



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**CIVIL APPEAL NO 20 OF 2020**

**RISPER NYOMENDA.....APPELLANT**

**VERSUS**

**GEORGE MARTIN KENYATTA.....RESPONDENT**

*(Being an appeal against the Ruling of Hon. W. C. Waswa (Mr.) – RM Nyamira dated and delivered on the 20<sup>th</sup> day of July 2020 in the original Nyamira Chief Magistrate’s Court Civil Case No. 88 of 2019)*

**JUDGEMENT**

This appeal arises from the judgement delivered by the trial court on the 20<sup>th</sup> July 2020 which awarded the respondent herein the sum of Kshs 200,000/= as general damages for malicious prosecution for the offences of creating disturbance in a manner likely to cause a breach of peace and trespass upon private land and Kshs 35,000 as special damages. The respondent was also awarded the costs of the suit. The appeal is premised on the grounds that: -

- “1. That the learned magistrate erred in law when he failed to properly evaluate evidence on record thus reaching erroneous decision.**
- 2. The learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendant to general damages of Kshs 200,000 special damages of Kshs 35,000/= in the circumstances.**
- 3. That the learned magistrate erred in law and fact in failing to appreciate the long established principle of stare decisis, precedent law thus bringing law into confusion and thereby deriving an erroneous finding/conclusion in particular law relating to malicious prosecution in particular where the court has placed one on defence and of found to have a case to answer.**
- 4. The learned magistrate erred in law and in fact by taking into consideration extraneous matters thereby arriving at erroneous decision to the prejudice of the appellant.**
- 5. The learned trial judge of the superior court grossly erred in law and in fact by failing to find that the balance of convincing tilted in favour of the Appellant.**
- 6. In a nut shell the order of the trial magistrate is contrary to the weight of submissions law and material on record.”**

It is proposed to ask this court for orders that: -

- “a. The appeal herein be allowed.**
- b The judgement and/or decree of the learned trial magistrate dated and delivered on the 20<sup>th</sup> day of July 2020 be set aside and/or quashed.**
- c. The honourable court be pleased to order the respondent suit be dismissed.**
- e. Costs of the appeal be borne by the Respondents**
- f. Any such and/further orders that the honourable court shall deem just and expedient in the circumstances”.**

When the appeal came before this court on 17<sup>th</sup> December 2020 for directions it was agreed that the same would be canvassed by way of written submissions and the same were duly received.

This being a first appeal, the court is tasked to peruse the entire record cognizant of the fact that it did not have the benefit of hearing the witnesses first hand. The court is further expected to make its own independent conclusions of the law and fact as was established in the case of **Selle & another v Associated Motor Boat Company Limited & others [1968] EA 123**.

In the trial court the respondent testified that he was wrongfully prosecuted in Criminal Case No. 60 of 2019 on false charges drummed up against him by the appellant. A perusal of the proceedings of the lower court shows that indeed the respondent was arrested on the 16<sup>th</sup> January 2019 and arraigned before court for the offences of creating disturbance in a manner likely to cause a breach of peace and trespass to private land. The respondent was tried and subsequently acquitted. In his testimony in the trial court and during cross examination the respondent confirmed that the appellant herein is his step sister and a dispute had arisen between them concerning ownership of a land parcel whose title deed had been obtained by a third party with the help of the appellant and without the respondent's knowledge and consent.

In her defence the appellant confirmed lodging the complaint against the respondent to the police. She however stated that the respondent had assaulted her while she was on her farm plucking tea. On cross examination she stated that the respondent had no right to be on the land in dispute and that the same had informed her action of lodging the complaint. She further confirmed having reported that the respondent had chased her with a panga and conceded that the land the subject of the charge of trespass was not hers.

In his submissions in this appeal, Counsel for the appellant contended that indeed the appellant had set the law in motion against the respondent in the criminal case. He stated that certain key ingredients must be proved by a person seeking compensation for unlawful arrest, wrongful confinement and malicious prosecution. On this he referred the court to the case of **Chrispine Otieno Caleb v Attorney General [2014] eKLR**. Counsel further submitted that the respondent's prosecution was instituted with reasonable and probable cause. He cited Rodd J in **Kagane v Attorney General (1969) EA 643** on what constitutes reasonable and probable cause and stated that it was a fact that a land dispute existed between the appellant and the respondent herein and that the appellant was on the material day plucking tea on the disputed land when she was attacked by the respondent hence necessitating the need for her to make a report to the police station. Counsel also relied on the cases of **Simba v Wamari [1987] KLR 601** and **George Masinde Murunga v Attorney General [1979] KLR 138** cited in the case of **Hassan Ogwimba Akibaya v Attorney General & 2 Others [2015] eKLR**. Counsel stated that reasonable and probable cause was established by the court when it made a finding that the respondent had a case to answer hence placing him on his defence. The other issue raised by Counsel was whether the appellant's actions were actuated by malice. Counsel argued that the respondent had not adduced any evidence to prove that the criminal prosecution was actuated by malice. Citing the case of **James Karugia Kiiru v Joseph Mwamburi & 3 others Nairobi CA 717 of 2000** Counsel submitted that on the contrary the respondent had filed the suit for compensation based on the dispute over the land in question and that the respondent was only given the benefit of doubt.

