



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 642 OF 2012**

**CO-OPERATIVE BANK OF KENYA LIMITED.....APPELLANT**

**VERSUS**

**SYLVESTER BARAZA OJIAMBO.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**A. Introduction**

1. This is an appeal against the judgement of the Chief Magistrate Milimani CMCC No. 8730 of 2007 that was delivered on the 9<sup>th</sup> November 2012.
2. The 1<sup>st</sup> respondent instituted suit against the appellant and 2<sup>nd</sup> respondent for compensation for wrongful arrest, false imprisonment, malicious prosecution and defamation of character as well as special damages.
3. The trial court awarded the 1<sup>st</sup> respondent Kshs. 400,000/= general damages for malicious prosecution as well as cost of the suit and interests.
4. The appellant who was the 1<sup>st</sup> defendant in the lower court suit, was dissatisfied with the judgement and lodged this appeal on 7 grounds that may be summarised as follows:-

- a) That the learned magistrate erred in law and in fact by finding against the appellant yet the appellant is not involved in prosecution of individuals.*
- b) That the learned magistrate erred in law and in fact by failing to consider the established elements as set out by judicial precedents in such cases.*
- c) That the learned magistrate erred in law and in fact by awarding the 1<sup>st</sup> respondent the sum of Kshs. 400,000 in complete disregard of the evidence tabled by the appellant.*

5. The parties disposed of the matter by way of written submissions.

**B. Appellant's Submissions**

6. The appellant submitted that it did not institute prosecution against the 1<sup>st</sup> respondent but merely made a complaint about the existence of a forged cheque. The appellant further submitted that indeed the 1<sup>st</sup> respondent's prosecution ended in his favour and further that the prosecution was instituted without reasonable cause.
7. It was further submitted that the appellant did not make the complaint with malice and as such it cannot be liable for the malicious prosecution of the 1<sup>st</sup> respondent as found by the trial court. The appellant relied on the case of **David Kirimi Julius v Fredrick Mwenda Civil Appeal 270 of 2003 [2009] eKLR** where it was held that a complainant who reported an assault to the police had no control over them in the investigations and could not influence or direct them in anyway. For that reason, he could not be said to have acted maliciously.
8. The appellant further submitted that just because the 1<sup>st</sup> respondent was acquitted, that cannot be reason for the claim of malicious prosecution and further that it was not in control over the prosecution of the 1<sup>st</sup> respondent. The appellant relied on the cases of **Kenya**

**Power Lighting Co Ltd v Florence Musau Nthenya & Anor [2017] eKLR as well as that of Douglas Apel & Anor v Telkom Kenya Limited & 2 Others [2006] eKLR** in explaining the role of a complainant in a criminal case.

### **C. 1<sup>st</sup> Respondent's Submissions**

9. The 1<sup>st</sup> respondent submitted that it was the appellant who made the malicious complaint against him and thereafter lured him to their Nairobi Office at Nacico Plaza on the pretext that there were some documents that the 1<sup>st</sup> respondent needed to sign. The 1<sup>st</sup> respondent went to the appellant's bank and was arrested.

10. The 1<sup>st</sup> respondent further submitted that the civil procedure allows for a joinder of parties and since the appellant was a complainant in the prosecution of the 1<sup>st</sup> respondent, it was fit to have it listed as a defendant in the suit.

11. The 1<sup>st</sup> respondent further submitted that the appellant could not place the burden on the magistrate to argue out their case for them and thus their failure to satisfactorily argue the appeal should not be a reason for instituting this appeal.

12. The 1<sup>st</sup> respondent submitted that both the appellant and the 2<sup>nd</sup> respondent took part in his malicious prosecution and thus both should be held liable.

### **D. Analysis & Determination**

13. From the perusal of the pleadings in this appeal I have identified the issue for determination as whether the trial court was right in finding both the appellant and 2<sup>nd</sup> respondent jointly and severally responsible for the malicious prosecution of the 1<sup>st</sup> respondent.

14. The duty of a first appellate Court as was held in the cases of **Mwana Sokoni v Kenya Bus Service Ltd [1985] KLR 931** and **Selle v Associated Motor Boat Company Ltd [1968] EA 123** as to analyze and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses.

15. The essentials ingredients of malicious prosecution were discussed in **Murunga vs the Attorney General [1979] KLR 138** as follows:

- a) *A prosecution instituted by the defendant or by someone for whose acts he is responsible.*
- b) *Termination of the prosecution in the Plaintiff's favour.*
- c) *The prosecution is instituted without reasonable or probable cause.*
- d) *The prosecution is actuated by malice.*

16. Also see **Mbowa vs. East Mengo District Administration [1972] EA 352** and **Gitau vs. Attorney General [1990] KLR 13**

17. In the present appeal, it is not in dispute that the 1<sup>st</sup> Respondent was arrested and by the police, locked in the police cells for 6 days and charged in court. It also not disputed that his prosecution was premised on a complaint made by the appellant, and ended in his favour as he was acquitted under section 215 of the Criminal Procedure Code.

18. On whether the making of the said complaint by the appellant was malicious, the law is clear that the mere fact that a person has been acquitted of the criminal charge does not necessarily connote malice on the part of the prosecutor. As was held in **James Karuga Kiiru vs. Joseph Mwamburi and 3 Others, Nrb C.A No. 171 of 2000** to prosecute a person is not *prima facie* tortuous, but to do so dishonestly or unreasonably.

19. It is worth noting that after a complainant has made a complaint it is for the prosecution to investigate the matter and make a decision whether to prosecute or not. In most cases the investigation and the decision to charge is undertaken by the Republic through the Kenya Police. At the time when the appellant made the complaint the police were the ones who were responsible for investigating and instituting public prosecution on behalf of the Attorney General (now Director of Public Prosecution.)

