



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT HOMA BAY**

**CIVIL APPEAL NO. 10 OF 2018**

**AGGREY OMODING.....APPELLANT**

**VERSUS**

**FREDRICK OTIENO ONYANGO.....1<sup>ST</sup> RESPONDENT**

**RAJAB KUMAR HARSHAD PHAI PATEL.....2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

(An appeal from the original judgment of Hon. Mr. T. Obutu, SPM, delivered on 15<sup>th</sup> March, 2018

in Homa Bay CM's Court Civil Case No.12 of 2013).

**JUDGMENT**

[1] This appeal emanates from the decision and Judgment of the Senior Principal Magistrate at Homa Bay in CMCC No. 12 of 2013 in which the appellant **Aggrey Omoding**, sued the first respondent **Fredrick Otieno Onyango**, the second respondent, **Rajab Kumar Harshad Phai Patel** and the third respondent, The Attorney General of the Republic of Kenya for general and exemplary damages arising from alleged wrongful arrest and malicious prosecution of the appellant at the instance of the respondents.

[2] The appellant/plaintiff pleaded in his statement of claim that he was a dealer in petroleum products and acted as an agent of Oil Companies based at the Kenya pipeline company depot in Kisumu County. As such he was on duty on the 12<sup>th</sup> June 2010 undertaking his lawful trade when the first respondent /defendant as an agent of the second respondent /defendant confronted him in the company officer police officers attached to the Criminal Investigations department (CID) who arrested him on allegations of intending to defraud the second respondent by false presences a sum of Ksh 859,200/-. Eventually he was arraigned in a criminal court for the offence.

[3] However, during the criminal trial and after the close of the case for the prosecution, the court acquitted him after ruling that he had no case to answer. He later filed the present suit against the three respondents contending that his arrest and arraignment were actuated by malice on their part. He therefore prayed for damages against the three who denied the claim in their respective statements of defence and prayed for dismissal of the suit.

[4] It was only the appellant who testified and led evidence at the trial of the suit. He did not call any other witness. None of the respondents appeared for the hearing of the suit despite the denial of the claim in their pleadings. This meant that they had no evidence to officer in support of their respective defence. Nevertheless, the obligation to establish the claim against them on a balance of probabilities lay with the appellant. Their failure to lead evidence in support of their pleadings merely rendered down their defence thereby rendering the appellant's evidence uncollaborated.

[5] The obligation to establish and/or prove the claim against the respondents still remained with the appellant notwithstanding his uncorroborated evidence at the trial. It was against that background that the trial court considered the appellant's pleadings and evidence and arrived at the conclusion that the claim was never established against the respondents. Consequently, the appellant's case was dismissed with costs for want of proof.

[6] Being dissatisfied with the decision, the appellant preferred this appeal on the basis of the ground set out in the memorandum of appeal filed herein on 13<sup>th</sup> April, 2013, through the firm of **Kinanga & Company Advocates**.

The duty of this court was to reconsider the evidence and draw its own conclusion bearing in mind that the trial court had the benefit of

seeing and hearing the availed witness.

[7] In that regard, the plaintiff/appellant (PW1) testified to the effect that he was a resident of Nyawita in the county of Kisumu and a businessman by occupation dealing in petroleum products. That, on the 12<sup>th</sup> June 2010, he was arrested by a group of four police officers while at his place of work. The four officers were led to him by the first respondent. They alleged that he received a sum of Ksh 859,200/= from the record respondent on a promise that he would supply twelve thousand (12,000) liters of diesel.

[8] He denied the allegation and was whisked to Kisumu Central police station from where he was removed to Homa Bay police station on the 13<sup>th</sup> June 2010 and arraigned in court at Homa bay on the 14<sup>th</sup> June 2010 for the offence of obtaining money by false pretenses in Criminal case No. 1175 of 2010. He produced the necessary charge sheet (PEX 4) He was however acquitted of the charge on the 22<sup>nd</sup> December 2012 as soon as in the necessary copy of the proceedings and ruling (PEX 5)

[9] The appellant contended that he was humiliated in public during his arrest and was not even informed of the reason for the action. He also contested that he suffered loss of business and damage to his reputation as members of the public and his family members viewed him as a criminal and a person not worth of trust. He further contested that he suffered monetary loss by travelling to and from Homa Bay to attend the criminal case trial. He therefore prayed for damages and costs of the suit against the respondents.

