



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CIVIL APPEAL NO. 4 OF 2018

FREDRICK MUTUA.....APPELLANT

-VERSUS-

DAN MULINGA MBALUKA.....RESPONDENT

(Being an appeal from the judgement, decree and order of the Learned Senior Resident Magistrate

in Mwingi Senior Principal Magistrate's Civil Case No. 64 of 2016)

JUDGEMENT

1. The respondent statement of claim is dated 24th June 2016. He sued the 1st defendant being the Chief Legal Advisor to and an advocate for the Government on behalf of the National Police Service, the Director of Public Prosecutions and the Ministry of Interior and Co-ordination of National Government reasons being he was aggrieved by the conduct of the National Police through the DCIO Mwingi and OCS Mwingi Police Station and the DPP for causing his arraignment in Mwingi SRMCC No. 506 of 2009.
2. In the said criminal case the respondent a practicing advocate of the High Court was charged with obtaining money by false pretences contrary to section 313 of the Penal Code.
3. The respondent was acquitted on 30th July 2015 under section 202 of the Penal Code hence this suit for malicious prosecution and defamation. The 2nd defendant was sued as the complainant in the criminal case on whose behalf the prosecution was carried out by the 1st defendant.
4. The plaintiff prayed for general damages for malicious prosecution and defamation. Special damages being legal fees of 250,000/=. Cost of the suit with interest.
5. The plaintiff itemized particulars of the 1st defendant's malice and the 2nd defendant's malice. The 1st defendant filed a statement of defence dated 20th September 2016. The 1st defendant's response to the plaintiff's allegations was that the plaintiff's arrest was as a result of a fair complaint and the prosecution was as a result of investigations that revealed a lawful cause of action.
6. The 1st defendant pleaded statutory duty and denied any ill motive or malice hence asked the court to deny the plaintiff the relief's sought.
7. The 2nd defendant's statement of defence was dated 6th September 2016. The 2nd defendant's response to the allegations by the plaintiff was that he made a bonafide complaint having lost money by purchasing plot 58 Kithimani market which had reverted back to Matuu Town Council hence not available for purchase. The 2nd defendant claimed the said sum of Ksh.174,276/- was paid to the plaintiff by the auctioneer M/s Transfield Auctioneers. The 2nd defendant claimed it was the plaintiff who was his friend who introduced him to the auctioneer and persuaded him to purchase the said plot.
8. Further the 2nd defendant averred that after he made what was a genuine legal complaint the State carried out the prosecution and he had no control over the work of the police. The 2nd defendant particularly denied malice in the report to the police and further claimed there was a pending appeal being Appeal No. 99 of 2014 hence the matter had not been finalized.
9. The plaintiff testified as PW1 and without restating the entire plaintiff's testimony the salient facts of his claim are as follows:

- **That he is a practicing advocate of the High Court.**

- That the plaintiff acted for a party in Yatta RMCC No. 14 of 2001, the party being James Lumumba vs Rose Holdings and Credit Investments Limited.
- That Transfield Auctioneers sold Plot No. 58 Kithimani in a public auction in execution of a lawful court decree.
- That the 2nd defendant purchased the plot that was identified as an immovable property belonging to the judgement debtor in the aforementioned case and a certificate of sale and order for delivery to the purchase was issued.
- That subsequently the 2nd defendant made a complaint at Mwingi Police Station which culminated in the arraignment of the plaintiff in Mwingi SRMCR No. 506 of 2009 whereby it was terminated on 30/7/17 and he was acquitted under section 202 of the Criminal Procedure Code.

10. The 1st defendant never participated in the hearing of the suit inspite of being aware of the same. The 2nd defendant testified and summoned one witness. The highlights of the 2nd defendant's response are that, it was a fact he was introduced to the auctioneer by the plaintiff who was his friend.

11. That he did not carry out the prosecution but the same was one by the police and he had no control over them. That he purchased Plot No. 58 Kithimani market in a public auctioneer but later realised ownership and was revoked by the Matuu Town Council hence he had not made any legal purchase. That the money Kshs.174,216/- was paid to the plaintiff by the auctioneer.

