



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CIVIL APPEAL NO. 27 OF 2018

SEDRICK MUSYOKA MATHUKU.....APPELLANT

VERSUS

MAKASA KITHU.....RESPONDENT

THE HON. ATTORNEY GENERAL.....INTERESTED PARTY

JUDGEMENT

1. The Respondent Makasa Kithu by a plaint dated 24th April, 2014 filed on the 29th April, 2014 the instant suit against the defendants the Honourable Attorney General and Sedrick Musyoka Mathuku jointly and severally seeking for general damages for malicious prosecution and false imprisonment, plus costs and interest of the suit arising out of the respondent's prosecution SRMCC No. 711 of 2011, where the respondent was charged with malicious damage to property.
2. The respondent averred under paragraphs 5 and 6 of the filed plaint, that he had endured the full trial and was eventually acquitted under Section 215 of the Criminal Procedure Act, following the prosecution's failure to prove the case against him to the required standard of proof.
3. The respondent further averred that his prosecution was actuated by malice and ill will on the part of the defendants and set out the particulars of malice attributable under paragraph 7 thereof.
4. The 1st defendant in a written statement of defence filed on the 26th May, 2014 generally denied the respondent's claim *in toto* and invited the respondent to strict proof thereof. The 1st defendant, in particular denied the particulars of malice attributed under paragraph (7) of the plaint.
5. Further 1st defendant averred under paragraphs 4 and 5 of the filed written statement of defence, in the alternative and on without prejudice basis that, if at all the respondent was arrested, charged and prosecuted, which is denied, then the same was done lawfully, devoid of any malice and in execution of a statutory duty after a complaint was made to the police.
6. He averred that, a thorough investigations was conducted, consequent to which a reasonable and probable suspicion against the respondent was drawn and further that the respondent's acquittal does not entitle the respondent to a civil claim, as here existed a probable and reasonable suspicion that the respondent had committed the alleged offence and the police had thereafter carried out investigations with due diligence ascertaining the truthfulness of the allegations before prosecuting him, with the only motive to vindicate the course of justice.
7. The 2nd defendant/appellant, in a written statement of defence dated 12th June, 2014 filed on the even dated denied the respondent's averments contained in the plaint.
8. And averred under paragraphs 5, 6 and 7 of the filed statement of defence that the respondent was charged after the police had carried out thorough investigations and were satisfied that a case had been established and that there was no malice in prosecuting the respondent at all. It further averred that it had exercised its constitutional rights by laying a genuine complaint with the police and had no malice at all, before the arrest, during the trial and the consequent acquittal.
9. After full hearing the matter, the trial court awarded respondent Kshs.300,000/= as general damages plus costs and interests.
10. Being aggrieved with the above decision, the appellant lodged instant appeal and set out 5 grounds of appeal.

(i) That the learned trial magistrate erred in law and in fact by giving judgement in favour of the respondent when he had not proved his case on a balance of probabilities.

(ii) That the learned trial magistrate erred in law and in fact in assessing and awarding general damages in the sum of Kshs. 300,000/= for malicious prosecution and false imprisonment which was manifestly excessive and inordinately high so as to amount to a miscarriage of justice and a misdirection in law.

(iii) That the learned trial magistrate erred in law and in fact by failing to thoroughly evaluate and interpret the evidence on record and the law prevailing which omission made him reach a decision unsupported by any law or evidence.

(iv) That the learned trial magistrate erred in law and in fact in failing to consider the law applicable in the circumstances.

(v) That the learned trial magistrate erred in law and in fact in failing to make a finding on appellant's counterclaim.

APPELLANT'S SUBMISSION

11. The appellant submitted that, it was not in dispute the appellant had no control or discretion over the subject matter before the police, as held in the case of *Susan Mutheu Muia vs Joseph Makau (2018) eKLR*. So the interested party here did not act as an agent of the appellant herein.