[10] The trial court considered the unchallenged evidence against the pleadings in the plaint and dismissed the claim by stating that:-

*“I do not see any malice or abuse of judicial process in the prosecution in the criminal case.....”*

*The plaintiff in this case was under duty to proof malice on the part of the defendants and that the defendants had improper and indirect motives in pursuing the false charge. Accordingly, I do make a finding that the plaintiff has not established and proved his case as required by law of malicious prosecution”*

[11] Having re-visited and considered the evidence against the appellants grounds of appeal and the rival submissions of the appellants and the respondents, that opinion of this court is that this action was poorly founded on that tort of malicious prosecution which occurs where there is no legal basis or reason for instituting criminal proceedings against a party and whose purpose should be personal and spite rather than for the public interest as was held in the Eastern Africa Court of Appeal in the case of **Mbowa Vs East Mengo District Administrator (1912) EA 352**.

[12] The same court states that the tort occurs as a result of the abuse of the minds of judicial whose responsibility is to administer crucial justice and that it suggests the existence of malice and the distortions of the truth. The court then went further to define the four (4) essential ingredients of the tort and emphasized that there must “Unite” in order to create or establish a cause of action. In other words, it is a “mixed grill” or “Cocktail” of the four requirements which creates and establishes the tort of malicious prosecution.

[13] The said requirements or ingredients are:-

**1] The criminal proceedings must have been instituted by the defendant, i.e. he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority.**

**2] The defendant must have acted without reasonable or probable cause i.e. there must have been no facts, which or reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified.**

**3] The defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings with an improper and wrongful motive, i.e. with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose.**

**4] The criminal proceedings must have been terminated in the plaintiff’s favour, i.e. the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge.**

[14] The foregoing requirement had to be proved if the plaintiff were to succeed in his claim against the respondents whether or not the respondents led any evidence in support of their defence. In that regard, the plaintiff proved and established without dispute the first and fourth ingredients/requirements aforementioned by showing that he was arrested and charged with the material criminal offence at the instance of the first and second respondents. The third respondent preferred the charge and prosecuted the case on answer of the information given by the first and second respondents. The presupposition was that the third respondent carried out proper investigations prior to charging the plaintiff and arraigning him before a criminal court.

[15] With regard to the second and third ingredients what constitutes a reasonable and probable cause was defined in **Simba Vs Wambar (1987) KLR 601** in the following terms:-

*“The plaintiff must prove that the setting of the law in motion by the inspector was without reasonable and probable cause.....if the inspector believed what the witness told him then he was justified in acting as he did and I am satisfied that the plaintiff has not established that he did not believe them or alternately that he proceeded recklessly and indifferently as to whether there were genuine grounds of prosecuting the plaintiff or not.”*

[16] In **James Kanega Kiiru –versus- Joseph Mwamburi** others (In Appeal No. 171 of 2000 Nairobi the court held that:-

**“To prosecute a person is not prima facie torturous, but to do so dishonestly or unreasonably is. And the burden of proving that the prosecutor did not act honorably or reasonably lies on the person prosecuted”.**

The test for reasonable and probable cause was set in the case of **Kagame –versus- Attorney General (1969) EA 643**, where it was stated that reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged as probably guilty of the crime imputed.

[17] It was further stated that the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of objective test. That if the material within the knowledge of the prosecutor at the time he instituted the prosecution must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty.

[18] The court went further to state that if and in so far as the material is based on information, the information must be reasonably credible, such that an ordinary reasonable, prudent and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for the prosecution.

It would appear from the foregoing observation in the **Kagame case** that the material or information to be relied upon prior to the prosecution of an accused person must be cogent and credible for a reasonable man to opine that the accused is probably guilty. Short of that, the subsequent action of charging and prosecuting the accused would be actuated by malice.

[19] In **Thomas Mboya Oluoch & another –versus- Lucy Muthoni Stephen & another HCCC NO.1729 OF 2001 at Nairobi**, the lack of good faith was included as an element of proof of malice similar to lack of reasonable and probable cause. In that case, it was heard that:-

**“Unless and until the common law tort of malicious prosecution is abolished by Parliament, policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense ..... I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable and so obviously crafted to be self-serving. To deploy the state’s prosecution machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes”.**

[20] In applying principles set out in all those cases to the evidence available at the trial by the appellant and in so far as the aforementioned second and third ingredients of the tort of malicious prosecution are concerned it is appealed that the appellant merely narrated to the trial court the circumstances under which he was arrested and arraigned in the criminal court following a complaint made against him by the first and second respondents. In so doing he did not make any attempt to explain why or how the complaint was malicious and unfounded. He did not even say that the first and second respondents had no good reason to complain against him. In any event, it was evident that he dealt with them directly or indirectly with regard to the supply of diesel, a petroleum product. It was that diesel and that product which formed the basis of his arrest and arraignment in court, a fact which was not disputed.

