



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL APPEAL NO. 10 OF 2017

SILA MUMO MULI.....APPELLANT

VERSUS

MBAKU NGINGA.....1ST RESPONDENT

MUTUNGA MALUKI.....2ND RESPONDENT

(Being an Appeal from the Judgment in Mwingi Senior Resident Magistrate's Court Civil Suit No. 62 of 2002 by Hon. S. Ongeri (RM) on 15/04/08)

J U D G M E N T

1. The Respondents herein were arrested and charged in **Criminal Case No. 467 of 1999**. Having been taken through full trial they were acquitted of charges of **Malicious Damage to Property**. As a result, the Respondents sued the Appellant who was the Complainant in the Criminal Case and the Attorney General being the Principal Legal Advisor of the Government.

2. It was pleaded that on the **4th June, 1999** police officers from **Migwani Police Station** arrested the Plaintiffs and detained them in police custody for three (3) days on allegations that the Plaintiffs had maliciously destroyed some property belonging to the Appellant. As a result the Respondents suffered damage. Special damages claimed were particularized as:

- Legal fees paid to Counsel to defend them in the **Criminal Case No. 467/1999 – Kshs. 75,000/=**.
- Expenses of transport and subsistence in the sum of **Kshs. 5,800/=**.

Total – Kshs. 80,800/=.

3. The Appellant filed a defence and counterclaim. In his defence he averred that he made a report to the police about the destruction of his fence and nappier grass valued at **Kshs. 10,000/=**, a report that was made genuinely and reasonably therefore was not responsible for anything else that happened to the Respondents. That having been put on their defence after a *prima facie* case was established meant that the Complaint was founded in law. He denied the loss and damage alleged to have been incurred.

4. In the counterclaim the Appellant averred that the Respondents trespassed onto his land whereby they unlawfully and without justification destroyed and/or caused to be destroyed a fence, nappier grass and burnt sisal plants valued at **Kshs. 10,000/=** which he claimed from the Respondents.

5. The Attorney General (2nd Defendant) filed a defence denying the allegations. He averred that the Prosecution of the Respondents was not malicious as there was a lawful and reasonable cause for the arrest and prosecution upon suspicion and information that the Respondents committed the offence.

6. The learned trial Magistrate considered evidence adduced by both parties and reached a finding that the Respondents were prosecuted by the Appellant and the Attorney General who acted as their agent, the Prosecution ended up in their favour, and reached a finding that the Respondents had proved the case against them on a balance of probabilities hence found them jointly and severally liable at **100%**.

7. On quantum of damages, he awarded each Respondents **Kshs. 150,000/=** in general damages for malicious prosecution, **Kshs. 75,000/=** for Legal Fees incurred and **Kshs. 120** for transport. He dismissed the counter-claim for lack of credible evidence. The Respondents were also awarded costs of the suit.

8. Aggrieved by the decision of the Court, the Appellant appeals on grounds that:

(i) The learned Resident Magistrate erred in both law and fact in failing to find, and to appreciate the fact that the suit before him was clearly incompetent, bad in law, and statute-barred, and to dismiss the same.

(ii) The learned Resident Magistrate erred in both law and fact in finding the Appellant liable when the evidence adduced before the Court did not point to, or prove liability on the part of the Appellant.

(iii) The learned Resident Magistrate erred in both law and fact and misdirected himself in finding and holding that the Attorney General acted as an agent of the Appellant herein in arresting and prosecuting the Respondents, thereby arriving at a wrong Judgment.

(iv) The learned Resident Magistrate erred in both law and fact in making unjustified and excessively high awards in general damages; and in failing to specify the amount(s) payable by each of the Defendants.

(v) The learned Resident Magistrate erred in both law and fact in awarding a sum of **Kshs. 75,240/=** in general damages when the said sum had not been proved, either strictly or at all.

(vi) The learned Resident Magistrate erred in both law and fact, and proceeding to dismiss the evidence adduced by both the Appellant and his witness(es), hence arriving at a one-sided Judgment.

9. The Appeal was canvassed by way of written submissions. It was urged that the Appellant had neither control nor discretion over the matter. That in a public prosecution, the (AG) (now DPP) is the party who institutes public prosecution and the Complainant has no control over them. In this regard they cited the case of **Susan Muthu Muia vs. Joseph Makau Mutua (2018) eKLR; Douglas Odhiambo Apel and Another vs. Telkom Kenya & Attorney General HCCC 2547 OF 1998 NBI**) and therefore, the AG could not be said to have acted as an agent of the Appellant.