12. That the 2nd defendant was genuinely aggrieved and the plaintiff had a duty to refund the said monies which he declined and he reported the matter to the police. That the 2nd defendant had a right to make a complaint to the police for investigations as he believed an offence had been committed. That the 2nd defendant had no malice and was motivated by deep grievances in terms of loss of money and property.

13. After the trial court heard above case it held judgment for the respondent and awarded him:-

- General damages Kshs. 2 million.
- Special damages Kshs. 25,000/-, plus
- Costs and interests.

14. Being aggrieved by above judgment the appellant appealed and set out the following grounds-

1. That the Learned Senior Resident Magistrate having found in her judgment that the appellant had genuinely lost money and the plot, she erred and misdirected herself both in law and fact when she held that the respondent was not to blame for the loss when there was ample and glaringly clear evidence on record that the proceeds of sale were paid to the respondent and the said respondent had thus an obligation to refund same to the appellant.

2. That the Learned Senior Resident Magistrate erred and misdirected herself in law and fact when she held that the appellant made a malicious report to the police hence contradicting herself with an earlier finding, when in fact there was no evidence of malice as the appellant had lost the plot he was buying as well as the purchase price that was paid to the respondent by the auctioneer as evidenced by the returns made to court by the auctioneers.

3. That the Learned Senior Resident Magistrate erred in law and fact by making contradictory findings which were not based on evidence on record and thus reaching at a biased conclusion against the appellant.

4. That the learned trial magistrate erred and misdirected herself when she held that the appellant failed to follow up the issue of payment with the auctioneer when indeed the auctioneer had discharged his duty by making payments to the respondent in the total sum of Kshs.102,531/- as evidenced by document number 9 filed with the court and made a return of warrants to court and the respondent had a duty to pay the same back to the appellant.

5. That the Learned Senior Resident Magistrate erred and misdirected herself when she held that the appellant set the law in motion contrary to the definition set out in the case of *Gitau vs Attorney General [1990] KLR 13* and she further erred when she failed to follow a binding precedent.

6. The learned trial magistrate erred and misdirected herself when she held that the tort of malice prosecution had been proved as against the appellant when the respondent had failed to show by evidence there was probable or reasonable cause for making a report to the police and that acquittal *per se* in a criminal charge is not a sufficient basis for bringing a suit for malice prosecution.

7. The Learned Senior Resident Magistrate erred and misdirected herself when she failed to admit document No. 9 in the appellant's list of document as exhibit in the case, a document that formed part of the record of the executing court.

8. The award of Kshs.2,000,000/- as damages for malicious prosecution was excessive and unreasonable and amounted to a miscarriage of justice.

9. The respondent's claim having partially succeeded with a substantial part of it in being dismissed, the respondent was not entitled to full costs of the suit and this amounted to a miscarriage of justice.

15. Parties were directed to file submissions to canvas appeal.

APPELLANT'S SUBMISSIONS

16. The appellant submitted that he made a report to the police for investigation. It is a right of every person to report to the police for a suspected offence for investigation. In this regard, and clearly, the appellant had lost money and could not trace his money easily. Clearly, the appellant was entitled to a refund.

17. That he never at any time prosecuted the respondent. He never even appeared in court to give evidence against the respondent. Appellant only made a complaint and rightly so to the police for investigation. The police booked the report and commenced their investigations.

18. The appellant did not form part of the investigating team. The appellant was not the one who made the decision to charge the respondent and the charging of respondent was as a result of police investigations. The decision to charge the appellant was made by the police. The appellant would be called as a State witness. The appellant had no control of the police functions, nor could he direct them.

19. By reporting to the police, the appellant bore no malice, spite nor ill will. He was looking for avenue to recover what he had lost through the respondent. Had the respondent returned the money that had been remitted to him, a report would not have been made to the police. The respondent became the author of his own misfortune.

20. He submitted that, the element that constitute malicious prosecution were set out in the case of **Mbowa vs East Mengo District Administration [1972] EA 354** which was cited in the case of **Dr. Lucas Ndungu Munyua vs Royal Media Services & Anor [2014] eKLR** attached to these submissions as follows:-

“The criminal proceedings must have been instituted by the defendant. In the case of Gitau vs Attorney General [1990] KLR 13 Justice Trainor addressing himself on the concept of instrumental in setting the law in motion against the plaintiff stated as follows:-

‘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. The responsibility for setting the law in motion vests entirety on the officer incharge of the police station.’”

