



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 61 OF 2011

JIMMY MUSYOKI KILONZO.....APPELLANT

VERSUS

JOHN KYALO KILONZO.....1ST RESPONDENT

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

(Being an appeal against the judgement of Hon S.M. Mungai SPM delivered on 25.3.2011 in Machakos CMCC 970 of 2011)

BETWEEN

JIMMY MUSYOKI KILONZO.....PLAINTIFF

VERSUS

JOHN KYALO KILONZO.....1ST DEFENDANT

THE HON ATTORNEY GENERAL.....2ND DEFENDANT

JUDGEMENT

1. The Appellant instituted a suit in the trial court against the respondents for recovery of Kshs 100,000/- being special damages, general damages for wrongful arrest, confinement in police cells and malicious prosecution, interest and costs of the suit.
2. It was pleaded that on or about the 16th day of December, 2003 the 1st respondent made a false and malicious report to the CID office to the effect that the appellant had forged transfer forms and that without investigation, CID officers arrested and locked him up and was later charged with the offences of forgery and uttering a false document. It was pleaded that the appellant was tried in Machakos court for three years and was found innocent and acquitted on 29.11.2006. It was pleaded that the arrest, confinement and prosecution were actuated by malice as pleaded in paragraph 9 of the plaint and as a result the appellant incurred costs of Kshs 100,000/-.
3. The 1st respondent in his defence pleaded that the report was true; that he is not in charge of investigation and prosecution of the appellant. He denied malice and damages and averred that if any cost was incurred then it was at the instance of the prosecution and that the 2nd respondent was responsible. The 1st respondent prayed that the suit be dismissed. The 2nd respondent in their defence denied that there was any arrest or confinement and pleaded in the alternative that the same was lawful. The 2nd respondent denied malice and liability for loss and damages and pleaded that the suit was bad in law for offending Section 13A of the Government Proceedings Act and that the claims for false arrest were barred under Section 3(1) of the Public Authorities Limitation Act CAP 39; that the suit offended the provisions of Order VI Rule 8 of the Civil Procedure Rules.
4. The evidence in the trial court was as follows. Pw1 was the appellant who testified that his brother reported that he had forged transfer documents as a result of which he was arrested, locked up, detained, charged and found innocent. He presented receipts of the money he paid for legal representation and sought that the respondents be found liable for malicious prosecution. He testified that he gave the 2nd respondent 30 days notice and testified that he filed the suit within a year from acquittal. On cross examination, he testified that the suit property Plot 56A Kangundo was not part of the property that was the subject of succession cause 233 of 2003 and he admitted selling the property. On reexamination, he confirmed that the succession cause was 335 and that the prosecution was malicious as his father had given him the plot. He testified that the conditions in the cells were dehumanizing to him. The appellant closed his case and the respondents also tendered their evidence.
5. Dw1 was the 1st respondent who testified that his deceased father had earlier kicked out the appellant from the home and that the subject

plot 56A Kangundo was part of the deceased's estate and was to be shared equally amongst the family yet the appellant was trying to grab the same and this prompted him to make a report to the CID that led to the appellant being arrested. He testified that there was a transfer form from the deceased to the appellant that was found not to be genuine. On cross examination, he testified that he was aware that gifts *intervivos* could be given and that the criminal case in the trial court was adjourned because of failure to avail the document examiner. The 2nd respondent closed their case without calling any witness.

6. The trial magistrate found that the only reason why the appellant was acquitted was because of failure to avail the document examiner but was cognizant that the suit plot was the subject of a dispute and that the outcome of the succession cause was unknown. The court found that he appellant failed to prove his claim and dismissed the suit. The appellant being dissatisfied with the decision filed the instant appeal that took issue with the trial magistrate's finding. The appeal took issue with the magistrate's delving into the evidence in the criminal trial as well as the matters related to the succession cause yet the proceedings were not before her. The appellant prayed that the appeal be allowed; the judgement of the trial court be set aside and be substituted with a finding in favour of the appellant as well as an award of damages to him.

7. The appeal was canvassed *vide* submissions. Learned counsel for the appellant submitted that prosecution was instituted at the instance of the respondents; that the prosecution was terminated in the appellant's favour; that the respondents were actuated by malice as the 2nd respondent did not tell the court how the decision to arrest and charge the appellant was arrived at. Counsel urged the court to allow the appeal.