[21] Apparently, the appellants' evidence suggested or implied that his grievance was with the police rather than the first and second respondents in the manner that he was arrested, held from one police cell to another before being arraigned in court with a criminal offence, all within a short period of time. He took it that the complaint by the first and second respondent was never investigated such that he was arraigned in court on a false unjustified charge and in bad faith.

[22] However in cross examination, the appellant indicated that investigations were carried out before being arraigned in court when he stated that:

**“I was proceeding police cell during the investigations by the police (emphasis added). They should have arrested me after investigations not before”**

This statement showed that the applicant was aggrieved by his immediate arrest no sooner had the complaint been made rather than being charged before completion of investigations.

[23] There was no obligation for the police to arrest him only after investigations. They ought to have been commended for receiving a complaint and acting on it immediately without the usual delays occasioned by logistics. Their action and conduct in the whole transaction was not proved to have been undertaken without good faith, but it would have been a different story if they had charged the appellant without having carried out any form of investigations of the complaint made by the first and second respondents. The fact that the appellant was arraigned in a criminal court was evident that investigations were carried out unless proved otherwise which was not the case herein.

[24] The question as to whether the investigations were properly conducted by the police fell for determination by the criminal court and not the civil court. What clearly came out in the trial subject of this appeal was that the appellant did not establish on a balance of probabilities that the third respondent was lacking in good faith when he received a criminal complaint from the first and second respondents and acted upon it. He did not show to the satisfaction of the trial court that the complaint was insufficient and not worth of belief in sustaining criminal charge. Indeed, he failed to establish that all the respondents acted maliciously and without reasonable or probable cause in putting in motion the entire criminal justice process to have him arrested and arraigned in court.

[25] For all the foregoing reasons, this court concurs with and affirms the finding of the trial court that the appellant did not prove that the action taken against him by the respondents jointly and or severally was actuated by malice. Consequently, the plaintiff's case against the respondent was untenable notwithstanding his acquittal by the criminal court.

In the upshot, this appeal is wanting in merit and is hereby dismissed with costs to the respondents in the original suit and this appeal.

[26] The appellant claimed general and exemplary damages for wrongful arrest and malicious prosecution.

After dismissing the appellant's case more of the basis of liability, the trial should **have but not find it necessary to access damages** awarded to the appellant if his claim had succeeded.

Normally, the damage to a claimant results at the stage in the criminal proceedings when the claimant is acquitted i.e. end in his favour, whether final or not. And actions founded on malicious prosecution mainly attract damages in respect of reputation. (See, **Mbowa –versus- East Meno Oshwal Amin** (Supra)

[27] The appellant, in his testimony before the trial court, implied that his reputation and standing in society was damaged by the respondents' actions against him. He said that he was a "big" businessman but was handcuffed in public during his arrest. People viewed him as a thug and together with his relatives lost trust in him. He also implied that he was humiliated in the open court during the criminal proceedings when witnesses stated that he stole money. He also alluded to loss of business as well as incurring expenses travelling to court to attend trial.

[28] Basically, punitive or exemplary damages are awarded under, two circumstances, **firstly**, where there is oppressive, arbitrary or unconstitutional action by servants of the government and **secondly**, where the defendants action was calculated to procure to him some benefit, not necessary financial at the expense of the plaintiff (see, **Obango & another –versus- Municipal Council of Kisumu [1971] EA 91**)

In this case, the appellant did not establish any of the two elements against the respondents. He was therefore not entitled to exemplary damages. However, if this appeal had succeeded he would have been established to general damages for malicious prosecution. In that regard, taking into consideration the circumstances of the case and the appellant's standing in society, a sum of kshs.500, 000/- would suffice. Otherwise, this appeal stands dismissed.

Orders accordingly.

[Delivered and signed this 6<sup>th</sup> day of **October, 2020**].

**J.R. KARANJAH**

**JUDGE**