

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 66 OF 2019

JOHN MWAMBAMBA MWADIME.....APPELLANT

VERSUS

DR. FATMA SALIM.....RESPONDENT

J U D G M E N T

1. Before the trial court was a suit by the appellant in which he merely sought damages on the basis that the Respondent had complained to his employer, the Mombasa Hospital, to the effect that her handbag had been stolen by the plaintiff. As a consequence of this complaint, the plaintiff pleaded, the plaintiff was charged tried and later acquitted under Section under Section 210 of the Criminal Procedure Code but all the same he was relieved of his duties by the employer.

2. When served the defendant filed a statement of defence in which the suit was faulted for being defective for all intents and purposes and in particular for failure to comply with the mandatory requirements of Order 4 in that it lacked the necessary particulars of the cause of action and state of mind.

3. It was pleaded that whether grounded and intended to seek damages for unfair termination of employment or malicious prosecution, the Appellant was non-suited against the respondent in that the same could only lie against the employer or director of public prosecution, both of whom had no nexus with the Respondent. The lack of clarify on the plaint was said to embarrass and prejudice the respondent for failure to provide particulars and that there was no pleading that the charges were false or actuated by malice, ill-will or spite.

4. On the merits, it was pleaded that having left his office with a handbag under the table, she came back to find the plaintiff in her office having opened the handbag but nothing had been stolen from therein. As a consequence of such find the nursing in charge and the security personnel were called in with the result that the hospital made a report to the police leading to the plaintiff being charged with attempted theft. Justification was then advanced that the complaints made leading to the prosecution were well meant and that has crafted, filed and prosecuted, the suit revealed no cause of action thus deserving being dismissed.

5. During the hearing the plaintiff was the only person who gave evidence. He produced the proceedings at trial, the letter by which he was terminated and the letter before action. The only mention he made of the defendant was that she made an allegation that her handbag had been stolen. In cross examination the appellant confirmed that he was employed by Mombasa Hospital just as the Respondent and that he was seeking damages for having been sacked by the employer. To him the sole ground for being terminated was the complaint by the Respondent. He however confirmed having had no grudge with the Respondent and that he was never arrested nor charged by the Respondent but by the police and the ODPP.

6. For the Respondent a detailed witness statement was given which then formed the basis of an equally elaborate testimony whose gist and effect was that she indeed found the Appellant in her office while inspecting her bag and did what was expected - report to the persons concerned who then took steps taken and that her actions were never accentuated by ay ill-will or malice. In her view the criminal case against the Appellant ended in an acquittal due to the fact that the court file went missing and not due to her fault. In cross-examination, the Respondent confirmed having been the complainant in the charge sheet and that it was Mombasa Hospital who said the Appellant had previous similar incidences.

7. Having consider the pleadings and the evidence led the trial court in its reserved judgment found that the Appellant had not proved his case for malicious prosecution because he did not establish the critical essentials of the tort and further that the Respondent had no power to arrest, charge and prosecute the Appellant and could thus not be blame. On the acquittal of the Appellant the court find that it was not on the merits but on account of lack of witness after the Respondent and another witness had given evidence and that the Respondent was entitled to make the report as she did. I was underscored that no ill-motive was pleaded and proved.

8. This being a first appeal, I am mandated to proceed by way of a rehearing and come to own conclusion. However even with such mandate and latitude, the court must bear in mind that the trial court had the benefit to hear and observe the witnesses testify and therefore enjoyed a benefit this court as an appellate court does not enjoy.

9. Having appraised the record of trial avail to me, I must from the beginning point out that the pleadings even if prepared by the Appellant in person fell far short of the material facts that the law obligated him to bring out. There was in fact a slovenly pleaded and inadequately prosecuted case that was most difficult for the court to be of assistance to the parties particularly the Appellant. The cause of action pleaded could not be clearly be deciphered nor was the prayer succinct on what genre of damages was sought. That difficulty is revealed in the judgment where the trial court was left to assume that the cause of pleaded was one on malicious prosecution. Any reasonable tribunal put in the position of the trial court would have faced such difficulties but even with such difficulties the trial court did consider all it was expected to consider.

10. He clearly steered on its expected path and did not stray to consider any irrelevant matter. In those circumstances, the law gives no leeway for disturbance of the determination thereby reached. It is clear that in a suit for malicious prosecution the originator of the prosecution by investigation and choice of the charge must be the bearer of responsibility. A member of the public who makes a report for what he considers to be a criminal act, can only be faulted if it be demonstrated that she was propelled or actuated by improper and ignoble ill-will, spite or malice. None of that was pleaded nor proved against the Respondent and therefore the trial court was on point in both law and fact in the decision it reached.

11. For those reasons, the appeal as filed lacks merit and the same is hereby dismissed with costs.

Dated and delivered at **Mombasa** this **17th** day of **January 2020**.

P.J.O. OTIENO

JUDGE