8. *Vide* submissions filed on 22.7.2019 by the 1st respondent's counsel, it was submitted that the appellant in CMCC 970 of 2009 did not meet the standards required for proof of malicious prosecution as acquittal in itself did not connote malice. Counsel submitted that the 1st respondent had reasonable cause to make a report to the police and that there was no evidence that the police officer did not believe the report or was reckless as to the genuineness of the grounds for preferring charges against the appellant. Learned counsel submitted that the record of appeal was not before the court as there was no order or decree and hence the same ought to be struck out for failure to meet the procedural requirements. Reliance in this regard was placed on the case of **Ndegwa Kamau t/a Sideview Garage v Fredrick Isika Kalumbo (2016) eKLR**.

9. Cognizant of my duty as the first appellate court and having subjected the evidence in the trial court to fresh scrutiny, the issue for determination is whether the tort of malicious prosecution and false imprisonment had been proven to the required standard. The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice.

10. According to Odunga's Digest on Civil Case Law and Procedure page 5276, the essential ingredients to prove malicious prosecution are as follows:

- a) *The criminal proceedings must have been instituted by the defendant*
- b) *The defendant must have acted without reasonable or probable cause*
- c) *The defendant must have acted maliciously*
- d) *The criminal proceedings must have been terminated in the plaintiff's favor.*

11. In this case, there is no doubt that the respondents instituted criminal proceedings against the appellant which proceedings were terminated in the appellant's favor hence proving two of the essential ingredients of malicious prosecution.

12. The appellant was charged of forgery contrary to section 349 of the Penal Code before Machakos Chief Magistrate's Court *vide* **Criminal Case No. 4953 of 2003**. Did the 2nd respondent's agents act with reasonable and probable cause? Reasonable and probable cause has been defined in the case of **Glink v Mclver [1962] AC 726** where Lord Devlin held that;

“reasonable and probable cause means that there must be sufficient ground for thinking that the accused was probably guilty but not that the prosecutor necessarily believes in the probability of conviction...”

13. According to the charge sheet, the appellant was charged with an offence of forgery. According to the particulars of the said offence;

“the appellant ...with intent to defraud forged a certain transfer ... respect of Plot 56A at Tala Market purporting to have been signed by Samson Kilonzo Nthei.”

14. The learned trial magistrate noted that “in a case of forgery, it must be proved that the appellant authored or that the alleged author is not the maker of the document and in the absence of evidence to the contrary that the late Samson Kilonzo Nthei is the one who signed the transfer to the appellant and Pw9, there was no evidence to a different finding” The learned magistrate found that the prosecution failed to prove that the appellant forged the transfer form to warrant the appellant to be put on his defence. It appears the prosecution sanctioned the appellant's file without sufficient grounds or evidence that the accused was probably guilty.

15. I find that that the 2nd respondent failed to present evidence as they closed their case without calling any evidence meaning on a balance of probabilities, the appellant's contention that the police investigations and available evidence was too shallow to make a right thinking person like a police officer to think that the appellant was probably guilty of forgery was true. From the available evidence, the charges were premised on a report that was made by the 1st respondent and there was nothing presented in evidence that led the prosecution to form an

opinion of probable cause. It can be implied that the prosecution was malicious. The appellant was discharged of the said offence.

16. With regard to *False Imprisonment*, It was an undisputed fact that the appellant was arrested and detained at the police station. The appellant was arrested on 16.12.2003 and remained in detention until 18.12.2003. The constitution Article 49(1) (f) provides that a person arrested shall be brought to a court of law within 24 hours. The detention of the appellant beyond the 24 hours was indeed a violation of his constitutional fundamental rights which would entitle him to general damages.

17. In the Ugandan case of *Mugwanya Patrick vs Attorney General High Court Civil Suit No. 154 of 2009 Justice Stephen Musota* (as he then was) stated that;

“The civil tort of false imprisonment consists of unlawful detention of the plaintiff for any length of time whereby he is deprived of his personal liberty. It must be total restraint....where an arrest is made on a valid warrant it is not false imprisonment; but where the warrant or imprisonment is proved to have been effected in bad faith then it is false imprisonment.”

18. Therefore the arrest and detention of the appellant for more than the mandatory 24 hours or 1 day was indeed wrongful imprisonment by the 2nd respondent's agents.

19. Once the detention or imprisonment is established the onus shifts to the defendant to show that it was reasonably justifiable and no such attempt was made in the instant case; the 2nd respondent opted not to call any witnesses. See *Sekaddu v Ssebadduka [1968] EA 213 7*

20. I therefore find that the arrest, imprisonment, detention and prosecution of the appellant was wrongful, illegal and malicious. The court should now determine whether the respondents acted without reasonable or probable cause.

