Kimbilio Daima Sacco Society v Bett & 4 others (Civil Appeal 20, 21, 22, 23 & 24 of 2018 (Consolidated)) [2023] KEHC 24423 (KLR) (17 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24423 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CIVIL APPEAL 20, 21, 22, 23 & 24 OF 2018 (CONSOLIDATED)

RL KORIR, J

OCTOBER 17, 2023

BETWEEN

KIMBILIO DAIMA SACCO SOCIETY ..... APPELLANT

AND

RICHARD BETT ..... 1ST RESPONDENT

WINNIE CHEMUTAI ..... 2ND RESPONDENT

LILIAN CHELANGAT ..... 3RD RESPONDENT

EDWARD KOSKEI ..... 4TH RESPONDENT

FILBERT KORIR ..... 5TH RESPONDENT

(Being an Appeal from the Judgments of the Principal Magistrate, Omwansa B. in the Principal Magistrate's Court at Sotik, Civil Suits Number 106, 103, 105, 108 and 107 of 2016)

JUDGMENT

1. Through their Plaints dated 13th April 2016, the Plaintiffs (now Respondents) sued the Defendant (now Appellant) for general damages for wrongful confinement and for aggravated damages for defamation.

2. The Appellant entered appearance in all the suits on 11th May 2013 and filed its Defences on 20th May 2013.

3. In its Judgments, the trial court found the Appellant and the Attorney General 100% jointly liable and further awarded each Respondent Kshs 120,000/= for wrongful confinement plus costs of the suits and interest thereof.

4. Being dissatisfied with the Judgments of the trial court, the Defendant/Appellant appealed to this court through a Memorandum of Appeal against each respondent all dated 18th December 2018. They all raised the following common grounds:-

    i. That the learned trial Magistrate erred in law and in fact in failing to make a finding that the Respondent's suit did not disclose a reasonable cause of action taking into account the entire circumstances of the case.

    ii. That the learned trial Magistrate erred in law and in fact in holding that the Plaintiff had been maliciously prosecuted by the Appellant when there were no cogent grounds and/or evidence to sustain the finding.

    iii. That the learned trial Magistrate erred in law and in fact in failing to analyze the evidence tendered by the Appellant herein.

    iv. That the learned trial Magistrate erred in law and in fact in that he totally failed to take into account the Appellant's case and submissions and placed undue weight on the Respondent's case.

    v. That the learned trial Magistrate erred in law and in fact in determining that the complaint made to the police by the Respondent's management was motivated by a desire to frustrate the Respondent when there was compelling evidence that the Respondent was reasonably suspected to have participated in a scheme to defraud it.

5. The duty of the 1st appellate court is to re-evaluate and re-examine the evidence of the trial court and come to its own findings and conclusions. This principle was espoused in the Court of Appeal case of Abok James Odera t/a A.J Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR.

The Plaintiffs/Respondents' Case

6. The Respondents stated that on 18th April 2002, the Appellant wrongfully and maliciously directed the police to arrest them on allegations of theft. That acting on the directions of the Appellant, the police detained them for 5 days and were later released on police cash bail.

7. It was the Respondents' case that they were arraigned in Sotik Law Courts after one month and were charged with several counts of theft by servant in Criminal Case Number 34 of 2005. That they were later acquitted of the charges on 30th October 2015 for lack of evidence.

8. The Respondents stated that the Appellant's acts were actuated with malice and they listed the particulars of malice in paragraph 7 of the Plaints.

9. The Respondents prayed for general damages for wrongful confinement, aggravated damages for defamation and costs of the suit.

The Defendant's/Appellant's Case.

10. In its statement of defence, the Appellant stated that it suffered loss of funds on diverse dates between January 2000 and February 2001 and they reported the matter to the police for investigations. That the police then made a decision to charge the Respondent.

11. It was the Appellant's case that if there was any confinement (which they denied), then it was a result of a conclusive and independent report and investigations conducted by the police which it was not privy to.

