REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 86 OF 2019

(An appeal from the judgment and decree of the Hon. WK Cheruiyot, Senior

Resident Magistrate (SRM), delivered on 8th August 2019 in Vihiga SPMCCC No. 182 of 2016)

SAMSON JUMBA.....1ST APPELLANT

JOSEPH MUTANGE.....2ND APPELLANT

DANIEL LANOGWA JUMBA.....3RD APPELLANT

GERALD LUMULA.....4TH APPELLANT

VERSUS

HELLEN JENDEKA NDAGADWA.....1ST RESPONDENT

LEVI KAYERI NDAGADWA.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. This is an appeal from the judgment delivered on 8th August 2019, in Vihiga SPMCCC No. 182 of 2016, on grounds that the appellants failed to prove their case on a balance of probability. The appellants seek to have the said judgment that denied them an award of general damages for unlawful and malicious prosecution, special damages and costs and interests' set aside.

2. A brief factual background to the appeal is that on or about the 29th December 2010, about 10.00 AM, the appellants were at their homes, when police officers from Mbale Police Station, acting on the complaints from the 1st and 2nd respondents, arrested them, took them to the Mbale Police Station and locked them up in the cells. The appellants were subsequently presented at the Vihiga Law courts and charged in Vihiga SPMCCRC No. 1200 of 2010, of causing grievous harm, contrary to section 234 of the Penal Code, Cap 63, Laws of Kenya, and assault causing actual bodily harm, contrary to section 251 of the Penal Code. A hearing was conducted, and six witnesses testified, but the appellants were discharged under section 87(a) of the Criminal Procedure Code, Cap 75, Laws of Kenya, after the prosecution failed to bond and produce more witnesses.

3. Thereafter, the appellants jointly filed the civil suit claiming special and general damages for unlawful arrest and malicious prosecution. Their case was that the respondents prosecuted them before carrying out thorough investigations. The respondents denied that the prosecution was actuated by malice, urging that the same was mounted in good faith. They further averred that the matter was prosecuted based on the investigations conducted by the police, as is mandated by the law, and it was devoid of malice. They further averred that trial court did not find that the prosecution was malicious, stating that the appellants were acquitted on technicalities, as the investigating officer did not avail the police file in court, prosecution witnesses did testify, and the case was concluded before the prosecution had concluded its case and the accused were acquitted. The civil suit was dismissed by the trial civil court, with costs, on grounds that the appellants had failed to prove their case on a balance of probability.

4. The appellants now seek that the decision of the trial civil court be overturned, and that the appellate court awards them compensation for special and general damages for unlawful arrest, detention and malicious prosecution. They have detailed, in their filings, the awards that they propose that the appellate court to make in their favour.

5. Their memorandum of appeal is dated 28th December 2016, and it lists various grounds of appeal. It is alleged that the trial court erred in

finding that the termination of the prosecution under section 82(a) of the Criminal Procedure Code was not in their favour; in finding that the prosecution was not actuated by malice; in finding that the four conditions required to prove malicious prosecution were not established yet the evidence on record was to the contrary; in not making a finding on the special damages pleaded; in not assessing general damages; and in making no finding of liability as against the 3rd respondent who had even tendered evidence at the civil trial.

6. Directions were given on 17th September 2020, for disposal of the appeal by way of written submissions. The record before me indicates that only the appellants filed written submissions. They argued four grounds: relating to whether they had not tendered evidence to demonstrate malice; whether the termination of the criminal proceedings under section 82(a) of the Criminal Procedure Code was not a determination in their favour; whether there was no liability against the 3rd respondent; and whether they were entitled to damages. On the first ground, they submitted that they had tendered adequate evidence to meet the conditions, set out in *National Bank of Kenya Limited vs. Alfred Owino Balla* [2017] eKLR (Okwany J), for award of damages in a malicious prosecution case, and that they had proved malice on a balance of probability. On the second ground, they asserted that a termination of a prosecution under section 82(a) of the Criminal Procedure Code amounted to a determination in their favour, by dint of decisions made in *Stephen Gachau Githaiga & another vs. Attorney General* [2015] eKLR Mativo J) and *Patel Rameshbhai Gordhanbhai vs. Stanley Ajonga Kivasa & another* [2020] eKLR (Musyoka J). On the third ground, it was submitted that the 3rd respondent arrested and prosecuted the appellants without fully investigating the report made by the 1st and 2nd respondents, and instituted the prosecution without ascertaining the genesis and veracity of the underlying dispute. It was asserted that there was liability against the impugned prosecution. The decision in *Catherine Wanjiku Kariuki vs. Attorney General & another* [2011] eKLR (Waweru J) is cited. Finally, it was averred that the trial court did not assess both general and special damages, and the decision in *Ouma vs. City Council of Nairobi* [1976] KLR 295 (Chesoni J) is cited to support that contention. Copies of the decisions cited are attached for perusal by the court.