21. In this appeal, the appellant was not incharge of the police station. Consequently, it is the officer incharge of the station who would be answerable to the institution of proceedings against the respondent.

22. The defendant must have been actuated by malice. By malice it means improper and wrongful motive. The concept of malice was addressed in the case of **Dr. Lucas Ndungu Munyua** cited above, where the court stated, **“with respect to the law it is clear that the mere fact that a person has been acquitted of the criminal charges does not necessarily connote malice on the part of the prosecutor.”**

23. In the case of **James Karuga Ruru vs Joseph Mwamburi & Others Nrb CA No. 171 of 2000 [2001] eKLR**, the Court of Appeal stated that to prosecute a person is not prima facie tortious, but to do so dishonestly or unreasonably is the burden of proving that the prosecutor did not act honestly or reasonably, being on the person prosecuted.

24. In **Nzoia Sugar Company Ltd vs Collins Funfututi Civil Appeal No. 1 of 1988 KLR 399**, the court stated that the tort of malicious prosecution cannot stand unless it is shown that, **“there was no reasonable or probable cause for making a complaint to the police as the case of malicious prosecution must be founded on the absence of proof on malice or ill will. It is trite learning that acquitting per se on a criminal charge is not sufficient basis to ground a suit for malicious prosecution without spit or ill will.”**

25. The appellant had no other motive in filing a complaint with the police saves only to be assisted to get his money. The last person known to be holding the money was the respondent. The appellant was driven by honesty and had a probable and reasonable cause to make a report to police after all other civil means failed.

RESPONDENT'S SUBMISSIONS:

26. The respondent submitted that, it is not disputed that the appellant was the complainant who set the law in motion by lodging a complaint with the police that culminated in the charging and prosecution of the respondent in the criminal case.

27. Having lodged a complaint and succeeded in having the respondent charged in court, the appellant was obliged to follow up on the case and attend court when required to present his evidence against the respondent.

28. The criminal case against the respondent was never tried on merits. It was dismissed under section 202 of the Criminal Procedure Code on account of failure to attend court by the appellant at the hearing of the case.

29. It is also the appellant who caused the acquittal of the respondent by his act or omission of failing to attend court when required to give evidence in his case.

30. The acts and omissions of the appellant make him squarely liable for any damage or injury that may be found to have been suffered by the respondent and the appellant cannot escape liability merely because the prosecution was conducted by the State and not by him in person.

31. The prosecution was instituted on his behalf and the information being acted upon was supplied by the appellant and this gives rise to joint liability between him and the State.

32. On whether there was reasonable or probable cause to undertake the prosecution, the trial court analyzed the evidence and found out that there was none. He respectfully submits that given the circumstances of this case, this finding of the trial court was correct and does not warrant any interference from this court.

33. The particulars of the offence alleged to have been committed by the respondent were that he had pretended to be in a position to sell Plot No. 58 situated at Kithimani town to the appellant, information he knew to be false.

34. The respondent had sought to set the record straight by writing a detailed letter to the DCIO Mwingi which was ignored and its contents were never ascertained before his arraignment in court. The act of the police not considering the respondent's side of the story beings about an inference of malice on the part of the police.

35. The appellant too acted maliciously in setting the prosecution against the respondent in motion without any reasonable or probable cause and then failing to follow up on the prosecution or even attend court to tender his evidence.

36. He relies on the cases of *Samuel Kiprono Chepkonga vs Kenya Anti-Corruption Commission & Anor [2014] eKLR* and *G. B. M. Kariuki vs Attorney General [2016] eKLR* which held that malice can be inferred from the absence of reasonable or probable cause and also the failure to take the version of events of the accused into account.

37. It is also noteworthy that the Attorney General though a party to the proceedings before the trial court chose to take a back seat and never attend court or participated in the proceedings in order to counter the respondent's case.

