in all, the Learned Magistrate misdirected himself on matters of both Law and facts to occasion a miscarriage of justice against the appellant.
 - q. The subordinate's court decision was manifestly unfair and prejudice to the appellant.
 - r. Other grounds and reasons to be adduced at the hearing hereof.
6. The court directed the parties to canvass the appeal by way of written submissions.

Appellant's Submissions.

7. The Appellant submits that the Respondent was put on his defence in Criminal Case no. 376 of 2008 as there was a prima facie case. Reliance was placed in the case of *Tobias Moinde Kengere v Postal Corporation of Kenya & 2 others* (2019) eKLR to demonstrate that the fact that the appellant was put on his defence was proof of reasonable cause. It was submitted that an arrest, prosecution and subsequent acquittal does not render prosecution to have been automatically malicious. Reliance was placed in the case of *Robert Okeri Ombeka v Central Bank of Kenya* (2015) eKLR. The respondent was said to have been acquitted on a technicality that there was no proof of ownership. It was further submitted that if the Complainant held honest and reasonable grounds that the Respondent is guilty then the allegation of malicious prosecution fails. In the circumstances, the court was urged to allow the appeal.

Respondent's Submissions

8. The Respondent submitted that ownership is one of the key ingredients which has to be proved by the person complaining that his property has been destroyed. The trial court was said to have rightly found that the Respondent had proved the four principles as found in the case of *Zablon Mwaluma Kadori v National Cereals & Produce Board* (2005) eKLR. The Appellant was said to have been the Complainant in Criminal Case No. 376 of 2011 for malicious damage in regard to a fence that did not belong to him as such he was led by malice and spite against the Respondent. It was submitted that a prosecution founded on a false allegation was said to be malicious and the Appellant could not escape from it as he was the genesis of the prosecution and not the police or the DPP. The court was urged to dismiss the appeal.

Trial Court's Evidence

9. David Muniyui Kimani (PW1) testified that he sued David Gachira MburE who was his neighbor. He stated that their land does not border each other as his land is parcel no. Kiambaa/Ruaka/2455. He averred that they do not share a common boundary. He further indicated that he removed his gate and fence to gain access to put building materials but was later charged for malicious damage but was acquitted in Criminal Case No. 376 of 2008. That he was arrested again for clearing the fence when he wanted to take a photograph to send to an officer at KPLC as they had placed an electric post at his gate and he was again charged in Criminal Case No. 376/2011 where he was acquitted. That David Gachira was aware of Criminal Case No. 376/08 and accused him again in 2011 as such he was driven by malice. He stated that he incurred legal fees of Kshs. 50,000/= as well as suffering from mental anguish.



10. David Gachira Mburu (DW1) stated that the dispute herein is in regard to an access road which serves the estate of Gachira Mbure. That the PW1 bought land which did not have an access road and could not agree to give Kshs. 120,000/= to be allowed to use the access road. That David destroyed his fence and was charged for malicious damage in Criminal Case no. 376/08 and was acquitted as the fence did not belong the complainant and his brother. That David destroyed the fence again and was charged in Criminal Case no. 376/11 and was acquitted. He stated that it is unfair for PW1 to be awarded damages.
11. Nicholas Kibe Mbure (DW2) testified that he saw PW1 cutting down the fence. That he informed DW1 and they decided to report at Rweno Police Post and PW1 was charged for malicious damage but was later acquitted.

Issues for Determination

12. Having read and considered the submissions by both parties and the case law relied upon, the main issues arising for determination are;
 - i. Whether the elements for the tort of malicious prosecution were established by the Respondent and;
 - ii. Whether the Respondent was entitled to the general damages awarded.

Analysis

Whether the elements for the tort of malicious prosecution were established by the respondent;

13. The elements of the tort of malicious prosecution have been discussed in the case of *Murunga v The Attorney General* (1976-1980) KLR 1251 where Cotran J listed them as follows: -
 - i. That a prosecution was instituted by the defendant or by someone for whose acts he is responsible.
 - ii. That the prosecution terminated in the Plaintiff's favour.
 - iii. That the prosecution was instituted without reasonable and/or probable cause.
 - iv. That the prosecution was actuated by malice.
14. The above mentioned elements must all be proven for a claim of malicious prosecution to succeed. Refer to the case of *Attorney General v Peter Kirimi Mbogo & Another* (2021) eKLR.
15. The Appellant herein reported the Respondent at Rweno Police Post for damaging his fence. This caused the Respondent to be arrested and was charged with malicious damage in Criminal Case No. 376 of 2011. This clearly points out that prosecution was instituted by the Appellant herein as he is the one who reported the Respondent to the police. The ground that ODPP is in charge of matters arising from malicious prosecution must fail.
16. The trial court heard and determined Criminal Case no. 376 of 2011 in favour of the Respondent as it found that there was no reasonable and probable cause that led to the Respondent's prosecution because the Complainant was not even the owner of the alleged fence. In the circumstances, the Respondent herein was acquitted.