On his part, Counsel for the respondent reiterated the respondent's evidence at the trial and submitted that the trial court arrived at a correct decision. Counsel cited the case of **Mbowa v East Menyo District Administration [1972] EA 352** which laid down the principles establishing the tort of malicious prosecution. Counsel cited part of the proceedings in the criminal case that highlighted the appellant admitting to instituting the criminal proceedings against the respondent and submitted that the report was made without reasonable and probable cause as the land upon which the second charge of trespass upon private land was informed belonged to a person who was not a party to the criminal proceedings. Counsel urged this court to dismiss this appeal with costs to the respondent.

It is not in dispute that the complaint culminating in the prosecution of the respondent was instituted by the appellant. It is also not in dispute that the prosecution terminated in the respondent's favour. The issues for determination are;

- a. Whether the claim for damages for malicious prosecution was proved on a balance of probabilities.**
- b. Whether the respondent was entitled to the damages awarded.**

The tort of malicious prosecution is established where a person causes the arrest and prosecution of another person without reasonable or probable cause. The threshold for establishing a claim for malicious prosecution was laid down in the case of **George Masinde Murunga v Attorney General [1979] KLR 138** 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) The plaintiff must show that the prosecution terminated in his favour.**
- (c) The plaintiff must demonstrate that the prosecution was instituted without reasonable and probable cause.**
- (d) He must also show that the prosecution was actuated by malice.”**

A party making a claim for damages for malicious prosecution must therefore establish the ingredients stated above. In this case it is not in dispute that the respondent herein was arrested by the police, detained at Nyamira Police Station and arraigned in court the following day. It is further not disputed that the said arrest and prosecution was instigated by a report made by the appellant. From the findings of the trial court the appellant did not prove that she had reasonable and probable cause to make a report to the police station. At the trial the appellant and her witness testified that she was chased by the respondent from the disputed land with a panga. However, her evidence was challenged by the respondent who called a witness who discredited her evidence by stating that the respondent only approached the appellant and requested her not to pluck tea from his farm. It therefore becomes necessary for this court to weight the evidence by both sides so as to determine which of them is more probable. In civil proceedings the standard of proof is on a balance of probabilities. The question as to what amounts to proof on a balance of probabilities was the subject of discourse in **William Kabogo Gitau v George Thuo & 2 others [2010] 1**

KLR 526 where Kimaru J stated: -

***“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”***

At the trial the respondent herein bore the onus to prove his case against the appellant. While the respondent's evidence was corroborated by a witness that of the appellant was not. The respondent's witness asserted that she was present when the respondent approached the appellant and that the approach was done calmly as opposed to what the appellant alleged. The respondent's account was to me more credible than that of the appellant because even in her testimony in the criminal trial the appellant's evidence was that she run away immediately she saw the respondent. There was nothing to demonstrate that he acted in a manner that could have resulted in a breach of the peace as claimed. It is my finding therefore that the appellant's report was without reasonable and probable cause.

On whether there was malice in making the report it is clear that the land did not belong to the appellant. The title deed tendered before the trial court indicated that the registered owner of the land was an entirely different person from the parties herein. In light of the foregoing it is clear that the appellant had improper motive in causing the arrest and prosecution of the respondent on property that did not belong to her. The acts of malice are further demonstrated by the admission by the appellant that a land dispute existed between her and the respondent and efforts to have the same resolved amicably had proved futile.

In regard to the assessment of damages, it is noteworthy that the respondent proposed Kshs. 500,000/- as general damages and Kshs. 35,000/- as special damages. The claim for special damages was proved by receipts produced before court as legal fees and travel expenses. On general damages it is clear that the respondent herein was able to prove the ingredients of the tort of malicious prosecution. It is trite law that an appellate court ought not to interfere with a trial court's assessment of damages unless it is persuaded that the award was made on the wrong principles of law or that the same is either inordinately high or inordinately low as to make an entirely erroneous estimate of the damages. See **Butt v Khan [1981] KLR 349 where it was held: -**

***“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.”***

It is my finding that the respondent's claim was merited and that the assessment of damages by the lower court was fair and reasonable and there is no reason to interfere. In the premises the appeal herein is dismissed with costs to the respondent. It is so ordered.

**JUDGEMENT SIGNED, DATED AND DELIVERED AT NYAMIRA ELECTRONICALLY VIA MICROSOFT TEAMS THIS 15TH DAY OF APRIL 2021.**

**E. N. MAINA**

**JUDGE**