REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

CIVIL APPEAL NO. 34 OF 2018

JOHN JUMA MUCHELESI.........................APPELLANT

VERSUS

GRACE MANG'ENI NABUKIYABI.........RESPONDENT

(Being an appeal from the judgement and Decree of Hon. J. King'ori C.M in Bungoma CMCC No. 310/2016 delivered on 3/7/2018)

JUDGEMENT

The appellant by a plaint dated 17th May, 2016 sued the respondent (defendant in the trial court) for general damages for tortous assault, malicious prosecution and false imprisonment, special damages and costs of the suit.

The appellant's suit is based on facts that the respondent instigated by malice and ill will, made a false report to the police that he, the plaintiff, uttered undisclosed words threatening to kill her. He states that the respondent knew the statement she had made was false. Consequently, the appellant was arrested and spent 7 days in remand awaiting to be released on bond and therefore lost reputation among right thinking members of the society.

The respondent filed her statement of defence denying the allegations attributed to her and averred that if the appellant suffered loss, he was the author of his own misfortune. The evidence in the trial court was adduced as follows;

PW-1, John Juma Muchekesi stated that he sued the respondent in the High Court over encroachment on his land. On his way from the court, he was arrested and charged for threatening to kill the respondent. That the matter was dismissed under Section 202 of the Criminal Procedure Code. He stated that the respondent made statements to the police referring to him as a boy and therefore sought damages for defamation and costs incurred in defending himself in the criminal trial.

PW2 was Lasoa Nekhanu Wafula who stated that she knew both the appellant and the respondent as she had sold a portion of her land to the respondent. She stated that the respondent and police officers came to her parcel and wanted to move the boundaries. That in the process, respondent uttered words that she would kill her (PW-2) and the appellant so she could take the whole parcel of land. Since the appellant was away, Alex Wanyonyi was arrested.

On the respondent's part, DW1 was Grace Mang'eni Nabukiyabi who stated that she was threatened by the appellant and PW2 when she visited the parcel of land she had bought from PW2. That she fled from the scene and reported the incident at Bungoma Police station and the appellant arrested and charged. She stated that she came to court to testify in the criminal case but the court file was missing where she was informed to await to be bonded for the next hearing. She later learnt that the matter had been dismissed.

In a judgement of that court, the trial magistrate held that the appellant had failed to prove his claim against the respondent and dismissed the suit.

Dissatisfied, the appellant appealed to this court on the following grounds;-

1. The learned magistrate erred both in law and fact by dismissing the appellant's case which was proven on a balance of probabilities.

2. The learned magistrate erred in law and fact when he dismissed the appellant's case on strict proof when the cause was actionable *per se*.

3. The learned magistrate erred in law and fact when he failed to properly analyze the evidence and submissions on record

and went on a fishing expedition for evidence not raised by the parties in the case.

4. That the learned magistrate erred in law and fact when he failed to properly frame issues and thereby caused a miscarriage of justice.

5. The learned magistrate was biased by complementing the respondent for defaming the appellant and maliciously causing his arrest and prosecution on a triviality.

6. The learned magistrate failed to assess damages in lieu of dismissal.

7. The learned magistrate contradicted himself as to the evidence on record and tortious reliefs sought by failing to judiciously see the nexus between the facts and common law.

By directions of this court, the appeal was disposed of by way of written submissions. Both parties complied.

The appellant through Mr. Waswa learned counsel submits that it is not necessary to enjoin the attorney general in a case of malicious prosecution where the report to the police was false and actuated by malice and recklessness. He relies on the case of ***Jadiel Nyaga vs Silas Mucheke nyeri C.A Appeal No. 59/1987 (U.R)*.**

He submits that the appellant's evidence was fully corroborated while the respondent evaded the crux of the matter and therefore judgement ought to have been entered on admission in terms of the consent of 29/10/2014. He faulted the trial magistrate for finding that since Criminal Case No. 2899/2015 was dismissed under Section 202 of the Criminal Procedure Code, it could not found a claim based on malicious prosecution.