20. It is important to note that the appellant had neither control nor discretion over the matter. The discretion and decision as to whether to charge or not, was the responsibility of the police for whose action the Attorney General may be held liable.

21. In a public prosecution therefore the Attorney General is a necessary party who ought to be joined where the police or public servants are accused of any wrongdoing that would give rise to a damage claim.

22. The Attorney General is the party who would be responsible for prosecutions instituted without reasonable or probable cause. In the case of **John Ndeto Kyalo v Kenya Tea Development Authority & Another – HCCC 502 of 1999**, the court defined what constitutes “reasonable and probable cause” and then went on to state “..... that it is the police who are liable to such person (accused person) for instituting a proceeding against him.”

23. The court went on to state that even if the accused had pleaded malice on the complainant, it was clear that it was the police who investigated the matter and made the decision to charge the accused. Any allegations ought to be attributed to the police.

24. Similarly, in the case of Douglas Odhiambo Apel & Anor v Telkom Kenya & Attorney General - HCCC 2547 of 1998 NBI the court faced with a similar issue rendered itself as thus: -

***“The accused were arrested and charged by the Police and the prosecution was undertaken by the Attorney General as the public prosecutor. Telkom Kenya (complainant) was merely a complainant. The decision to charge and prosecute the plaintiffs was taken by the police and the attorney general Telkom Kenya as the complainant would not have been involved in that process ..... that is why in a claim for unlawful arrest, false imprisonment and malicious prosecution, the proper defendant is always the Attorney General.”***

25. The magistrate blamed the appellant for handing over the cheque to the police before finding out whether Premco Agencies had issued it. Based on this reason, the court went further to find that the appellant acted without a probable and reasonable cause. I wish to differ with this finding in that the appellant had no duty to investigate the matter. Once it satisfied itself that the cheque was not genuine and that it was the 1<sup>st</sup> respondent who banked it, the appellant had a good basis to report the matter to the police.

26. The magistrate further said that the material in its possession was not enough to find the 1<sup>st</sup> respondent guilty of the offence and found that the appellant was actuated by malice. It was not the duty of the appellant to investigate and to institute the criminal charges. This was the role of the police and it was wrong to use this reasoning to find that the appellant was actuated by malice.

27. The fact that the appellant is an institution implies it was not capable of acting maliciously against the 1<sup>st</sup> respondent.

28. In a case of malicious prosecution, the plaintiff must also prove that the prosecution was actuated by malice. The 1<sup>st</sup> respondent had an obligation to adduce evidence to prove malice on the part of the police which he failed to do. The learned Magistrate, in my view erred in her finding that the appellant's failed to enquire from the said Premco Agencies if it had drawn the cheque in question before handing over the plaintiff to the police and said that this was evidence of malice. The magistrate then reached a finding that the respondent had proved that **“the prosecution was actuated by malice”** which is necessary in a claim for malicious prosecution.

29. It is trite law that even if a complainant makes a malicious complaint that element of malice cannot automatically be transferred to the prosecutor unless it is proved that there was collusion between the complainant and the prosecutor in bringing up the prosecution as was held in the case of Music Copyright Society of Kenya vs Tom Odhambo Ogow [2014] eKLR.

30. The Appellant submitted that the trial court was misguided in its award of damages. The general principle is that the assessment of damages is within the discretion of the trial court, and an appellate court will only interfere with quantum of damages where the trial court either took into account an irrelevant factor or left out a relevant factor, or where the award was too high or too low as to amount to an erroneous estimate, or where the assessment is not based on any evidence. This principle was laid down in the case of Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KLR

31. The respondent did not demonstrate that the magistrate failed to take into consideration any relevant factors or whether the damages awarded were too high as to amount to an error in principle.

32. In my view, the 1<sup>st</sup> respondent did not adduce evidence of wrongful arrest, false imprisonment or malicious prosecution.

33. It is not in dispute that the criminal case terminated in favour of the 1<sup>st</sup> respondent. It was held in the case of Kenya Power and Lighting Co. vs Florence Musau Nthenya & Another [2017] eKLR that: -

***“The learned trial magistrate was faulted for finding the appellant liable only for the fact that it made a complaint to the police whereof the 1<sup>st</sup> respondent was subsequently charged and acquitted. It was submitted for the appellant that an acquittal per se is not sufficient basis to ground a suit for malicious prosecution. In support thereof, the court was invited to consider the holding in Nzoia Sugar Company Ltd v Fungututi (1988) KLR 399 in which the Court of Appeal held:-***

***It is trite learning that acquittal, per se, on a criminal case charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill will must be proved against the prosecutor. The mental element of ill-will or improper motive cannot be found in an artificial person like the appellant. But there must be evidence of spite in one of its servants that can be attributed to the Company.***

34. It is not sufficient that the case ended in an acquittal.

35. Having found that the appellant was not actuated by malice and that the police had a reasonable and a probable cause to institute the criminal proceedings. I reach a conclusion that the magistrate erred in finding that the 1<sup>st</sup> respondent had proved his case against the appellant.

36. Consequently, I find that the 1<sup>st</sup> respondent did not prove his case on the balance of probabilities. I hereby set aside the judgment of the lower court and substitute it with one of dismissal of the case with costs for lack of proof.

37. Each party to meet its costs of this appeal.

38. The appeal is hereby allowed.

39. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 5<sup>TH</sup> DAY OF FEBRUARY 2019.**

**F. MUCHEMI**

**JUDGE**