12. When this matter came before me on 20th July 2022, counsel for the Appellant prayed for the consolidation of Bomet High Court Civil Appeal Number 20 of 2018 with Bomet High Court Civil Appeals 21, 22, 23 and 24 of 2018. I noted that the Appeals arose from the same transaction and I directed that they be consolidated and that Civil Appeal No. 20 of 2018 being the lead file. I further directed that the consolidated Appeal proceed by way of written submissions.

The Respondents Submissions.

13. The Respondents were all represented by Mr. Orina Advocate who filed his written submissions dated 19th October 2022 on behalf of the 5 Respondents.

14. The Respondents submitted that the tort of malicious prosecution is established when a person causes the arrest and prosecution of another without reasonable or probable cause. They relied on George Masinde Murunga vs Attorney General (1979) KLR 138. They further submitted that it was not in dispute that the complaints culminating in their prosecution was instituted by the Appellant. That Rose Chepngetich (DW1) testified that the management of the Appellant reported the matter to Litein Police Station under the apprehension that they had a scheme to defraud the Appellant.

15. It was the Respondents' submission that the criminal prosecution terminated in their favour. That the matter dragged in court for 14 years before it was finally terminated.

16. The Respondents submitted that the Appellant had the burden of demonstrating that the institution of the proceedings was appropriate and that it had an honest belief that they had committed a crime. That any reasonable person would also believe that a crime had been committed. He relied on James Kahindi Simba vs Director of Public Prosecution & 2 others (2020) eKLR and Hicks vs Faulkner (1878) 8 Q.B.D 167.

17. It was the Respondents' submission that the Appellant did not have reasonable cause for their arrest. That DW1 testified and stated that there was an apprehension of a scheme to defraud the Appellant. It was their further submission that the Appellant's management never conducted any audit to verify or substantiate the veracity of the claims of theft and that they just acted on suspicion and conjecture. They relied on Crawford Adjusters (Cayman) Ltd vs Sagicor General Insurance Ltd (2014) AC 366.

18. The Respondents submitted that any Sacco acting without malice would have first conducted an investigation to establish whether money had been stolen and who the culprits were. That the blanket excuse that the Respondents, being tellers, were behind the scheme flew in the face of the law and cemented their position that the Appellant's acts were actuated with malice. The Respondents further submitted that the move to arraign them and prosecute them was informed by malice and there was no justification for such acts.

19. It was the Respondents' submission that there was no evidence that informed the Appellant that they were responsible for hatching the alleged scheme to defraud the Appellant. That the only single reason that they were arrested and arraigned in court was the Appellant's apprehension of a scheme to defraud it. It was their further submission that there was no evidence adduced to connect them to the alleged scheme.

20. In conclusion, the Respondents submitted that there were no reasons or grounds to disturb the determination of the trial court and that the Appeal was without merit and ought to be dismissed.

The Appellant's submissions.

21. The Appellant through Bett & Co. Advocates filed similar written submissions in all the Appeals and they were all dated 9th September 2022.

22. The Appellant submitted that the Respondents arrest and detention was not made by the Appellant or its agents but by the police in the execution of their duties. It relied on Henry Giflex Ombati vs University of Nairobi (2001) eKLR.

23. It was the Appellant's submission that the Respondents confirmed that they worked for it and further confirmed that they handled cash deposits and paid the Appellant's customers in execution of his duties as a teller. That save for insisting that the allegations against them were false, the Respondents did not lead evidence of malice. It was the Appellant's further submission that the Respondents admitted that there were no grudges between them and the Appellant's management and only attributed malice to the report made against them on the allegations of embezzlement of the Appellant's funds.

24. The Appellant submitted that it was trite law that allegations of malice, ill will or spite could not lie on a body corporate or institution such as itself. That such claims should be premised on the actions of a specific agent, servant, manager or any decision maker of the institution involved. It relied on Nzoia Sugar Company Ltd vs Fungututi (1988) eKLR. The Appellant further submitted that the Respondents did not identify the officer or agent of the Appellant who lodged the claim.

25. It was the Appellant's submission that the Respondents never led any evidence of malice and as such failed to discharge his burden of proof. It relied on James Karuga Kiiru vs Joseph Mwamburi & 3 others (2001) eKLR. That the learned trial Magistrate erred in finding that the Respondents were victims of malicious prosecution on the face of compelling evidence to the contrary.