7. From the memorandum of appeal, and of the written submissions, I am satisfied that the issues identified in the written submissions by the appellants neatly capture what this court ought to determine.

8. On the first issue, as to the lawfulness of the arrest and malicious prosecution, the elements to be proved in an action for malicious prosecution are well settled. In *Mbowa vs. East Mengo District Administration* [1972] EA 352 (Sir William Duffus P, Lutta and Mustafa JJA), the court summarized the law as follows:

> *"The action for damages for malicious prosecution is part of the 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 the public benefit.... It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion of the truth. Its essential ingredients are:*
>
> > *(1) the criminal proceedings must have been instituted by the defendant,*
> >
> > *(2) the criminal proceedings must have been terminated in the plaintiff's favor,*
>
> *The plaintiff, in order to succeed, has to prove that the four essentials or requirements 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 would fail in his action..."*

9. In the appeal, the appellants allege that there was no evidence that they committed the offence. However, arrests were effected and a joint prosecution was mounted, after the police had conducted an investigation. Witnesses were produced in court by the prosecution, and they testified, placing the appellants at the scene where the criminal acts alleged were committed against the 1st and 2nd respondent. There was no evidence by the appellants at the civil trial that the case by the prosecution at the criminal trial was personal and spiteful. Six witnesses were presented by the respondents, and medical evidence was also placed on record by the prosecution.

10. In *Gitau vs. Attorney General* [1990] KLR 13 (Trainor J), it was stated that if the person making a complaint, or the police officer to whom the complaint was made, genuinely believed the facts and acted upon them, being satisfied that a probable crime had been established, then the arrest and subsequent prosecution would be justified.

11. The particulars of malice pleaded in the plaint, were that the 1st and 2nd respondents had filed a complaint with the police when they had not suffered any physical injury and while knowing that they had had a domestic dispute regarding their relative's memorial; and that the 3rd respondent arrested and prosecuted the appellants without fully investigating the report and without ascertaining the genesis and veracity of the dispute.

12. Let me start by considering the issue as to the underlying dispute, which all the respondents were accused of knowing about and not investigating it. It is averred that there was a dispute regarding the memorial for the grandmother of both appellants and the 1st and 2nd respondents. The appellants have not elaborated on how the underlying dispute impacted on the charges that they faced, and the nature of the investigations that the police ought to have conducted with respect to the said dispute. The criminal charges that the appellants faced related to causing grievous harm. That was the complaint that the 1st and 2nd respondents placed before the police and it was in respect of that complaint of assault and causing of grievous harm that the appellants were arrested, charged and tried. Whether there was a domestic dispute was not relevant, for the incidence of a domestic dispute could not exonerate the appellants from the crime of assault and causing grievous harm. The fact that the parties had an active domestic dispute over something could not be a defence, where it was alleged that some of the parties assaulted the others and occasioned on them grievous harm. There would be no justification for that. The issue of the underlying dispute was, therefore, wholly irrelevant and the police did not need to investigate it. It was enough for them to investigate the offence reported, that of assault and causing grievous harm.

13. The second issue is about the 1st and 2nd respondents not suffering any injury, to warrant the charges being framed. The original file in the criminal matter, being Vihiga SRMCCRC No. 1230 of 2011, was availed. The proceedings were typed. The 1st and 2nd respondents testified as PW1 and PW2. They stated that they were attacked by the appellants, and that they sustained injuries. PW3 and PW6 were at the scene, they saw the appellants throw stones, and they said that the 1st and 2nd respondents were injured in the process. PW5 was the clinical officer who attended to the 1st and 2nd respondents. He detailed the injuries that he noted on the two of them, and he produced P3 forms, which are on the record, and which give particulars of the injuries sustained by the 1st and 2nd respondents. Curiously, the appellants did not even challenge the clinical officer by way of cross-examination. There is evidence on record that the 1st and 2nd respondents were injured, and the appellants did not controvert that evidence at the civil trial.