38. On the question of quantum of damages, he submits that the issue is a matter of discretion. The discretion is not to be interfered with unless it is demonstrated that the trial court acted on some wrong principle or that the award is so inordinately high or low as to amount to an injustice. This was restated in the case of *Kemfro Africa Limited t/a Meru Express Services & Anor vs Lubia & Anor [1985] eKLR*.

39. The learned trial magistrate took into account that the respondent is an advocate of the High Court of Kenya. He was maliciously prosecuted in connection to the execution of his duties as an advocate. He was arraigned in court in the same town where he has practice of law.

40. He suffered great humiliation and his business was no doubt affected by this prosecution. The respondent had submitted for a sum of Kshs.5,000,000/- guided by the two authorities of *Samuel Kiprono Chepkonga vs Kenya Anti-Corruption Commission & Anor [2014] eKLR* and *G.B.M. Kariuki vs Attorney General [2016] eKLR*.

41. The appellant did not submit on what would be adequate general damages. The trial court exercised its discretion and awarded a sum of Kshs.2,000,000/= as opposed to Kshs.5,000,000/- prayed for the respondent. The trial court cannot be faulted for this exercise of discretion.

ISSUES, ANALYSIS AND DETERMINATION

42. After going through pleadings, proceedings and submissions on record, I find the issues are; **whether the elements of malicious prosecution were established? if above in positive, what was the quantum? What is the order as to costs?**

43. the settled laid down principles to be satisfied and proved by a respondent/plaintiff in a case of malicious prosecution proceedings as held in the case of *Kagame & Others vs the Attorney General (1969) EA 643* are as follows:

- i. That the prosecution was instituted by a police officer.**
- ii. That the prosecution terminated in the respondent's favour.**
- iii. That the prosecution was instituted without reasonable and probable cause.**
- iv. That the prosecution was actuated by malice.**

44. The plaintiff testified as PW1 and without restating the entire plaintiff's testimony the salient facts of his claim were as follows:

- That he is a practicing advocate of the High Court. That the plaintiff acted for a party in Yatta RMCC No. 14 of 2001, the party being James Lumumba vs Rose Holdings and Credit Investments Limited.
- That Trans field Auctioneers sold Plot No. 58 Kithimani in a public auction in execution of a lawful court decree.
- That the 2nd defendant purchased the plot that was identified as an immovable property belonging to the judgement debtor in the aforementioned case and a certificate of sale and order for delivery to the purchase was issued.
- That subsequently the 2nd defendant made a complaint at Mwingi Police Station which culminated in the arraignment of the plaintiff in Mwingi SRMCR No. 506 of 2009 whereby it was terminated on 30/7/17 and he was acquitted under section 202 of the Criminal Procedure Code.

45. The 1st defendant pleaded statutory duty and denied any ill motive or malice hence asked the court to deny the plaintiff the relief's

sought. The 1st Defendant never tendered any evidence to contest plaintiff respondent evidence.

46. The 2nd defendant's statement of defence was dated 6th September 2016. The 2nd defendant's response to the allegations by the plaintiff was that he made a bonafide complaint having lost money by purchasing plot 58 Kithimani market which had reverted back to Matuu Town Council hence not available for purchase. The 2nd defendant claimed the said sum of Ksh.174,276 was paid to the plaintiff by the auctioneer M/s Transfield Auctioneers. The 2nd defendant claimed it was the plaintiff who was his friend who introduced him to the auctioneer and persuaded him to purchase the said plot.

47. Further the 2nd defendant averred that after he made what was a genuine legal complaint the State carried out the prosecution and he had no control over the work of the police. The 2nd defendant particularly denied malice in the report to the police and further claimed there was a pending appeal being Appeal No. 99 of 2014 hence the matter had not been finalized.

48. The first 2 elements of malicious prosecution are not contested i.e. whether the prosecution was instituted by a police officer and whether the prosecution was terminated in the respondent's favour.

49. The contested elements are the last two namely whether the prosecution was instituted without reasonable and probable cause and whether the prosecution was actuated by malice.