26. It was the Appellant's submission that the Respondents failed to prove their assertion that the complaints lodged against them were actuated by malice.

27. The Appellant submitted that the Respondents failed to demonstrate the principles contained in the leading case of Murunga (supra). That firstly, the Appellant did not institute the prosecution but the police did and secondly that termination of the case in the Respondents' favour did not automatically warrant a claim of malicious prosecution. It relied on Nzoia Sugar Company Ltd (supra). The Appellant further submitted that the prosecution was not instituted without reasonable or probable cause. That DW1 testified that there was a repeated loss of funds which prompted it to report to the police.

28. It was the Appellant's submission that it had probable cause because the Respondents were employed by the Appellant and the gist of the complaints were that funds had been lost under their custody.

29. The Appellant submitted that the Respondents never pleaded a prayer for damages for malicious prosecution and that in the absence of such a specific prayer, damages for malicious prosecution could not be issued.

30. In conclusion, the Appellant submitted that the learned trial Magistrate erred in finding that the Respondents had proved their cases and awarded damages for malicious arrest, detention and prosecution of the Respondent. That this court ought to set aside the Judgment and Decree of the trial court with costs.

31. Before I go into the substantive Appeal and as I noted earlier, the Appeals were consolidated because they arose from the same transaction. Therefore this Judgment will be the decision for all the Appeals being Bomet Civil Appeal Numbers 20, 21, 22, 23 and 24 of 2018.

32. I have gone through and considered the trial court proceedings, the Record of Appeal dated 20th December 2019, the Appellant's written submissions dated 9th September 2022 and the Respondents' written submissions dated 19th October 2022 and two issues arise for my determination:-

i. Whether there was malicious prosecution against the Appellant

ii. Whether the trial court erred in awarding general damages for wrongful confinement against the Appellant

i.Whether There Was Malicious Prosecution Against The Appellant

33. The Black's Law Dictionary, 10th Edition defines malicious prosecution as:-

> The institution of a criminal or civil proceeding for an improper purpose and without probable cause.

34. The principles involved in the tort of malicious prosecution were provided by the Court of Appeal in the case of National Oil Corporation vs. John Mwangi Kaguenyu & 2 others (2019) eKLR, where it stated that:-

> " ...case law is replete on the issue of malicious prosecution. Of critical importance is that a litigant must establish malice. It is not sufficient to find one liable on the basis that he/she is the one who made the complaint. In the often-cited case of MURUNGA VS. ATTORNEY GENERAL [1979] KLR 138, the principles of the tort of malicious prosecution were spelt out. These are:-
>
> i) The defendant instituted the prosecution against the plaintiff.
>
> ii) The prosecution ended in plaintiff's favour.
>
> iii) The prosecution was instituted without reasonable and probable cause.
>
> iv) The prosecution was actuated by malice."

35. Similarly in Bethwel Omondi Okal vs. Attorney General & another (2018) eKLR, Mwita J. stated:-

> " The law on false imprisonment and malicious prosecution is now well settled. For one to succeed, he/she must prove four elements. First that the criminal proceedings were instituted by the defendant who was instrumental in setting the law in motion against the plaintiff, second, that the defendant acted without reasonable or probable cause. Otherwise there must exist facts which show that the defendant genuinely believed that the criminal proceedings were justified; third, that the defendant must have acted maliciously. That is the defendant in instituting the criminal proceedings acted with improper or wrongful motive. and fourth, the criminal proceedings must have terminated in the plaintiff's favour having been acquitted of the charge laid against him. (See Egbema vs. West Nile District Administration [1972] EA 60)
>
> From the above principles, it is therefore the law that a party who claims that he was unlawfully arrested falsely imprisoned and or maliciously prosecuted, bears the responsibility of proving that the arrest had no basis in law at all. It will not be enough for him to merely state that the arrest was unlawful....."

36. On whether the Appellant instituted the prosecution against the Plaintiff, from the record it is clear that the Appellant reported a claim of suspected theft by the Respondents to the police as evidenced by Rose Chepngetich's testimony (DW1) who was the Appellant's Manager at the material time. I have also gone through the testimony of the 1st Respondent and I have noted during cross examination, he stated that Rose Chepngetich Bett (DW1) and Elijah Cheruiyot Bii reported the matter to the police. It is therefore not in doubt that the Appellant instituted the prosecution of the 1st Respondent by reporting the alleged theft to the police.

