REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 79 OF 2014

GITHUNGURI WATER & SANITATION CO. LIMITED.....APPELLANT

-VERSUS-

BEATRICE NJERI KAMAU

LYDIA NYAMBURA KIOI

STEPHEN WAWERU IKOMA.....RESPONDENTS

AND

THE HON. ATTORNEY GENERAL.....INTERESTED PARTY

(Being an appeal from the judgment and decree of Honourable Wambo (Mr.)

(Senior Resident Magistrate) delivered on 12th February, 2014

in Githunguri PMCC No. 40 of 2012)

JUDGEMENT

1. The respondents in this matter jointly lodged a suit against the appellant and the interested party, vide the plaint dated 28th June, 2012 and sought for general and special damages in the sum of Kshs.418,000/= with costs of the suit and interest on the same arising out of the tort of malicious prosecution.

2. The respondents pleaded in their plaint that sometime on or about the 1st day of September, 2009 the appellant maliciously and falsely lodged a complaint with the police stationed at Githunguri Police Station, claiming that the respondents had illegally and without permission discharged water from the appellant.

3. The respondents further pleaded in their plaint that pursuant to the false and malicious information above, they were arrested on 2nd September, 2009, arraigned before the Principal Magistrate's Court at Githunguri and charged in Criminal Cases No. 1183, 1184 and 1185 of 2009 with the offence of illegal water connection contrary to Section 95(i) (d) as read with Section 105 of the Water Act No. 8 of 2002; which cases were subsequently consolidated into Criminal Case No. 1183 of 2009.

4. According to the respondents, they were later acquitted under Section 210 of the Criminal Procedure Code on 1st July, 2011 and consequently claimed that their arrest and prosecution by the appellant and the interested party was malicious in nature.

5. The appellant and interested party entered appearance on being served with summons and filed their separate statements of defence to deny the respondents' claim.

6. At the hearing of the suit, all the respondents testified, while the appellant summoned one (1) witness. The interested party did not call any witnesses but it was agreed by consent of the parties that his list and bundle of documents filed in court would constitute his evidence.

7. Upon filing of the written submissions by the parties, the trial court entered judgment in favour of the respondents and against the appellant and the interested party in the following manner:

a) Liability 100%

b) General damages Kshs.250,000/= in favour of each of the respondents

c) Special damages Kshs.415,000/=

8. Being aggrieved by the trial court's finding on both liability and quantum, the appellant has now lodged an appeal against the same by filing the memorandum of appeal dated 13th March,2014 featuring the following grounds:

i. THAT the learned trial magistrate erred in law and fact and misdirected himself by finding that the respondents were maliciously prosecuted, in total disregard of the evidence and submissions tendered before him by the appellant hence reaching an erroneous decision against the appellant.

ii. THAT the learned trial magistrate erred in law and fact and misdirected himself by awarding the respondents the sum of Kshs.250,000/= each as general damages for malicious prosecution when there was no evidence and/or basis for such an award.

iii. THAT the learned trial magistrate erred in law and fact and misdirected himself by awarding the respondents the sum of Kshs.418,000/= as special damages without appreciating the principles guiding charges on advocate-client fees under the Advocates Remuneration Order.

iv. THAT the learned trial magistrate erred in law and fact and misdirected himself by failing to consider at all the submissions made before him by the appellant and reached an erroneous conclusion by entering judgment against the appellant thereby occasioning a miscarriage of justice.

v. THAT the learned trial magistrate erred in law and fact and misdirected himself by failing to follow and/or ignoring a binding authority of the Court of Appeal submitted before him and in the ends made a decision per incuriam.

vi. THAT the learned trial magistrate erred in law and fact and misdirected himself by failing to consider the appellant's documentary and oral evidence on record to find that the respondents failed to prove their case against the appellant on a balance of probabilities.

vii. THAT the learned trial magistrate erred in law and fact in failing to find that the evidence by the respondents were at variance.

viii. THAT the learned trial magistrate erred in law and fact in failing to find that the evidence by the respondents did not support their pleadings.