12. He submitted that, there are four essential elements for malicious prosecution which ought to be established as held in the case of *Mbowa vs East Mingo District Administration 1972 EA 352*, one of which respondent did not satisfy in the lower court namely, whether there was spite, ill-will or improper motive.

13. There is no dispute the police visited the scene after the report was made and collected some exhibits which were used in the proceedings.

14. The respondent did not dispute those exhibits.

15. Arising from the appellant's testimony, the lower court put the respondent on his own defence. The lower court did not make a finding the evidence was a fabrication and hence established there was a probable cause.

16. Similarly, it is clear from the court proceedings that the respondent admitted he was staking a claim over the subject land, yet he took the law into his own hands, visited the subject land then in possession of the appellant, and maliciously destroyed some items. He cannot therefore turn around and claim he was maliciously prosecuted.

RESPONDENT'S SUBMISSION

17. The respondent submitted that, this court is divested of the jurisdiction to consider the merits of the appellant's appeal herein on account of the appeal being incompetent having been instituted through a defective and incomplete record of appeal.

18. The respondent contends that, the trial magistrate in his judgement at page 5-6 quoted from the case of *Kagame & Others vs The Attorney General (1969) EA 643* that had enumerated the legal principles that are applicable to a case of malicious prosecution. Thus the trial magistrate did appreciate the legal principles that are applicable to a case of malicious prosecution.

19. Further it is argued that, the Attorney General did not offer any evidence at the trial to dislodge the respondent's assertion that his arraignment in court in the criminal case was actuated by malice and no proper or any investigations were conducted.

20. The trial court placed reliance on the case of *Margaret Njeri Wanyoike vs Chief Inspector Ann Waruguru Gitate & 3 Others Ex-parte Republic (2014) eKLR* in arriving at the conclusion that an attempt to criminalize an otherwise civil dispute over ownership of land was in all circumstances malicious prosecution.

21. On the issue of the general damages awarded, it was submitted that, there is no scientific formula applied in arriving at a specific figure. The issue is a matter of discretion and unless it is otherwise proved that a wrong principle was applied or that the damages are manifestly excessive or too low as to cause an injustice, an appellant court is hesitant to interfere with the discretionary powers of the trial court. The respondent relied on the Court of Appeal in *R.J.T vs H.M.T (1977) eKLR* which long ago settled this principle.

22. The respondent submitted for a sum of Kshs.500,000/= and quoted two cases of Thomas *Mboya Olouch & Another vs Lucy Muthoni Stephen & Another (2008) eKLR* and *Maundu vs Kwiya & Others (2003) EA 144*.

23. On their part, the appellant and the Attorney General did not deem it fit to submit on quantum. The trial court doing the best it could reduced the sum proposed by the respondent to Kshs.300,000/= The trial court did not depart from the authorities cited by the respondent and it cannot therefore be said that the award was so inordinately high as to constitute an injustice. The award does not warrant interference from this court.

INTERESTED PARTY'S SUBMISSIONS

24. It was submitted that, the respondent was not entitled to the general damages awarded as he did not prove that he was maliciously

prosecuted. It relied on the case of *Katerrega vs Attorney General (1973) EA 289*; where the court observed that;

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

25. It submitted that the police were carrying out their mandate as provided by the law. A report was made by the appellant to the police and that the police while believing the same to be true proceeded to charge and prosecute the respondent.

26. It contends that, it was in the discretion of the court to make a finding as to quantum of damages payable to the respondent. In the case of *Stephen Gachau Githaiga and Another vs The Hon. Attorney General eKLR*, the court clearly stated that, **“the assessment of the damages ought to be within the discretion of the trial court and the appellate court will only interfere where the trial court took into consideration an irrelevant factor or left out a relevant factor or the award was deemed to be too high or low as to amount to an erroneous estimate or that the assessment is not based on any fundamental evidence.”**

27. It urges the court to do find that the respondent did not prove his case on a balance of probabilities and the appeal herein be allowed with costs.

EVIDENCE

28. From the record, the matter was substantially partly heard before the then trial court and parties through their respective advocates thereafter took directions and agreed to have the matter proceed from where it had reached upon typing of proceedings.