37. On whether the prosecution terminated in the 1st Respondent's favour, the Record indicated that the 1st Respondent together with his fellow employees were charged with several counts of theft by servant in Sotik Criminal Case Number 34 of 2005. The Respondents were acquitted by the trial court for lack of evidence. This was evidenced by the Judgement in Sotik Criminal Case Number 34 of 2005 which was marked as P.Exh 2. There is no doubt that the criminal prosecution in Sotik Law Courts against the Respondents terminated in their favour. In Nzoia Sugar Company Ltd v Fungututi(1988) eKLR, the Court of Appeal held that:-

> " It is trite learning that acquittal, per se, on a criminal case charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill will must be proved....."

38. Similarly in Samson Jumba & 3 others vs Hellen Jendeka Ndagadwa & 2 others (2021) eKLR, Musyoka J. held that:-

> " The mere fact that a prosecution terminated in favour of a party is not, by itself, sufficient proof of malicious prosecution....."

39. Flowing from the above, the 1st Respondent had to further prove that the Appellant instituted the criminal proceedings without reasonable and probable cause. In Kagane vs Attorney General, (1969) E.A, the East African Court of Appeal held that:-

> " .....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....."

40. Similarly in Stephen Gachau Githaiga & Another vs Attorney General (2015) eKLR Mativo J. (as he then was) held that:-

> " .....As a matter of policy, if reasonable and probable cause existed at the time the prosecutor commenced or continued the criminal proceeding in question, the proceeding must be taken to have been properly instituted, regardless of the fact that it ultimately terminated in favour of the accused....."

41. The terms reasonable and probable cause were further defined in the case of GLINSK v MCLVER (1962) AC 726 by Lord Devlin, who held that:-

> " reasonable and probable cause means that there must be sufficient ground for thinking that the accused was probably guilty but not that the prosecutor necessarily believes in the probability of conviction..."

42. It was the 1st Respondent's case that he had been arrested and charged on false allegations that he had stolen cash from the Appellant. He submitted that the Appellant had the burden of demonstrating that the institution of proceedings was appropriate and that it had an honest belief that he had committed the theft. He further submitted that the Appellant should have conducted an audit to verify and substantiate the claim of theft before deciding to report him to the police. That the decision to report him on mere apprehension or suspicion of theft before conducting an investigation or audit was unreasonable and that he was charged without probable cause.

43. I disagree with the 1st Respondent's sentiments. In order to prove that his prosecution was malicious, he had the burden of proving that the Appellant instituted the criminal proceedings against him without probable or reasonable cause. The 1st Respondent has instead shifted that burden to the Appellant thereby failing to discharge that burden.

44. The Appellant through Rose Chepngetich (DW1) stated that they reported the 1st Respondent to the police because of bonafide concerns of loss of money that the Appellant held on behalf of its customers. The Appellant submitted that the 1st Respondent had been employed as a teller by the Appellant and part of his duty was receiving cash. The Appellant further submitted that the cash got lost under the 1st Respondent's custody as a teller and that the report to the police was made with a probable cause. The 1st Respondent in his testimony confirmed that the Appellant was his employer during the alleged time of the theft i.e. between September 2001 and May 2002.

45. Having considered the 1st Respondent's case and submissions, it is my finding that he did not discharge his burden of proving that the Appellant reported him to the police without probable cause. I have also considered the Appellant's case and submissions and I am satisfied by its explanation. It was reasonable for it to suspect the 1st Respondent as he mainly handled the flow of the Appellant's cash. Any reasonable man would point to him as the first suspect in the event of the loss of money. The 1st Respondent has failed to prove that the Appellant lacked a reasonable or probable cause to report him to the police.

46. Before I delve into whether the Respondent had demonstrated whether the Appellant's acts were actuated by malice, I note that the Appellant is a Sacco Society Limited which is a body corporate. In Nzoia Sugar Company Ltd (supra), the Court of Appeal held that:-

> " .....The mental element of ill-will or improper motive cannot be found in an artificial person like the appellant. But there must be evidence of spite in one of its servants that can be attributed to the Company....."