14. On the third issue, that the police did not conduct investigations on the report of assault and causing of grievous harm, I note, from the trial record in the criminal matter that the 1st and 2nd respondents were issued with P3 forms by the police. The P3 form is a police document. The P in P3 stands for police, and the document is issued by the police to a complainant who claims to have had been injured in a criminal enterprise, so that the alleged injuries could be evaluated by a police surgeon. In this case theP3 forms were issued to the 1st and 2nd respondents. These forms are issued in the course of investigations, and for them to have been issued to the 1st and 2nd respondents would mean that the police did conduct investigations, saw the need to issue P3 forms, and after the P3 forms were returned to the police duly filled by the police surgeon, in the course of the investigations, the police must have found basis to have the appellants arrested and charged. The fact of the issuance and filling of the P3 forms was sufficient evidence of the police having conducted investigations. It cannot be true, therefore, that the police did not investigate the matter before deciding to arrest and charge the appellants. The trial record in the criminal matter shows that the prosecution did supply witness statements to the appellants, and the appellants did not seek to demonstrate, from those statements, that the police did not conduct any investigations. The taking of statements from potential witnesses is part of investigations, and the fact that such statements were taken was sufficient evidence of the police having conducted investigations. In any event, the appellants did not call for other police records relating to investigations, such a police diaries and investigation logs, from which it might have emerged that no or insufficient investigations were conducted. He who alleges must prove.

15. From what I have stated above, it ought to be clear that the particulars of malice, itemized in paragraph 10 of the plaint, were not proved. There was *prima facie* evidence of physical injury, and *prima facie* evidence of investigations by the police of the allegations made by the 1st and 2nd respondents. I fully agree with the trial civil court, that the appellants did not present any evidence to support their allegation that the respondents had acted with malice.

16. On the issue as to whether the termination of the prosecution under section 87(a) of the Criminal Procedure Code amounted to a determination in favour of the appellants, I will refer to the decision in *Stephen Gachau Githaiga & another vs. Attorney General* [2015] eKLR (Mativo J), where the court stated that a termination of a prosecution would be favourable to a party regardless of the route taken, be it an acquittal, a discharge, a withdrawal or a stay. In that case, the court said:

> *"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 avoids conflict between civil and criminal justice. The favourable termination requirement may be satisfied no matter the route by which the proceedings conclude in the plaintiff's favour, whether it be an acquittal, a discharge at a preliminary hearing, a withdrawal, or a stay."*

17. Similar sentiments were expressed in *Paramount Bank Limited vs. Vaqvi Syed Qamara & another* [2017] eKLR (Makhandia, Ouko and MÍnoti JJA), stated:

> *"The favourable termination requirement of criminal charges may be satisfied in various ways depending on how the proceedings are concluded in favour of the accused person. For instance, by acquittal, a discharge or a withdrawal.*
>
> *Courts in this jurisdiction have relied, over the years on the following passage from the case of Egbema v. West Nile Administration [1972] EA 60 for the foregoing proposition;*
>
> *"For the purposes proof that the criminal proceedings have been determined in the appellant's favour it is enough that the criminal proceedings have been terminated without being brought to a formal end. The fact that no fresh prosecution has been brought, although five years have elapsed since the appellant was discharged, must be considered equivalent to an acquittal, so as to entitle an appellant to bring a suit for malicious prosecution..."*
>
> *Although the withdrawal of a charge under Section 87 is technically not on acquittal and does not operate as a bar to subsequent proceedings against an accused person on account of the same facts, guided by the foregoing holding, we note in this appeal that five years after the charges were withdrawn on 30th July, 2012, ostensibly pending the arrest of Lawrence Atieno, no fresh charges have been preferred against the 1st respondent. There was no indication whether Lawrence Atieno was ever arrested and charged. The discharge of the respondent, therefore amounted to a termination of the prosecution in his favour."*