17. With regard to whether the prosecution was instituted with a reasonable and/or probable cause the test 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.”
18. The Respondent was charged with the offence of Malicious Damage to Property contrary to Section 339 (1) of the *Penal Code*. The Section provides as follows: -
339. Malicious Injuries to Property
- (1) Any person who willfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanour, and is liable, if no other punishment is provided, to imprisonment for five years.”
19. The key ingredients for the offence of malicious damage to property, therefore, include: -
- i. Ownership of the property by the complainant;
 - ii. Damage or destruction of property; and
 - iii. Linkage of the damage to the accused person.
20. The Respondent herein was for the first time charged with the offence of malicious damage to property in Criminal Case No. 376 of 2008 where the Appellant herein was a witness. He was however, acquitted as it was held that the fence did not belong to the Complainant therein. The second time round, the Respondent was charged for a similar offence in Criminal Case No. 376 of 2011 where the Appellant herein complained that the Respondent had destroyed his fence. Similarly, the case was heard and the Respondent was acquitted. In this regard he filed the Civil Case No. 103 of 2013 the subject of this appeal for malicious prosecution.
21. The Respondent contended that the Appellant being aware that he had been acquitted in Criminal Case No. 376 of 2008 was actuated by malice and spite in reporting the Respondent for a similar complaint when the court had decided that the fence did not belong to the Complainant in Criminal Case Number 376 of 2008 as such he contends that there was no reasonable or probable cause to charge the Respondent in Criminal Case No. 376 of 2011 where the Respondent was once again acquitted as the fence did not belong to the Appellant.
22. The trial court found that there was no reasonable and probable cause for the prosecution to have charged the Respondent with the offence of malicious damage as the Complainant was aware that he did not own the fence in question. The trial court further found that the complaint was done probably to intimidate and harass the Respondent herein.



23. The Appellant argues that the police and the DPP were responsible for investigating and instituting the charges respectively. This court is satisfied that indeed there was no reasonable or probable cause to charge the Respondent herein with the offence of malicious damage the issue of the ownership of the fence having not been settled. The Respondent in his testimony explained why he cleared the fence. This court finds that the Appellant herein acted in bad faith in reporting the Respondent at Rweno Police Post. It is this report, that caused the police to charge the Respondent with the malicious damage to property and the same was prosecuted by the DPP. It is thus this court's finding that the prosecution was actuated by malice as the Respondent had not destroyed a fence that belonged to the Appellant.

Whether the Respondent was entitled to the general damages awarded.

24. The trial court having acquitted the Respondent the same can be interpreted to mean that the matter was terminated in favour of the Respondent as such this court finds that the Respondent is entitled to an award of damages for malicious prosecution. In the Ugandan case of *Dr. Willy Kaberuka v Attorney General Kampala* HCCS NO. 160 OF 1993 it was held that;-

“The plaintiff suffered injury to his reputation.He must have suffered the indignity and humiliation. He is also entitled to recover damages for injuries to his feelings especially the possibility of serving a sentence... There are no hard and fast rules to prove that the plaintiff's feelings have been injured or that he has been humiliated as this is inferred as the natural and foreseeable consequence of the defendant's conduct. The plaintiff's status in Society is also a relevant consideration and for all these reasons the plaintiff is entitled to damages...A plaintiff who has succeeded in his claim is entitled to be awarded such sum of money as will so far as possible make good to him what he has suffered and will possibly suffer as a result of the wrong done to him for which the defendant is responsible”.

25. The Appellant contends that the general damages awarded by the trial court were inordinately high. The general principal in regard to the assessment of damages is that the same should be within the discretion of the trial court and the appellate court will only interfere where trial court, in assessing damages, if it either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is not based on any evidence. Refer to the case of *Peter M. Kariuki v Attorney General* (2014) eKLR. This court finds that the Appellant herein has not demonstrated that the trial court in assessing the general damages took into account an irrelevant factor as such arrived at a wrong award. This court is satisfied that there is no good reason to interfere with the award of general damages as awarded by the lower court.

Findings and Determination

26. In light of the forgoing this court finds the appeal to be devoid of merit and it is hereby dismissed with costs to the Respondent,

Orders Accordingly.

DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 22ND DAY OF SEPTEMBER, 2023.

A.MSHILA

JUDGE

In the presence of;

Mourice – C/A



Rono - h/b for Waiganjo for Appellant

Kimani – for Respondent