29. The respondent, in his evidence in chief wholly adopted his recorded filed statement dated 24th April, 2014 and the list of documents as his evidence in corroboration of his claim against the defendants which documents were produced and admitted in evidence as Pexh 1-3 respectively.

30. He, on cross-examination by the 1st defendant's counsel conceded that he had not produced in evidence a document in proof of ownership of the disputed portion of land. He maintained that he was arrested and charged for destroying some seedlings allegedly belonging to the 2nd defendant, upon the 2nd defendant's complaint, to the police.

31. He, on further cross-examination conceded that there was a pending land case, filed in the year 2013 relating to the same land dispute pending before Court No. 2. He reiterated that the police ought to have carried out proper investigations before arresting him.

32. He, on cross examination by the 2nd defendant's advocate conceded that he had indeed field a civil matter vide Mwingi SRMCC No. 179/13 over the same subject matter, which fact he had not disclosed on his record filed statement.

33. He, on further cross examination stated that his father is deceased and has not obtained letters of administration to administer, the estate of his late father. He, on further cross examination stated that he was acquitted in respect of the criminal proceedings preserved against him, together with one Komu Ngonde.

34. He maintained that the 2nd defendant knew too well that the disputed portion of land belonged to him. He called one witness, Muia Vengi Karani (PW2) who in his adduced evidence adopted his recorded filed statement as his evidence in the matter.

35. PW2 on cross-examination by the defendant's respective advocates stated that the respondent had inherited the disputed portion of land from his late father, one Kithu. He stated that the 2nd defendant was out to grab the respondent's portion of land and had in fact, fenced it off, working in cahoots with one Komu Ngandu.

36. The 2nd defendant (hereinafter referred to as DW1) Sedrick Musyoka Mathuku in his part adduced evidence by wholly adopting his recorded and filed statement together with the filed list of documents as his evidence in the matter.

37. It was his case and testimony that he had made a bonafide complaint with the police who had taken up the matter by carrying out independent investigations on his lodged complaint, without his directions. He stated that the respondent was properly prosecuted and in fact was found to have had a case to answer in the criminal proceedings against him.

38. He on cross-examination by the respondent's advocate confirmed that he was the complainant against the respondent vide Mwingi SRMCC No. 711/11 where the respondent was consequently acquitted. He further conceded that he had a protracted land dispute with the respondent vide Mwingi SRMCC No. 79/13.

39. The same case was before court where the trial court had made a decision to the effect that the disputed portion of land belonged to the respondent, which case, he hastened to add is pending determination on a lodged appeal.

40. He maintained that the respondent had damaged his properties on the disputed portion of land which he had fenced off, which portion of land he had purchased in the year 1994. He, on further cross-examination stated that he is yet to develop the purchased land, although he has building materials thereon, which portion of land he stated is still under adjudication.

41. He on cross-examination by the 1st defendant counsel maintained that he had purchased the disputed portion of land from the deceased's son and he executed a sale agreement to that effect in the year 1994.

42. He stated that the police had carried out their own independent investigations to establish the truth on his lodged complaint and that the police had no malice at all in the respondent's prosecutions.

43. He, on re-examination reiterated that he had supplied the police with all the necessary documents in proof of ownership of the disputed portion of land but the respondent, at no time had he, lodged a complaint, that he was the bonafide owner of the disputed portion of land.

44. He called one witness DW2 Onesmus Kisinyinmndi Kasoni who in his evidence in chief wholly adopted his recorded filed statement as his evidence in the matter. He, on cross-examination stated that he had executed a land sale agreement dated 4th January, 1994, on behalf of his late father who at the time was unable to execute the agreement due to his health which agreement was attested by the area chief.

45. He further stated that the 2nd defendant had purchased some two portions of land from his late father situate Nuu and Nguni road. He, on re-examination reiterated that he had executed the same agreement with the 2nd defendant as his late father, at the time was of poor health which sold portion of land are partially developed. The 1st defendant did not tender any evidence on their defence.