18. The charges in the criminal proceedings herein, in Vihiga SRMCCRC No. 1200 of 2010, were withdrawn on 5th September 2014, under section 87(a) of the Criminal Procedure Code, and the appellants were discharged. A discharge under section 87 of the Criminal Procedure Code is one of the ways by which a prosecution can be terminated in favour of an accused person, and, therefore, that is adequate proof that the prosecution, in that case, terminated in favour of the appellants. It is not in dispute that the appellants were discharged from the criminal proceedings under the provisions of section 87(a) of the Criminal Procedure Code, due to the prosecution failing to avail the remaining witnesses. That however, does not negate the fact that the case had proceeded with the witnesses presented earlier, and evidence was adduced against the appellants.

19. The mere fact that a prosecution terminated in favour of a party is not, by itself, sufficient proof of malicious prosecution. I have already, pinpointed the facts, from the trial record of the criminal matter, which show that the malice was not established, and, therefore, the discharge of the appellants was neither here nor there. In *Socfinaf Kenya Limited vs. Peter Guchu Kuria & another* [2002] eKLR (Aganyanya

J), it was stated that acquittal of a suspect in a criminal case was not sufficient ground for filing a civil suit to claim damages for malicious prosecution or false imprisonment; and that evidence of spite, ill will, lack of reasonable and probable cause must be established.

20. On the question as to whether there was liability against the 3rd respondent, I reiterate what I have already stated above, that there was evidence that the 1st and 2nd respondents were physically injured, and that the police did conduct investigations before they arrested and charged the appellants. There was, therefore, reasonable and probable cause for their arrest and prosecution, and, therefore, no liability attached on the 3rd respondent.

21. On the last issue, as to whether the appellants were entitled to damages, it follows that, if the prosecution was with reasonable and probable cause, and no liability attached on the respondents, that the appellants were not entitled to damages, whether general or special.

22. The last thing. I note from the trial record in the civil matter, Vihiga PMCCC No. 182 of 2016, that the plaint was not signed by the advocate who drew it. It was, therefore, not authenticated. It was incompetent *ab initio*, and no trial should have been conducted in the first place. Order 2 rule 16 of the Civil Procedure Rules provides:

> *"Every pleading shall be signed by an advocate, or recognized agent (as defined by Order 9, rule 2), or by the party if he sues or defends in person."*

23. With regard to order 2 rule 16 it was said in *Phoebe Wangui vs. James Kamore Njomo* [2012] eKLR (Odunga J):

> *"It is clear that the position in Kenya as regards unsigned pleadings is the same whether in the High Court or in the Court of Appeal. Consequently, such pleadings are rendered incompetent and are for striking out. It is therefore clear that the fate of the amended plaint filed herein on 25th October 2011 is sealed and the Court has no option but to strike out the same. I accordingly accede to the Motion dated 8th February 2012 and strike out the said amended plaint with costs to the defendant."*

24. Similar sentiments were expressed in *Stephen Raphael Garama vs. Robert Baya Mramba & 9 others* [2012] eKLR (Meoli J), where the court said:

> *"2…Order 2 rule 16 of the Civil Procedure Rules provides that: -*
>
> *"Every pleading shall be signed by an advocate, or recognized agent…or by the party if he sues or defends in person."*
>
> *3. Although the plaintiff did file his Further Amended Defence to the Counterclaim on 20th March, 2011, I think it is necessary for the Defendants' pleadings to be regularized before judgment can be pronounced on the dispute. While this may cause some delay, the court is wary of proceeding on the basis of what may well be an incompetent counterclaim.''*

25. A pleading that is unsigned is incompetent, and a suit founded on it cannot possibly stand. It is a curable defect, however, which must be corrected before judgment, but if fatal if not corrected. As plaint in this matter was not signed, the suit was incompetent *ab initio*. The trial court ought not have conducted a trial founded on it. The proceedings founded on that pleading were themselves incompetent.

26. The upshot of the foregoing is that this appeal lacks merit, and should be, and is hereby, dismissed, with costs to the respondents.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 7TH DAY OF MAY, 2021

W. MUSYOKA

JUDGE