47. Similarly, I agree with Majanja J. in Attorney General & 2 others vs Joseph Marangu (2018) eKLR, where he stated that:-

> " Since the Co-operative is an artificial person, malice had to be imputed from its employees or agents. From the evidence, it is not clear which of the Co-operative's officers had a malicious intent in filing the complaint....."

48. It is clear that malicious intent cannot be imputed on a company such as the Appellant but it can be imputed on its employees or agents. I have gone through the testimony of the 1st Respondent and I have noted during cross examination, he stated that Rose Chepngetich Bett (DW1) and Elijah Cheruiyot Bii reported the matter to the police. In her testimony, DW1 stated that she was the Appellant's Manager at the material time. It is my finding that the actions of that Rose Chepngetich Bett (DW1) and Elijah Cheruiyot Bii of reporting the alleged theft to the police were attributable to the Appellant.

49. The 1st Respondent then has to prove that the Appellant's actions were motivated with malice. Malice is defined by the Black's Law Dictionary, 10th Edition as:-

The intent, without justification or excuse, to commit a wrongful act.

50. The Court of Appeal in the case of James Karuga Kiiru vs Joseph Mwamburi & 2 Others (2001) eKLR stated that:-

> "…….To prosecute a person is not prima facie tortious, but to do so dishonestly or unreasonably is. Malicious prosecution thus differs from wrongful arrest and detention, in that the onus of proving that the prosecutor did not act honestly or reasonably, lies on the person prosecuted."

51. Similarly in the case of Kagane (supra), the East African Court of Appeal held that:-

> "…….The plaintiffs have further to prove that the prosecution was instituted with malice on the part of the prosecutor King. In this connection malice means that the prosecution was motivated by something more than a sincere desire to vindicate justice.

52. The 1st Respondent particularized the Appellant's malice and stated that the Appellant caused him to be arrested in broad daylight and in public thereby subjecting him to humiliation and disgrace; that the Appellant caused him to be arrested and confined without any evidence and that the Appellant falsely alleged that he stole its money. The 1st Respondent bore the burden of proving the Appellant's malice, if any.

53. The 1st Respondent submitted that there was no evidence that informed the Appellant to conclude that he was responsible for the theft. That the decision to report him to the police on pure apprehension and suspicion was malicious. As I have already stated, the Appellant through it witness, Rose Chepngetich (DW1) stated that they reported the 1st Respondent to the police out of the bonafide concerns of loss of money. The Appellant submitted that the 1st Respondent did not adduce evidence to prove the existence of malice or ill will.

54. I have gone through the trial court proceedings and the Respondents' submissions and I agree with the Appellant that the 1st Respondent did not adduce any evidence of malice or ill will on the part of the Appellant. The 1st Respondent had to demonstrate if the Appellant had malice or ill will when it reported the issue of theft to the police, which he did not. It is apparent from the 1st Respondent's arguments that his main reason for imputing malice on the Appellant was because he was acquitted of the criminal charges. An acquittal, as I have already found was not sufficient proof of malicious prosecution as held in the case of Samson Jumba (supra).

55. The Appellant in this case was not a Prosecutor and thus for the 1st Respondent to attribute malice on the Appellant, he had to show that there was collusion between the Appellant and the Prosecutor. The 1st Respondent failed to show any collusion between the Appellant and the Prosecutor. I am persuaded by Kariuki J. in Susan Mutheu Muia vs Joseph Makau Mutua (2018) eKLR, where he held that:-

> "It must always be remembered that the element of malice is material on the part of the prosecutor and not the complainant unless there is collusion between the two……."

56. It is my finding that there is nothing on the record to indicate that the Appellant acted with malice when it reported the alleged theft by the 1st Respondent to the police, therefore the claim of malicious prosecution against the Appellant must fall.

ii.Whether The Trial Court Erred In Awarding General Damages For Wrongful Confinement Against The Appellant

57. In its Judgments dated 15th November 2018, the trial court found the Appellant and the Inspector General of Police (sued through the Attorney General) jointly liable for the wrongful confinement of the Respondents who were detained for 5 days without being presented to court. The trial court awarded the each Respondent Kshs 120,000/=.