21. In the present case, it is the uncontroverted evidence of the appellant that he was detained. There is no evidence that he was asked to explain himself or tender any explanation for the complaint that was levelled against him. The 2nd respondent then proceeded to institute criminal proceedings against the appellant and the appellant was acquitted of the charges. Had due consultation and investigations been conducted by any ordinary and prudent respondent prosecutor, his position would have led him to the conclusion not to arrest, detain and charge the appellant.

22. I have carefully read the judgment of the trial court and agree with the same. I find that the 2nd respondent acted without reasonable or probable cause in detaining the appellant. The 2nd respondent did not seem to have all the necessary material to satisfy a prudent and cautious man not to institute criminal proceedings against the appellant. They ought to have verified that the appellant was or was not the author of the document and therefore not prosecute him before verifying this fact.

23. I shall address the element of malice. In *Gwagilo v Attorney General [2002] 2 EA 381 (CAT)*, malice in the context of malicious prosecution is an intent to use the legal process for some other purpose than its legally appointed and appropriate purpose and the appellant could prove malice by showing for instance that the prosecution did not honestly believe in the case which they were making that there was no evidence at all upon which a reasonable tribunal could convict that the prosecution was mounted with a wrong motive and show that motive. Relating that to the present circumstances, the 2nd defendants officials had ample to time to carry out proper investigations since they were given copies of the transfer but instead opted to institute criminal proceedings and detain the appellant. Therefore in this case malice was clearly inferred from the 2nd appellant's failure to consult the law and conduct proper investigations as a cautious and prudent person would have done upon receipt of the 1st appellant's report. The 1st appellant had presented the subject documents and it was the duty of the respondents together with their agents to subject the document to thorough investigation by inviting a document examiner. In that regard I find the burden lay upon the respondents to discharge. Indeed the trial court in the criminal case acquitted the appellant on the ground that a document examiner was not called to testify. The 1st respondent started by taking a complaint to the police and according to him the appellant had committed a crime and it was his duty to avail to the police the relevant evidence and collaborate with them and that he should not be exempted from blame after the criminal case had collapsed.

24. Basing on all the above, the appellant fulfilled the essential ingredients to prove malicious prosecution as well as unlawful detention.

25. The appellant pleaded for special damages, general damages and costs of the suit. The law relating to special damages is settled. In *Bonham Carter v. Hyde Park Hotel Ltd (1948) 64 TL P 177* the guiding principle is that special damages must be specifically pleaded and strictly proved. See also *Hassan v Hunt [1964] EA 201*

26. The appellant in the plaint pleaded special damages to a tune of Kshs 100,000 being expenses paid to the advocate. The receipts were tendered in court and therefore the special damages were proved. This prayer is accordingly allowed.

27. With regard to general damages, it is trite law that general damages are awarded at the discretion of court. Damages are awarded to compensate the aggrieved, fairly for the inconveniences caused as a result of the actions of the Respondent. Clearly the appellant was inconvenienced by the malicious prosecution by the respondent. The appellant was placed in custody for about three days and he suffered a lot of anguish in addition to a damaged reputation. He had to be attended at Kenyatta hospital after his release. Hence I will allow the prayer for general damages. In *Joseph Wamoto Karani v C. Dorman Limited & another [2018] eKLR Kshs 2,000,000/-* was awarded as a global sum for malicious prosecution. I find an award of Kshs 2,000,000/ as general damages would be adequate compensation for the appellant.

28. Before penning off I need to deal with the respondent's claim that the absence of a decree should lead to the striking out of the appeal. The 1st respondent in his appeal has challenged the record of appeal being unprocedurally filed as there was no decree. In applying the purposive approach, in line with the overriding principles of justice and considering Section 3A of the Civil Procedure Act this court is aware

of the decision of the trial court and the said decision did not involve a monetary claim hence the decree would make no difference in the appeal. The suit had been dismissed and there would have been no purpose to extract one for execution yet a negative order had been made. I am not persuaded by the 1st Respondent that the appeal be dismissed on that ground and hence the objection is rejected.

29. In the result I find merit in the appeal. The same is allowed. The judgement of the trial court dismissing the appellant's case is hereby set aside and substituted with an order that judgement be and is hereby entered for the appellant against the Respondents jointly and severally as follows:

a) General damages of Kshs 2,000,000/.

b) Special damages of Kshs 100,000/.

c) Costs of the suit plus interest.

The appellant is awarded costs of the appeal.

It is so ordered.

Dated and delivered at Machakos this 5th day of February 2020.

D. K. Kemei

Judge