9. This court gave directions that the appeal be canvassed by written submissions. At the time of writing this judgment, only

the submissions by the appellant had been availed to this court.

10. The appellant essentially submits that for the respondents' suit to succeed, they ought to have satisfied each of the four (4) elements associated with the tort of malicious prosecution, set out *inter alia*, in the case of **Mbowa v East Mengo District Administration [1972] EA 352** by the East African Court of Appeal thus:

"(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 for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority;

(2) the defendant must have acted without reasonable or probable cause i.e. there 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 and wrongful motive, that is, with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose; and

(4), the criminal proceedings must have been terminated in the plaintiff's favour, that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge."

11. The appellant submits that the trial court solely relied on the evidence presented by the respondents and totally disregarded its own evidence and submissions, despite its witness presenting facts to show the illegal water connections by the respondents, in the absence of the requisite approvals from the appellant's Managing Director.

12. The appellant equally faulted the trial court for shifting the burden of proof to itself, thereby requiring it to demonstrate the absence of malice, contrary to the provisions of Sections 107 to 109 of the Evidence Act, Cap. 80 Laws of Kenya which essentially provide that any person who desires the entry of judgment or a finding of liability on the basis of certain facts ought then to prove the existence of those facts.

13. The appellant is of the view that the burden of proof rested with the respondents to prove the elements of malicious prosecution and that they did not satisfy all the elements, particularly those of probable/reasonable cause and malice.

14. It is also the view of the appellant that the respondents failed to demonstrate a hint of collusion between the appellant and the prosecution, represented in the main suit by the interested party.

15. To support the above argument, the appellant cited the Authority of **Susan Mutheu Muia v Joseph Makau Mutua [2018] eKLR** where the court stated as follows:

> ***"Even if a complainant in a criminal case makes a malicious complaint that malice cannot automatically be transferred to the prosecutor unless it is proved that there was collusion between the complainant and the prosecutor in bringing up the prosecution… the learned magistrate made a clear finding that there was no collusion between the complainant and the police who were the prosecutors. He absolved the police of the issue of malice. In the circumstances he could not make a finding that the prosecution was actuated by malice."***

16. In the end, the appellant urges this court to interfere with the entire decision by the trial court.

17. I have considered the submissions by the appellant and the authorities cited on appeal. This being a first appeal, I have similarly re-evaluated the evidence placed before the trial court.

18. It is noted that the appeal lies against both liability and quantum. I will therefore address the grounds of appeal under the two (2) limbs.

19. On liability, the 1st respondent testified that at the trial she was at home on the material date when askaris came and arrested her under the claim that she was stealing water.

20. The 1st respondent further testified that together with the remaining respondents, she was confined at Githunguri Police Station before being arraigned in court and charged with a criminal offence the following day.

21. It was the evidence of the 1st respondent that she and the other respondents were eventually acquitted. She also denied ever stealing the water and stated that the respondents had been using a tap which had been installed back in 1967.

22. It was also her evidence that prior to her arrest and prosecution, the appellant had never visited her premises, nor did the police question them beforehand.

23. In cross-examination, the 1st respondent stated that she erected the tap on her land and that she did not seek permission from anyone before doing so, but that the water was provided to the people occupying that area by their then Member of Parliament (MP).

24. The 1st respondent also stated that the pipes were situated on the main road and that the taps were connected from there and restated that the respondents were arrested without being questioned.

25. In re-examination, it was the evidence of the 1st respondent that on the material date, the police were accompanied by someone from the City Council and that the motor vehicle which was on the premises belonged to City Council and not the appellant.

26. The 2nd respondent essentially echoed the narration of the 1st respondent that the respondents were arrested and charged with illegal water connection, subsequently being acquitted. According to the 2nd respondent, the tap in use was erected by her father in the 70s.

27. In cross-examination, the 2nd respondent testified that the people who accompanied the police on the material date had indicated that they were from Githunguri Water.

28. In re-examination, she stated that upon arrest, she was detained at the police station until such time as she was able to post bail.