50. In the case of *Socfinaf Kenya Limited vs Peter Guchu Kuria Nairobi High Court Civil Appeal No. 595 of 2000* it was noted as follows-

“That a suspect who was acquitted of a criminal case is not sufficient ground for filing a civil suit to claim damages for malicious prosecution or false imprisonment. Evidence of spite, ill will, lack of reasonable and probable cause must be established.”

51. The same was reiterated in *Nzoia Sugar Company Ltd vs Funfututi (1988) KLR 399*, where the Court of Appeal held that,

“Acquittal per se on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecutor.”

52. Further in the case of *Katerrega vs Attorney General (1973) EA 289*; the court observed that:

“It is well established that in a claim of malicious prosecution, malice in fact must be proved illustrating that the person instituting the proceeding was actuated either by spite ill will or by direct or improper motives.”

53. The agrees that the 2nd defendant had a genuine complaint and he made a report to the relevant authority and thereafter never participated in setting in motion the state machinery of investigations and prosecution whereby the plaintiff was arraigned in court.

54. In order to determine if the complainant was genuine and there was a legal cause of action, the court must discount any malice on the 2nd defendant's part.

55. This will help to determine whether it was the defendant who prosecuted the plaintiff since public prosecutions are conducted on behalf of a complainant since a complainant normally will not file a private prosecution unless the State has failed to act on his complaint.

56. The defendant stated that he merely made a complaint and the State machinery independently acted on his complaint. Malice in the decided authorities cited by the plaintiff and defendant i.e. *Nzoia Sugar Company Ltd vs Collins Funfututi Civil Appeal No. 7 of [1988] KLR 399* and *Samuel Chepkonga vs Kenya Anti-Corruption Commission & Anor* where the definition of malice was quoted in the case of *Mbowa vs East Mengo District Administration [1972] EA 352* malice has been described as where there is no legal reason for instituting criminal proceedings. The purpose of prosecution being personal and spiteful in the case of *Funfututi* cited above it must be shown there was no reasonable or probable cause for making to the police.

57. The 2nd defendant genuinely lost money and the plot, he was not aware the plaintiff was not to blame for his loss. There is no evidence that the plaintiff made it clear to the 2nd defendant that he was acting on behalf of a client in Yatta RMCC No. 14 of 2001. Even if he did so, there is no malice in reporting that he lost money between plaintiff and the auctioneers for the police to investigate.

58. It did not matter that the plaintiff did not declare to the 2nd defendant that he owned the said Plot. He did not receive the proceeds of sale which was by public auction not private treaty. There was no evidence of malice on the part of the 2nd defendant proved in making the report he made and thus the trial court erred and making a finding that he had same.

59. The malice is not in the making of a report to the police as 2nd defendant did. It was incumbent upon the police to investigate whether there was fraud or false pretense on the part of the sale transaction in which the 2nd defendant lost the money. There was no prove that 2nd defendant made a false report that the plaintiff was selling the plot at Kithimani, that the land was the plaintiff's and the proceeds were pocketed by the plaintiff for his own use which he refused to refund.

60. The 2nd defendant in his statement said he visited Matuu town council and the plot had been allocated to private developers illegally and the allocations were revoked in 2003.

61. The fact that the report is what precipitated the prosecution of the plaintiff implied that he had a reasonable and probable cause to complain over loss of the money. It was incumbent then upon the 1st defendant, to make a valid and competent investigation to justify the charges lodged.

62. The documents for the transactions were availed None the less the DCIO was intent on having the advocate charged in court hence malice. No investigations into the matter were carried out. Thus the prosecution of the plaintiff by the police and DPP was actuated by spite and malice.

63. The first defendant failed to tender evidence to justify and validate their investigation and charges. The prosecution also was so casual that the matter was dismissed pre- maturely. Thus the court finds that the 1st defendant did not exonerate itself from the elements of malice.

64. The court therefore allows appeal in respect of the appelland and makes the following orders;

i. The appeal is allowed with no orders as to costs.

ii. The respondent is at liberty to pursue the 1st defendant who seems not to have been enjoined in the appeal nor participated herein.

DATED, SIGNED AND DELIVERED AT KITUI THIS 17TH DAY OF JANUARY, 2020.

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C. KARIUKI

JUDGE