ISSUES, ANALYSIS AND DETERMINATION

46. After going through the evidence on record, pleadings and submissions filed, I find the issues are;

i. Whether the record of appeal is defective and if so the consequence thereof?

ii. Whether there was a pleaded counterclaim which was ignored by the trial court?

iii. Whether the respondent proved his case on a balance of probabilities?

iv. Whether the award of Kshs. 300,000/= for malicious prosecution and false imprisonment was manifestly excessive and inordinately high so as to amount to a miscarriage of justice and a misdirection in law?

v. What is the order as to costs?

47. On whether the record of appeal is defective, the respondent has not pointed out single defect which would warrant the court to hold the same as defective. I have perused the same and found that it contains the basic documents namely, memorandum of appeal, pleadings, of the trial court, exhibits, judgement and decree plus certificate of costs *inter alia*.

48. The record is though convoluted as it is not paginated such that I could not trace where about the trial court proceedings. However, as the trial court record was at hand and I was able to access the proceedings. I find nothing to justify striking out the record but for the minor omissions noted same are curable courtesy of Art 159 (2) d of the constitution of Kenya.

49. On merit, the settled laid down principles to be satisfied and proved by a respondent 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.

50. I have carefully considered the entire evidence adduced by the parties in support of their respective cases as well the filed written submissions supported by a number of cited legal authorities' and now wish to make the following observation/findings and by ultimate decision in the matter.

51. The first 2 principles above namely that the prosecution was instituted by a police officer and that the prosecution was terminated in the respondent's favour are not contested. What is in issue is whether the prosecution was instituted without reasonable and probable cause and whether the prosecution was actuated by malice.

52. It is not in dispute at issue that the respondent was arraigned in court, alongside one Komu Ngonde vide Mwingi SRMCC No. 711 of 2011 with the offence of malicious damage to property contrary to Section 339 (1) of the Penal Code, which complaint was laid to the police by the 2nd defendant, wherein the respondent after enduring the entire trial was acquitted under Section 215 of the penal code, following the trial court's finding that no conclusive evidence on ownership of the suit land property was presented before court.

53. The respondent in evidence maintained that he was arrested and charged for destroying some seedlings allegedly belonging to the 2nd defendant, upon the 2nd defendant's complaint, to the police. it was clearly established that the respondent had failed to comply with the directives given by the chief as he was summoned on several occasions on the matter and failed to appear thus the appellant resulted to informing the police of the matter with the intent of getting justice done.

54. The 2nd defendant made a bonafide complaint with the police who had taken up the matter by carrying out independent investigations on

his lodged complaint, without his directions. The respondent was prosecuted and in fact was found to have had a case to answer in the criminal proceedings against him. The malicious damage was on prima facie basis established but for the dispute as to the ownership of subject land the trial court acquitted the respondent.

55. As for the police, had good intentions as they were merely performing their statutory duties when they decided to investigate the allegations made against the respondent and prefer charges against him as they had reasons to believe that the offence that had been committed upon reasonable and probable suspicion was one which could be tried in a Court of Law.

56. 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.”

57. The same was reiterated in *Nzoia Sugar Company Ltd vs Fungututi (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.”

58. 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.”

59. There is no dispute the police visited the scene after the report was made and collected some exhibits which were used in the proceedings. The respondent did not dispute those exhibits. Arising from the appellant’s testimony, the lower court put the respondent on his own defence. The lower court did not make a finding the evidence was a fabrication and hence established there was a probable cause.

60. Thus the court finds that the two elements of malicious prosecution which ought to have been proved inter alia namely that the prosecution was instituted without reasonable and probable cause and that the prosecution was actuated by malice were not established thus the appeal has merit and same is allowed.

61. Thus the court makes the following orders;

i) The appeal is allowed and the lower court suit is dismissed with no orders as to costs in both lower court and in this appeal.

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

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C. KARIUKI

JUDGE