29. On his part, the 3rd respondent gave evidence that on the material date, he was approached at home by the police and representatives of the appellant, claiming that he had illegally connected water to his home, which he denied.

30. The 3rd respondent further gave evidence that he was arrested together with the 1st and 2nd respondents who are his relatives.

31. It was the testimony of the 3rd respondent that the information resulting in their prosecution was false and blamed the appellant and police for having them arrested without interrogating them. He then produced the criminal proceedings, charge sheets and a letter dated 31st October, 2011 as Plaintiff Exhibits.

32. In cross-examination, the 3rd respondent told the trial court that the police officer who visited his home informed him that he had been sent by the appellant and that if the police had done their work, they would not have arrested him.

33. The 3rd respondent also stated that the water connection had been done by Gatundu Water and not Nairobi Water and that there were community pipes being used by the residents in that area.

34. He further testified that Gatundu Water then disconnected their water sometime in 2005 and that they remained without water until 2009 when the appellant came about, during which time the 3rd respondent requested the representatives of the appellant to come and connect water to his home but they did not.

35. In re-examination, the 3rd respondent gave evidence that when the police came to arrest him, he showed them the dry taps to show that he had not been supplied with water by the appellant, to no avail.

36. For the appellant, Wilfred Kariuki Mwangi gave evidence that he worked for the appellant as a water technician at all material times. The witness testified that while in the process of connecting water to various areas, the appellant received a report that certain people had made connections and were using water, and that when they visited the ground, they confirmed that there were connections.

37. According to the witness, this led them to the homes of the respondents, which led to their arrest.

38. The witness stated that previously, it is Nairobi Water that supplied water to Githunguri area, but that the appellant took over sometime in 2008 upon which time all customers' water supplies had been disconnected from the main source and would only be reconnected upon payment.

39. The witness is of the view that the information given to the police officers was not malicious or false.

40. In cross-examination, it was the evidence of the appellant'switness that two (2) representatives of the appellant reported the matter to the police, with the intention of deterring people from interfering with the appellant's water system.

41. However, the witness stated that he accompanied the police to the respective homes of the respondents and admitted that they did not inquire from them regarding the water connection.

42. In re-examination, the witness stated that by the time the appellant took over water supply in Githunguri area, the pipes were already in place. The witness is of the view that the connections by the respondents were illegal.

43. Upon hearing the parties, the learned trial magistrate found that the respondents had proved that the prosecution had been instituted by a representative of the appellant and that the criminal prosecution had terminated in favour of the respondents.

44. The learned trial magistrate also found that the appellant ought to have brought credible evidence to demonstrate the absence of malice or to show that there was probable cause in the prosecution of the respondents but it did not. He went further on to find that the police should equally have sought further information from the respondents so as to ascertain whether the connections were truly illegal or otherwise, but did not.

45. In the end, the learned trial magistrate arrived at the finding that the elements of malicious prosecution had been satisfied by the respondents, thereby entering a finding of liability as against the appellant and in favour of the interested party.

46. The guiding principles that the courts use in determining the success of a malicious prosecution claim were laid out in the case of **Mbowa v East Mengo District Administration [1972] EA 352** cited by the appellant and reaffirmed in the case of **Kagane v Attorney General (1969) EA 643** as follows:

> ***a) The plaintiff must show that the prosecution was instituted by the 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.***

47. As correctly put by the appellant, it was incumbent upon the respondents to establish all the above principles in order for their claim to succeed.

48. Concerning the first two (2) principles above, upon my study of the record I note that it is not in dispute; as the learned trial magistrate also found; that a representative/employee of the appellant reported the matter to the police thereby giving rise to the arrest and subsequent prosecution of the respondents. It is also not in dispute that the criminal proceedings terminated in favour of the respondents, by way of an acquittal under Section 210 of the Criminal Procedure Code.

49. Under the third principle, it is appreciated that the burden of proving the absence of probable cause ultimately lies with the plaintiff. In the case of ***Kagane v Attorney General*** *(supra)* the court stated what amounts to reasonable or probable cause using the following words:

> ***"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…"***

50. From my re-evaluation of the evidence tendered at the trial, I note that even though there was a belief by the appellant that the respondents may have connected water illegally, there is nothing to indicate that this issue was at all addressed with any of the respondents prior to their arrest.

