



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CIVIL APPEAL NO. E006 OF 2020

BETWEEN

ALOICE OCHIENG OMBOGA.....APPELLANT

AND

SHIVLING SUPERMARKET.....1ST RESPONDENT

THE HON. THE ATTORNEY GENERAL.....2ND RESPONDENT

(Being an Appeal from the judgment and decree in Homa Bay Chief Magistrate's

CMCC No. 3 of 2020 by Hon. J.S. Wesonga – Senior Resident Magistrate).

JUDGMENT

1. Aloice Ochieng Omboga the appellant herein, had filed a suit against the respondents in Homa Bay Chief Magistrate's CMCC No. 3 of 2020. He was seeking compensation for malicious prosecution and loss of employment. The claim was dismissed in a judgment dated 15th Day of October, 2020.
2. The appellant was aggrieved by the said judgment and filed this appeal through the firm of H. Obach & Partners Advocates. He raised twelve grounds of appeal as follows:
 - a) The learned magistrate erred in law and fact by considering extraneous factors which were not material to the case.
 - b) The learned magistrate erred in law and fact by disregarding the evidence tendered by the appellant before arriving at her decision.
 - c) The learned magistrate erred in law and fact by wholly disregarding submissions tendered by the appellant before arriving at her decision.
 - d) The learned magistrate erred in law and fact in holding that the 1st respondent had not acted maliciously even when the 1st respondent did not tender evidence to the contrary.
 - e) The learned magistrate erred in law and fact in holding that the appellant had not proved his case on balance of probabilities as required by the law.
 - f) The learned magistrate erred in law and fact in failing to find that the prosecution was instituted maliciously against the weight of evidence and which malice was proved by the appellant.
 - g) The learned magistrate erred in law and fact in disregarding the evidence by PW1 while delivering her judgment yet the same was overwhelming in favour of the appellant.
 - h) The learned magistrate erred in law and fact in failing to find that the prosecution of criminal case in the Magistrate's court at Homa Bay was motivated by malice.
 - i) The learned magistrate erred in law and fact in failing to find that special damages based on legal fees that the appellant incurred in

criminal case no.3 of 2017 was reasonable and ought to have been taxed or assessed by the court.

j) The learned magistrate erred in law and fact in continuously showing bias against the appellant during the trial process.

k) The learned magistrate erred in law and fact by failing to advise the appellant that he had a right of appeal.

l) The learned magistrate erred in law and fact by dismissing the appellant's suit with costs to the 1st and 2nd respondents when there was enough evidence against the respondent.

3. The appeal was opposed by both respondents. The first respondent was represented by the firm of P.R. Ojala & Company Advocates while the second respondent was represented by Sarah A. Jumma, litigation Counsel.

4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

5. Both parties are in agreement that the goods of the 1st respondent were stolen from the motor vehicle that the appellant was the conductor. The matter was reported to the police and the appellant was arrested and charged in court.

6. The appellant contended that he was acquitted under section 202 of the Criminal Procedure Code for non-attendance. The section provides:

If, in a case which a subordinate court has jurisdiction to hear and determine, the accused person appears in obedience to the summons served upon him at the time and place appointed in the summons for the hearing of the case, or is brought before the court under arrest, then, if the complainant, having had notice of the time and place appointed for the hearing of the charge, does not appear, the court shall thereupon acquit the accused, unless for some reason it thinks it proper to adjourn the hearing of the case until some other date, upon such terms as it thinks fit, in which event it may, pending the adjourned hearing, either admit the accused to bail or remand him to prison, or take security for his appearance as the court thinks fit.
[Emphasis added]

The trial court in Criminal case number 3 of 2017 erred in invoking section 202 of the Criminal Procedure Code. There was no evidence that the complainant had been summoned to appear in court for trial but failed to do so.

7. In the case of **Kasana Produce Store vs. Kato [1973] E.A. 190** at page 191, paragraph G-I the ingredients for malicious prosecution were spelled out as follows:-

i. The plaintiff was prosecuted by the defendant in that the law was set in motion against him by the defendant on a criminal charge. The test is not whether the criminal proceedings have reached a stage at which they may be described as a prosecution but whether they have reached a stage at which damage to the plaintiff result.

ii. That the prosecution was determined in the plaintiffs favour.

ii. That it was without reasonable or probable cause-On the evidence the defendant did not believe in the justice of his own case.

iv. It was malicious-The defendant had improper and indirect motives in pursuing the false charge against the plaintiff.

8. The trial court was alive to these ingredients. He was equally aware that the burden of proving these ingredients was appellant's.

9. In the course of hearing in the trial court, the appellant conceded that there indeed was a theft of the goods that were entrusted to him. He went ahead to acknowledge that it was logical for the 1st respondent to suspect him. Consequently, his arrest and being charged in court cannot be said to have been actuated by malice.

10. I therefore find that the appellant did not prove his case to the required standards. The appeal is therefore dismissed with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 7TH DAY OF DECEMBER, 2021

KIARIE WAWERU KIARIE

JUDGE