58. It was the Appellant's case that it reported the suspected theft by the 1st Respondent to the police. It submitted that it was not responsible for the Respondents arrest and detention, but the same was done by the police in the execution of their duties. The 1st Respondent on the other hand stated that after being arrested, he was detained for 5 days together with 6 of his colleagues.

59. The Appellant is a company and it is not clothed with the power to arrest and detain. Such power is given to the police by dint of the National Police Act No. 11A of 2011. Under the Arrest and Detention Rules in the Fifth Schedule, the Act provides that:-

1. In the performance of the functions and exercise of the powers of arrest and detention set out in *the Constitution* and this Act or any other law, a police officer shall carry out an arrest and detention only as provided for in law.

2. A police officer shall accord an arrested or detained person all the rights set out under Articles 49, 50 and 51 of *the Constitution*.

60. The Court of Appeal in National Oil Corporation (supra) held that:-

> "…….In this Court's decision of Jedel Nyaga Vs. Silas Mucheke CA NO. 59 OF 1987 the court stated:-
>
> "The appellant had made a complaint to the police and nothing more and what followed had nothing to do with him. The decision to arrest the respondent was made by the police who must have found some merit in the report".
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> Consequently, the Court found that; "the appellant who had made the report to the police was not responsible for the arrest of the respondent and the mere fact that he was a probable prosecution witness did not render him responsible for the arrest of the subsequent prosecution of the respondent by the police."

61. The Court of Appeal in Douglas Odhiambo Apel & another v Telkom Kenya Limited while discussing the decision of Kihara Kariuki J. (as he then was) in HCCC NO. 2547 OF 1998 stated:-

> "The learned judge also found difficulty in having to assess damages for wrongful confinement and malicious prosecution yet, by the earlier consent alluded to, the claim against the Commissioner of Police and the Attorney-General had been withdrawn. The learned judge explained the difficulty as follows;
>
> "The plaintiffs were arrested and charged by the police. And the prosecution was undertaken by the Attorney-General as public Prosecutor. Telkom Kenya was merely a complainant. The decision to charge and prosecute the plaintiffs was taken by the police and the Attorney-General. Telkom Kenya as a complainant would not have been involved in the process. Once Telkom Kenya had made a complaint to the police, it was left to police to investigate the complaint and decide whether or not to charge the plaintiffs. That is why

in a claim for damages for unlawful arrest, false imprisonment and malicious prosecution, the proper defendant is always the Attorney General."

62. The court went ahead to agree with the Judge on his finding that Telkom Kenya as the complainant was not involved in the prosecution process and that the claim for damages for unlawful arrest and false imprisonment lay solely with the Attorney General. The court stated:-

> "On the law of malicious prosecution, we do not doubt that the judge directed himself properly in holding that the claim lay as against the Attorney General alone. He was also correct in holding that the withdrawal of the suit against the Commissioner of Police and the Attorney-General meant that that claim was essentially non-suited....."

63. It is my finding that the trial court erred in apportioning liability to the Appellant. As indicated by the authorities above, the Appellant was only a complainant and its work ended once it reported the theft to the police. It was not involved with the process of investigation, arrest, detention and eventually the prosecution. The liability against the Appellant must fall as no claim of wrongful confinement lies against the Appellant.

64. In the end, I find that the Appeal dated 18th December 2018 has merit and it succeeds partially. I hereby set aside the order of joint liability against the Appellant and the Attorney General. For clarity, the case against the Appellant is dismissed. Consequently, the Attorney General is 100 % liable for the payment of Kshs 120,000/= against each Respondent as awarded by the trial court. The Appellant shall have costs of the appeal while the Respondents shall have costs of the suit in the lower court. I decline to grant interest on costs.

65. The Appellant shall have the costs of the Appeal while the costs of the suit and interest thereof shall be as awarded by the trial court.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 17TH DAY OF OCTOBER , 2023

R. LAGAT-KORIR

JUDGE

Judgement delivered in the absence of the parties, and Siele (Court Assistant)