51. In view of the fact that the appellant had taken over the water supply in Githunguri area from Nairobi Water in 2008, it would have been prudent for it to take reasonable steps to ascertain the circumstances under which the respondents had access to the water if there was doubt, especially considering that the water pipes in their respect to their homes had been put in place years ago. It is noteworthy that it was not the duty of the trial court to determine whether the connection was illegal; rather, it was called upon to make a finding on whether a case for malicious prosecution had been made.

52. From the foregoing, it is my view that while there naturally could have arisen reasons to investigate the matter further, it is apparent from the circumstances that no probable cause was demonstrated by the appellant to warrant the prosecution of the respondents.

53. In relation to the fourth principle on malice, upon my study of the evidence and material adduced at the trial, it is apparent that prior to being arrested, the respondents were not actually questioned as required by law.

54. The appellant's witness himself testified that the report made to the police was intended to deter people from interfering with the appellant's water system. There was an expectation that the respondents would be arrested and charged, despite the absence of credible evidence to ascertain whether their use of water was the result of illegal connections.

55. The above, coupled with the fact that there is nothing to indicate that the appellant's representatives visited the respondents in regard to the issue at hand before involving the police, connotes malice to my mind.

56. Consequently, I am satisfied that the learned trial magistrate considered the totality of the evidence placed before him and arrived at the correct finding on liability. I therefore see no reason to interfere with the finding on liability.

57. On quantum, the respondents suggested an award of Kshs.1,800,000/= on general damages and cited the case of **Harriet Karimi v Attorney General [2005] eKLR** where the court awarded a sum of Kshs.1,000,000/= and the case of **Zablon Mwaluma Kadori v National Cereals & Produce Board [2005] eKLR** in which an award of Kshs.500,000/= was made by the court.

58. On their part, neither the appellant nor the interested party cited any authorities to guide the trial court on comparable damages.

59. The learned trial magistrate awarded the sums of Kshs.250,000/= on general damages to each of the respondents.

60. From my study of the judgment, it remains unclear how the learned trial magistrate arrived at the above sums.

61. Suffice it to say that I considered the case of **Johnson Muendo Waita v Odillah Mueni Ngui [2018] eKLR** where the High Court sitting on appeal substituted an award of Kshs.500,000/= with that of Kshs.300,000/ on general damages, and the case of **Peter Wachira Gitau v Attorney General & another [2019] eKLR** in which an award of Kshs.400,000/= was made on appeal to the High Court.

62. Upon considering the authorities I have just cited, I am satisfied that the award of the learned trial magistrate was reasonable and within the range of comparable awards made. I see no need to interfere with it.

63. This leaves me with the special damages.

64. In their pleadings, the respondents sought the sum of Kshs.418,000/= under this head. In their oral evidence, the 1st and 2nd respondents stated that they did not personally pay the lawyer who represented them in the criminal trial. However, the 3rd respondent stated in his testimony that it is he who made payments to the said lawyer. He went on to produce receipts to that effect as exhibits.

65. The learned trial magistrate awarded the sum of Kshs.415,000/=on special damages.

66. The law on special damages is such that damages of such nature must be specifically pleaded and strictly proved. Upon my study of the pleadings, material and evidence, I observed; as the learned trial magistrate did; that three (3) receipts were produced bearing the name of the 3rd respondent and showing payments made to a law firm as legal fees for representation in the criminal case.

67. From my calculations, the sum in the receipts totaled Kshs.418,000/= which is slightly higher than what was awarded. However, given that the respondents did not challenge the award on appeal, I have no basis on which to interfere with this award.

68. The upshot is that the appeal lacks merit it is dismissed with costs to the respondent.

Dated, signed and delivered online via Microsoft Teams at Nairobi this 5th day of March, 2021.

J. K. SERGON

JUDGE

In the presence of:

.... for the Appellant

....for the Respondents

......................................for the Interested Party