Counsel faults the trial court for usurping the role of the Director of Public Prosecutions since the DPP could have appealed but did not. That since the respondent called the appellant a boy at the police station, he ought to have been awarded damages.

He submits that the appellant's claim on tortious assault and false imprisonment required an award of damages. That the learned magistrate failed to assess damages that he would have awarded had the suit been successful.

In support of his submissions, counsel cites the authorities in ***Rodgers Abisai T/A Abisai & Co. Advocates Vs Wachira Waruru & Anor (2006)eKLR*** and ***Musikari Kombo Vs Royal media Services (2018) eKLR.***

The respondent on her part basing her argument in the case of ***George Masinde Murunga Vs Attorney General (1979) eKLR*** identified the following issues for determination;-

1. Whether the appellant was charged

2. Whether the prosecution was terminated in the appellant's favour?

3. Whether the said prosecution was actuated by malice?

4. Whether the appellant has a reasonable appeal?

On the first and second issues, counsel freely admits the same in the affirmative.

In submitting that the prosecution was reasonable and not actuated by malice, counsel sought refuge in the provisions of Section 107 of the Evidence Act for the proposition that he who alleges must prove and the case of ***Nzoia Sugar Co. Ltd Vs Collins Fungututi Civil Appeal No. 7 of 1987*** and ***Gitau Vs Attorney General (1990) KLR 13,***

Counsel thus submits that the complaint by the respondent and the subsequent prosecution was not malicious.

On whether the respondent had a reasonable cause of action, it is submitted that in a criminal trial, the complainant is technically the state and the victim a witness who did nothing other than to give evidence to that extent. He cites the case of ***Republic Vs Principal Magistrate Hon Shadrack A. Okato of the Chief Magistrates Court at Milimani Commercial Court, Ex-Parte Equity Bank Limited and Lucy Nduruni (2012)eKLR*** in support of this proposition

This being a first appeal, this court is guided by the principles set in ***Oluoch Eric Gogo -Vs- Universal Corporation Limited [2015] eKLR***, where it was held;

> **"As a first appellate court, the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of Selle & Another v Associated Motor Boat Co. Ltd &Another (1968) EA 123, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect……**

The issues in this appeal are twofold;- whether the appellant established his case to the required standards and secondly whether the trial

court ought to have assessed the damages awardable had the suit been successful.

Whether the respondent established his case to the required standards

Malicious prosecution is an actionable tort having its roots in the common law. For one to succeed in an action based on this tort, there are certain ingredients that he must prove *to wit;- the plaintiff must show that the prosecution was instituted by the defendant; or by someone for whose acts he is responsible; that the prosecution terminated in the plaintiff's favour, that the prosecution was instituted without reasonable and probable cause and that the prosecution was actuated by malice.* **See *Kagane -Vs- Attorney General (1969) EA 643***

The above were restated in the case of ***Gitau Vs. Attorney General [1990] KLR 13***,**where it was held;-**

> **To succeed on a claim for malicious prosecution the plaintiff must first establish that the defendant or his agent set the law in motion against him on a criminal charge. Setting the law in motion" in this context has not the meaning frequently attributed to it of having a police officer take action, such as effecting arrest. It means being actively instrumental in causing a person with some judicial authority to take action that involves the plaintiff in a criminal charge against another before a magistrate. Secondly he who sets the law in motion must have done so without reasonable and probable cause… The responsibility for setting the law in motion rests entirely on the Officer-in-Charge of the police station. If the said officer believed what the witnesses told him then he was justified in acting as he did, and the court is not satisfied that the plaintiff has established that he did not believe them or alternatively, that he proceeded recklessly and indifferently as to whether there were genuine grounds for prosecuting the plaintiff or not. The Court does not consider that the plaintiff has established animus malus, improper and indirect motives, against the witness.**

Upon carefully reviewing the evidence, it is not disputed that the appellant was charged with the offence of threatening to kill and an environment and land case was also pending in court pitting the parties herein. The status of the latter was not disclosed while the former was dismissed.

