REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CIVIL APPEAL NO. 21 OF 2018

ALFRED MINCHA NDUBI..APPELLANT

=VRS=

1. THADDEUS NYABARO MOMANYI..1ST RESPONDENT

2. DIRECTOR OF PUBLIC PROSECUTIONS..................................2ND RESPONDENT

{Being an appeal against the Judgement of Hon. A. C. Towett – RM Nyamira

dated and delivered on the 7th day of November 2018 in the original Nyamira

Chief Magistrate's Court Civil Case No. 47 of 2015}

JUDGEMENT

The background of this appeal is that sometimes in the year 2013 the appellant herein was charged with the **offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code.** The complainant/victim in that case was the 1st respondent in this case. At the trial, the prosecution (now the 2nd respondent), called four witnesses namely the 1st respondent, an alleged eye witness, a clinical officer and the investigating officer. After the close of the prosecution's case the trial Magistrate retired to decide whether a prima facie case had been established sufficiently to warrant the appellant to be put on his defence. It was then that it transpired to the court that the charge against the appellant was defective for omitting to state the date when the offence was committed. **The court proceeded to acquit the appellant under Section 210 of the Criminal Procedure Code.** Subsequent to the acquittal the appellant filed an action for damages for false imprisonment and malicious prosecution. The 1st respondent filed a counter-claim and sought damages in respect of the assault but the trial court after hearing and considering evidence by both sides dismissed both the suit and the counterclaim and ordered parties to bear their own costs.

The dismissal of the action is the genesis of this appeal. The grounds set out in the Memorandum of Appeal are: -

> **"1. That the learned trial magistrate erred in fact and in law in failing to find that the arrest and subsequent prosecution of the appellant by the respondents in Criminal case no. 901 of 2013 – Nyamira was malicious.**
>
> **2. The learned trial magistrate erred in fact and in law in failing to find and appreciate the fact that in criminal proceedings, an accused person can either be convicted, discharged or acquitted and that neither of those results are as a result of a technicality but rather an elaborate process of due process.**
>
> **3. That the learned trial magistrate erred in fact and in law in failing to assess the quantum of damages in any event."**

It is proposed that this court: -

> **"1. Allow the appeal by setting aside the learned trial magistrate's judgement with a finding that the arrest and subsequent prosecution of the appellant in criminal case no. 901 of 2013 amounted to malicious arrest and prosecution for which the respondents are liable.**
>
> **2. Assess the quantum of damages payable by the respondents to the appellant.**

3. Grant costs of the suits, both for the lower court and the appellate court together with interest on both quantum and costs from the date of judgement in the lower court until payment in full."

The appeal was canvassed by way of written submissions. I have fully considered the rival submissions. However, an appeal is in the nature of a retrial and as a first appellate court I have a duty to re-consider and evaluate the evidence in the trial court so as to arrive at my own independent conclusion bearing in mind that I did not see or hear the witnesses ***(see Selle & another v Associated Motor Boat Company Limited & others [1968] EA 123*** and also the case of ***Peters v Sunday Post Limited [1958] EA 424*)**.

False imprisonment and malicious prosecution are well known torts under Kenyan law and a person who proves the same on a balance of probabilities is entitled to damages. The **Black's Law Dictionary 10th Edition page 719** defines **false imprisonment** as: -

"The restraint of a person in a bounded area without legal authority, justification, or consent. False imprisonment is a common-law misdemeanor and a tort. It applies to private as well as governmental detention."

The same dictionary defines **malicious prosecution** as: -

"1.The institution of a criminal or civil proceeding for an improper purpose and without probable cause. The tort requires proof of four elements: (1) the initiation or continuation of a lawsuit; (2) lack of probable cause for the lawsuit's initiation; (3) malice; and (4) favourable termination of the original lawsuit.

2. The tort claim resulting from the institution of such a proceeding. Once a wrongful prosecution has ended in the defendant's favour, he or she may sue for tort damages – also termed (in the context of civil proceedings) *malicious use of process;* (archaically) *malicious institution of civil proceedings."*

When the appellant filed the action for false imprisonment and malicious prosecution he was required to prove the ingredients set out in the case of **Mbowa v East Mengo District Administration [1972] EA 352** where it was held: -

"The action for damages for malicious prosecution is part of common law of England……The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than for public benefit. It originated in the medical writ of conspiracy which was aimed at the prevention or restraint or improper legal proceedings…..It occurs as a result of abuse of minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and distortion of the truth. Its essential ingredients are: -

1. The criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant of arrest of plaintiff.

2. The defendant must have acted without reasonable or probable cause i.e. must have been no facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified.

