



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NANYUKI**

**CIVIL APPEAL NO.1 OF 2018**

**KENYA FOREST SERVICE (GATHIURU FOREST STATION).....APPELLANT**

**VERSUS**

**1. JOSEPH MWEBIA MBIJIWE**

**2. ATTORNEY-GENERAL.....RESPONDENTS**

**(Appeal from original Decree dated 30/11/2017 in Nanyuki CM**

**Civil Case No 57 of 2013 – W J Gichimu, PM)**

**J U D G M E N T**

1. This is an appeal from the decree of the lower court passed on 30/11/2017. By that decree the 1<sup>st</sup> Respondent (who was the plaintiff) got judgment against the Appellant (1<sup>st</sup> defendant) and the 2<sup>nd</sup> Respondent (2<sup>nd</sup> defendant) jointly and severally on liability and general damages of KShs 800,000/00 and special damages of KShs 19,000/00. The plaintiff's claim was based on the torts of unlawful arrest, detention and malicious prosecution. The suit proceeded to trial and a judgment was rendered.

2. The following grounds of appeal are raised –

- i. That the trial court failed to appreciate that “the onus of investigating, preferring and prosecuting criminal charges lies entirely with the...Director of Public Prosecutions and the Police Service and not on the Appellant”.
- ii. That the trial court erred in fact and law in finding that the prosecution of the 1<sup>st</sup> Respondent was instituted by the Appellant.
- iii. That the trial court erred in fact and law in finding that the arrest and prosecution of the 1<sup>st</sup> Respondent was devoid of any reasonable and probable cause.
- iv. That the trial court erred in fact and law in finding that the 1<sup>st</sup> Respondent was charged so that he could be evicted from the forest by the Appellant.
- v. That the trial court erred in fact and law in finding that malice was proved against the Appellant.
- vi. That the trial court erred in fact and law in finding that the police did not carry out independent and impartial investigations before charging the 1<sup>st</sup> Respondent, and also in imputing liability on the Appellant.
- vii. That the amount of KShs 800,000/00 awarded as general damages was so “outrageous, unreasonable and exaggerated as to amount to an erroneous assessment...”.

3. This appeal was canvassed by way of written submissions. I have considered the submissions of the Appellant and the 1<sup>st</sup> Respondent. The 2<sup>nd</sup> Respondent did not file submissions or participate in the appeal. In the trial court he entered appearance and filed defence though he did not offer any evidence. I have also read through the record of the trial court in order to evaluate the evidence tendered and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have borne in mind however, that I neither saw nor heard the witnesses testify, and I have given due allowance for that fact.

4. There has been delay in preparation and delivery of this judgment occasioned by the atmosphere of uncertainty and fear engendered by the Covid-19 pandemic. The delay is regretted.

5. For a plaintiff to succeed in a claim for damages founded on malicious prosecution he must prove the following on a balance of probabilities –

i. That the prosecution was instituted by the defendant or someone for whose acts he is responsible.

ii. That the prosecution was instituted without reasonable or probable cause.

iii. That the prosecution was actuated by malice.

iv. That the prosecution terminated in the plaintiff's favour.

6. There was evidence tendered before the trial court to the effect that the 1<sup>st</sup> Respondent occupied some forest land upon some agreement with the Appellant and paid requisite fees. At some point the Appellant alleged that the 1<sup>st</sup> Respondent was in breach of some conditions of his occupancy. It therefore sought to evict him from the forest land by using criminal law in what appeared to be a purely civil dispute. Officers of the Appellant arrested the 1<sup>st</sup> Respondent and subsequently drafted the charges that took him to criminal court where he was prosecuted. The prosecution terminated with his acquittal. The criminal charge laid against the 1<sup>st</sup> Respondent was illegal cultivation in the forest.

7. The trial court held that the sole purpose of arresting and prosecuting the 1<sup>st</sup> Respondent was to evict him from the forest land which he was otherwise lawfully occupying and cultivating upon his agreement with the Appellant, and upon payment of valuable consideration by way of fees or license. The Appellant alleged that the 1<sup>st</sup> Respondent became hostile and violent when he was asked to adhere to the terms of the license, and that that was the reason for his arrest. But it is to be noted that he was never charged with any offence related to violence or threat of violence.

8. Although after arrest the 1<sup>st</sup> Respondent was taken to Nanyuki Police Station and subsequently charged, as already observed, the charge was drawn by officers of the Appellant who had power to arrest and charge. They did not merely hand over the 1<sup>st</sup> Respondent to the police; they were the prime movers for his being prosecuted.

9. One may ask, what is the nature of the relationship between the Appellant and a citizen when the two enter into an arrangement under which the citizen is permitted to carry out cultivation of forest land upon certain conditions, like taking care of tree seedlings, and upon payment of certain fees? Does it not amount to a civil arrangement? Should one party then be permitted to enforce any condition of that arrangement by criminal proceedings? Would that not be a civil dispute to be resolved by civil proceedings?

10. I hold that the trial court made the correct finding that the sole purpose of the arrest and prosecution of the 1<sup>st</sup> Respondent was to evict him from forest land that he was otherwise lawfully occupying and cultivating. There was no other probable or reasonable cause. And since the 1<sup>st</sup> Respondent's occupation and cultivation of the forest land had been granted by the Appellant and requisite fees paid to it, arresting and prosecuting him in order to evict him from the land was actuated by malice.

11. I would therefore not disturb the judgment of the trial court on liability.

12. Regarding the general damages awarded, I have considered the submissions of both sides and the comparable authorities cited. The Appellant's complaint is that the award of KShs 800,000/00 was so "*outrageous, unreasonable and exaggerated*" as to amount to a wholly erroneous assessment. The 1<sup>st</sup> Respondent's arrest and prosecution were an egregious abuse of the Appellant's coercive power to unilaterally terminate what amounted to a civil license for occupation and cultivation of forest land, and evict him therefrom. There was evidence that in the process he was assaulted by the Appellant's officers and he suffered injuries. He was then locked up in the cells and subsequently taken to court. His criminal trial dragged on for about two years.

13. Upon my own assessment, I do not find the award of KShs 800,000/00 to be so manifestly excessive as to amount to a wholly erroneous estimate.

14. In the result I do not find any merit in this appeal. It is hereby dismissed with costs to the 1<sup>st</sup> Respondent. It is so ordered.

**DATED AND SIGNED AT NANYUKI THIS 21<sup>ST</sup> DAY OF JULY 2021.**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT NANYUKI THIS 22<sup>ND</sup> DAY OF JULY 2021.**