It is correct as pointed by the respondent's counsel that the respondent's role in the criminal case was limited to testifying in the matter as a complainant and the burden of proving that the prosecution was indeed malicious lay on the appellant. Having lodged her complaint with the police, it was the duty of the police to interrogate the complaint to ascertain whether there was a possibility of a crime having been committed.

The case having been dismissed pursuant to the provisions of Section 202 of the Criminal Procedure Code is not proof of malice on the part of the respondent.

Having said that, this court finds no evidence of malice on the part of the respondent and thus his claim on this limb has no merit.

On the issue of false imprisonment, the appellant in his pleadings before the trial court laments that he remained in remand for 7 days awaiting release on bond where he was apprehensive that he could die or contracting diseases and lost his waist coat and belt.

In ***Bobby Macharia Vs The Attorney General & 3 Others (2018) eKLR*** it was held:

> **……. He goes as far as to state that his denial by the court of bail and his being held in custody until the conclusion of his case on 17th November, 2005, amounted to unlawful detention. I think that is stretching the argument on unlawful detention too far. The refusal of a court to grant bail is an action of the court's judgment, challengeable only by way of appeal. That is, the court having considered the application for bail and all the circumstances of the case, may allow or disallow bail. This is a decision that is subject to appeal, and there is no evidence that Macharia preferred an appeal. From that point when the court made its decision, the detention was made lawful by the court, and cannot be the subject of a false imprisonment claim, except if fraud, bribery or collusion were alleged or shown.**

I find semblance in this authority for the reason that once the appellant was arraigned in court, what followed was a judicial process. After all, the appellant was granted bond the day he took plea and it was his duty to marshal security or whatever he could to secure his release. It cannot therefore be correct to suggest that the detention violated his individual rights. The detention does not qualify to be false imprisonment.

The appellant's argument on this point is devoid of merit.

On assault, the appellant complaints that while at the police station, he was assaulted. His testimony was as follows;

> **I was handcuffed and punched up and taken to Bungoma Police Station. I was embarrassed as my right had been defamed. My shirt got torn.**

It is trite law that he who alleges must proof. The relevant legal provisions on this is the Evidence Act under Sections 107 and 109 which provides;

> **107. (1) Whoever deserves any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**
>
> **(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence.

Upon careful scrutiny of the evidence tendered by the appellant, I am satisfied that the appellant failed to proof his allegations to the required standards. He did not produce medical evidence to show that he was indeed assaulted, he did not avail the shirt he alleges got torn in the hands on the police. He has also not led evidence linking the respondent with the tearing of his shirt.

Whether the award of damages by the trial court was erroneous to warrant an interference by this court.

In his submissions in the subordinate court, the appellant sought Kshs 1 Million on the head of tortious assault, Kshs 3 Million for malicious prosecution and Kshs I Million for false imprisonment.

In a line of authorities of this court and the superior courts, it is settled that even if a claim for compensation is dismissed, the court ought to assess the damages it would have awarded had the suit been successful.

In ***Gladys Wanjiru Njaramba –Vs- Globe Pharmacy & Another (2014)eKLR*** the Court stated-

> **"It is trite law that the trial Court was under duty to assess the general damages payable to the Plaintiff even after dismissing the suit. This position is confirmed by the Court of Appeal in the case of Mordekai Mwangi Nandwa V Bhogals Garage Ltd Ca No. 124 OF 1993 report in [1993]KLR 4448 where the Court held that the practice that damages be assessed even if the case is dismissed does not imply writing an alternative judgment and in the case of Matiya Byabaloma & Others V Uganda Transport Co. Ltd Uganda Supreme Court Civil Appeal No. 10 OF 1993 IV KALR 138 where the Court held that the Judge erred in not assessing the damage he would have awarded had the appellant been successful in her claim. From the above authorities it is clear that the trial Court fell into error by not assessing the award of general damages he would have awarded to the Appellant had she been successful in proving her case."**

When a party succeeds in an appeal, the appellate court can assess the damages or remit the same to the trial court to do so. In this case I am not satisfied that the appeal has merit. The same is hereby dismissed with costs to the respondent.

DATED AT BUNGOMA THIS 9TH DAY OF NOVEMBER, 2021

S. N. RIECHI

JUDGE