3. The defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings, with an improper or wrongful motive, that is, with intent to use the legal process in question for some other legally appointed and appropriate purpose.

4. The criminal proceedings must have terminated in plaintiff's favour and he was acquitted of the charge……The plaintiff in order to succeed, has to prove that the four essentials of malicious prosecution as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must unite in order to create or establish a cause of action. If the plaintiff does not prove them he will fail, he would fail in his action."

The above ingredients were echoed by Mativo J in the case of **Stephen Gachau Githaiga & another v Attorney General [2010] eKLR** where he observed: -

"An action for malicious prosecution is the remedy for baseless and malicious litigation. It is not limited to criminal prosecutions but may be brought in response to any baseless and malicious litigation or prosecution, whether criminal or civil. The criminal defendant or civil respondent in a baseless and malicious case may later file this claim in civil court against the parties who took an active role in initiating or encouraging the original case. The defendant in the initial case becomes the plaintiff in the malicious prosecution suit, and the plaintiff or prosecutor in the original case becomes the defendant.

Malicious prosecution is an intentional tort designed to provide redress for losses flowing from an unjustified prosecution. Under the first element of the test for malicious prosecution, the plaintiff must prove that the prosecution at issue was initiated by the defendant. This element identifies the proper target of the suit, as it is only those who were *actively instrumental* in setting the law in motion that may be held accountable for any damage that results.

The second element of the tort demands evidence that the prosecution terminated in the plaintiff's favour. This requirement precludes a collateral attack on a conviction properly rendered by a criminal court, and thus a voids conflict between civil and criminal justice. The favourable termination requirement may be satisfied no matter the route by which the proceedings

conclude in the <u>plaintiff's</u> favour, whether it be an acquittal, a discharge at a preliminary hearing, a withdrawal, or a stay.

The third element which must be proved by a plaintiff – absence of reasonable and probable cause to commence or continue the prosecution – further delineates the scope of potential plaintiffs. 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.

Finally, the initiation of criminal proceedings in the absence of reasonable and probable grounds does not itself suffice to ground a plaintiff's case for malicious prosecution, regardless of whether the defendant is a private or public actor. Malicious prosecution, as the label implies, is an <u>intentional tort</u> that requires proof that the defendant's conduct in setting the criminal process in motion was fueled by <u>malice</u>. The <u>malice</u> requirement is the key to striking the balance that the tort was designed to maintain; between society's interest in the effective administration of criminal justice and the need to compensate individuals who have been wrongfully prosecuted for a primary purpose other than that of carrying the law into effect."

In summary the ingredients for malicious prosecution are: -

(i) Whether the criminal proceedings were instituted by the 1st respondent.

(ii) Whether the report was made without reasonable or probable cause or whether there were reasonable grounds to do so.

(iii) Whether the prosecution was actuated by malice.

(iv) Whether the criminal proceedings were terminated in the appellant's favour.

In this case, the appellant was arrested and subsequently charged with the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code upon a report made to the police by the 1st respondent. The prosecution was conducted by the 2nd respondent. However, at the close of the prosecution's case it transpired to the trial Magistrate that the charge was defective in that the date of the commission of the offence was omitted. The trial Magistrate relied on **Section 137 (f) of the Criminal Procedure Code.** It is thus not in doubt that the criminal proceedings were instituted by the 1st respondent and that the same terminated in favour of the appellant. **The issues that remain for determination therefore are (ii) and (iii).** Having considered the evidence in the trial courts both in the criminal and civil proceedings, my findings are: -

<u>Issue (ii) Whether the 1st respondent in making the report acted without probable cause</u>