10. That the Respondents in their pleadings and evidence did not allege and/or prove lack of reasonable and probable cause. They seemed to have assurance that their acquittal was enough to prove their claim in malicious prosecution and no evidence was led to prove that the Respondents suffered any damages.

11. Regarding evidence adduced by the Appellant's witness, it was argued that there was no eminent danger as the Respondents had already set the crops and fence on fire and what was of importance was that she saw the Respondents on the land in issue at the material time destroying the Appellant's crops and fence. That the Respondents did not produce evidence contrary to her evidence and even if a Complainant makes a malicious complaint such malice cannot automatically be transferred to the Prosecution unless it is proved that there was collusion between them in bringing up the collusion.

12. On quantum it was argued that the sum awarded was inordinately high and misplaced. That receipts produced in the claim of special damages were not specific in the circumstances.

13. On the part of the Respondents it is urged that the Attorney General was satisfied with the Judgment and never appealed. That the Appellant never called evidence before the trial Court to show the incompetence of the suit or how it offended the law.

That a cause of malicious prosecution arises upon termination of the proceedings impugned. It is a fact whose limitation period is three (3) years. That the Respondents were acquitted in the Criminal Case on **27th February, 2002** and they filed the Civil Case on **21st August, 2002**. In that regard they cited the case of **Mbowa vs. East Meno District Administration (1972) EA 352** where the Court stated thus:

“The action for damages for malicious prosecution is part of the common law of England...The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than for the public benefit. It originated in the medieval writ of conspiracy which was aimed against combinations to abuse legal procedure, that is, it was aimed at the prevention or restraint of improper legal proceedings...It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion of the truth. Its essential ingredients are: (1) the criminal proceedings must have been instituted by the defendant, that is, 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 on 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, that is, with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose; and (4), the criminal proceedings must have been terminated in the plaintiff's favour, that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge...The plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must “unite” in order to create or establish a cause of action. If the plaintiff does not prove them he would fail in his action. The damage that is claimed is in respect of reputation but other damages might be claimed, for example, damage to property...The damage to the plaintiff results at the stage in the criminal proceedings when the plaintiff is acquitted or, if there is an appeal, when his conviction is quashed or set aside. In other words, the damage results at a stage when the criminal proceedings came to an end in his favour, whether finally or not. The plaintiff could not possibly succeed without proving that the criminal proceedings terminated in his favour, for proving any or all of the first three essentials of malicious prosecution without the fourth which forms part of the cause of action, would not take him very far. He must prove that the court has found him not guilty of the offence charged...The law in an action for malicious prosecution has been clearly defined and in so far as the ordinary criminal prosecution is concerned the action does not lie until the plaintiff has been acquitted of the charge. In this case the respondent could have brought his action for

malicious prosecution until the prosecution ended in his favour. He could not have maintained his action whilst the prosecution was pending nor could he have maintained an action after he had been convicted. His right to bring the action only accrued when he secured his acquittal of the charge on appeal, and he then had the right to bring this action for damages...Time must begin to run as from the date when the plaintiff could first successfully maintain an action. The cause of action is not complete until such a time, and in this case this was only after he was acquitted on appeal.”

14. It was urged that had the Appellant not made the complaint to the police the Respondents would not have been arrested.

15. That the Appellant acted without reasonable cause as he never saw the Respondents committing the offence. That he was told by a third party who saw several people working on the land, and being **Parcel No. 3400 Kanyaa Adjudication Section** it did not belong to the Complainant. That the records indicated that the said land had an Appeal to the Minister of Lands pending hearing and determination. The land was adjudicated in the names of **Muli Kiti** (Deceased) who had an Appeal with **Ngui Nginga** and the Appellant was not even an Administrator of the Estate of **Muli Kiti** the owner of the land. They cited the case of **Johnson Muendo Waita vs. Odilla Mueni Ngui (2018) eKLR** where **Nyamweya, J.** faced with similar facts reached a finding that there was no probable nor reasonable cause to commence the prosecution.

16. That **Muli Kiti** the father of the Appellant, **Nginga Ngui** the father of the 1st Respondent had a dispute before the Minister for Lands concerning **Land Parcel No. 3400 Kanyaa Adjudication Section**. Therefore the prosecution was meant to intimidate the Respondents as far as the pending Appeal was concerned.