Acting without probable cause is tantamount to or is acting from wrongful or improper motive. From the evidence both in the criminal and civil proceedings, there was evidence that the 1st respondent made the report upon being assaulted by the appellant. He himself testified to that effect and called a direct eye witness and a clinical officer who confirmed that he examined him and found he sustained the injuries complained of. The investigating officer was also called as a witness and he confirmed that the 1st respondent indeed had bruises and swelling on the left side of the cheek. The investigating officer testified that he issued the 1st respondent with a P3 form and referred him to Nyamira District Hospital where he was treated and discharged and the P3 form was filled and returned to the station. The three witnesses called by the 1st respondent were cross examined at length by the appellant's advocate but their evidence was consistent and unshaken. It is my finding that prima facie there was evidence that the appellant had committed the offence. The case against him was not determined on the merits and indeed the reason he was acquitted was that the charge was defective which in my view is a technicality. It is unfortunate that the defect in the charge did not come to the attention of the court until after the close of the prosecution's case otherwise the court would have amended the same under **Section 214 of the Criminal Procedure Code.** It is my finding that the acquittal of the appellant upon a technicality does not disclose wrong or improper motive on the part of the 1st respondent. To the contrary I find that the complaint/report by the 1st respondent to the police was not actuated by any other motive other than the wrong that had been meted upon him and to bring the appellant to justice. It was therefore with reasonable and probable cause that he made the report. My so holding finds support in the case of **Robert Okeri Ombeka v Central Bank of Kenya Civil Appeal No. 105 of 2007 [2015] eKLR** where the Court of Appeal observed: -

"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."

<u>(iii) Whether the prosecution was actuated by malice</u>

This issue turns on whether the police to whom the report was made by the 1st respondent reasonably and honestly acted upon the report. At the criminal trial the investigating officer testified that he was new in the station and that he acted on the 1st respondent's report because he saw that the 1st respondent had injuries on the face. He also stated that when the P3 form he issued to the 1st respondent was returned the degree of injury was classified as harm. In the case of **Simba v Wambari [1987] KLR 601** the court stated: -

"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."

Regarding the duty of the police to investigate crime, the Court of Appeal held as follows in the case of **Republic v Commissioner of Police and another ex parte Michael Monari & another [2012] eKLR**: -

> ***"…..The police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court…... As long as the prosecution and those charged with the responsibility of making the decision to charge act in a reasonable manner, the High Court would be reluctant to intervene."***

The officer in the appellant's case was certain that he carried out investigations before arresting the appellant and charging him. I am satisfied from his evidence and that of the 1st respondent both in the criminal and in the civil trial that the arrest and charge were not actuated by malice. The officer reasonably believed that the 1st respondent had been assaulted and he in turn had a duty to act on the report. The arrest and subsequent prosecution of the appellant were therefore justified. In the upshot I find that the appellant's appeal has no merit and proceed to dismiss it with costs to the 1st respondent but as the 2nd respondent did not enter appearance in the appeal the order for costs shall not apply.

Counsel for the appellant faulted the trial Magistrate for omitting to assess the damages she would have awarded the appellant had his suit succeeded. While I do not agree with the language employed by Counsel in that respect I agree with him that the trial Magistrate and this court have a duty to assess the damages although in itself that is not a ground to allow the appeal.

In the trial court Counsel for the appellant proposed general damages of Kshs. 6,000,000/= and exemplary damages of Kshs. 2,000,000/=. He also proposed special damages of Kshs. 80,000/=. Counsel for the 1st respondent did not make any proposal as regards general damages.

In the case of **Chrispine Otieno Caleb v Attorney General [2014] eKLR** the court taking into account all the circumstances of the case, the status of the plaintiff, the period the plaintiff spent in custody and the effect of the proceedings on the plaintiff's inability to get promoted awarded him Kshs. 2,000,000/= as general damages and Kshs. 500,000/= as exemplary damages. In the case of **Stephen Gachau Githaiga & another v Attorney General [2015] eKLR** the court upheld an award of general damages in the sum of Kshs. 300,000/=. Each case must be determined on its own facts and in this case I am satisfied that an award of Kshs. 600,000/= (six hundred thousand shillings) would have sufficed to compensate the appellant. I would also have awarded the specials of Kshs. 80,000/= as the same had been specifically pleaded and proved.

In the end the appeal is dismissed with costs to the 1st respondent. It is so ordered.

JUDGEMENT SIGNED, DATED AND DELIVERED AT NYAMIRA ELECTRONICALLY VIA MICROSOFT TEAMS THIS 4TH DAY OF MARCH 2021.

E. N. MAINA

JUDGE