17. That having prosecuted the case on behalf of the Complainant and State, the agency element could not be ruled out.

18. Regarding special damages it was urged that receipts were produced to prove the claim and the sum awarded for general damages was not inordinate.

19. This being a first Appellate Court, it is my duty to re-examine afresh the evidence and material tendered before the Lower Court and draw my own conclusions, but I have to be slow in overturning the decision of the trial Court, bearing in mind that I did not have the opportunity of seeing or hearing witnesses who testified so as to assess their credibility (**See Selle vs. Associated Motor Boat Company Limited (1968) EA 123**).

20. Guided by the **Murunga Case** (supra) and the **Mbowa Case** (supra) respectively, it is apparent that the Plaintiff (Respondents) were duty bound to prove that:

- (i) The prosecution was instituted by the Defendant (Appellant) or by someone for whose acts he was responsible.
- (ii) That the prosecution terminated in the Plaintiff's favour.
- (iii) The prosecution was instituted without reasonable and probable cause.
- (iv) The prosecution was actuated by malice.

And in the **Mbowa Case** (supra) it was held that:

“The Plaintiff in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must “unite” in order to create or establish a cause of action. If the Plaintiff does not prove them he would fail in his action.”

21. It is not in dispute that the Respondents were arrested and arraigned in Court following a complaint lodged by the Appellant. They were called upon to present their case in defence but ultimately they were acquitted of the charges. No doubt the prosecution did terminate in favour of the Respondents.

22. It is pleaded that the Respondents were acquitted of the charges of malicious damage to property by the presiding officer of the Court. It is not expressly stated that the Appellant acted without reasonable cause. In the case of **Nzoia Sugar Company LTD vs. Fungututi (1988) KLR 399** the Court of Appeal held that:

“An acquittal perse 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. The mental element of ill-will must be 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.”

23. The Appellant herein was not an eye-witness to what transpired. However, PW2 **Vunza Simon** his sister-in-law testified that she saw the Respondents amongst other people uprooting sisal plants, cutting firewood and burning the fence made of sisal. She said the parcel of land belonged to their late father but the portion they destroyed belonged to the Appellant. In his testimony the Appellant stated he erected the fence that was damaged in 1987. Part of the nappier grass and sisal that were burnt were adduced in evidence. It was however the evidence of the 1st Respondent that he had a case with the Appellant's father having taken over from his brother and following decision reached he had filed an Appeal before the Minister for Lands which is pending hearing and determination. That the matter is now between him and the Appellant.

24. What is apparent is that both the Appellant and 1st Respondent took over the case after the initial parties passed on. It is not known

whether it was procedural or not. But the question of possession of the land and existence of the fence does not seem to be in doubt.

25. When the Appellant lodged a complaint to the police, they visited the scene and took possession of evidence establishing the fact of a fence having been burnt. The trial Court heard the case and placed the Respondents on their defence which was a demonstration that the Appellant had reason to complain.

26. In the case of **Kagane and Others vs. Attorney General and Another (1969) EA LR 643** it was stated that:

“Whether or not there was reasonable and probable cause for the prosecution is primarily lodged on the objective basis of whether the material known to the prosecutor would satisfy a prudent and cautious man that the accused was probably guilty. Once the objective test is satisfied, it may be necessary to consider whether the prosecutor did honestly believe in the guilt of the accused; but this subjective test should be applied only where there is evidence directly tending to show that the prosecutor did not believe in the truth of his case...The facts show that no reasonable person could honestly have believed that the prosecution was at all likely to succeed then malice would have been established and malice in that case meant that the prosecution was motivated by something more than a desire to vindicate justice.”

27. This is a case where the trial Court upon hearing evidence adduced at the outset found the existence of a legal duty that the Respondents owed the Complainant an explanation. This meant that the Court did not find that the allegations were fabricated by the Prosecution. Therefore there was a probable cause for the Prosecution to institute the prosecution.

28. Although there was a dispute between the families of the Appellant and Respondent there was no evidence of that the Appellant was actuated by malice when he made a report to the police.

29. Regarding the issue whether the Attorney General acted as an agent of the Appellant in arresting and prosecuting the Respondent. It is apparent that in all criminal cases proceedings are commenced by the State. People who lodge complaints to the police or victims of crime are witnesses of the Republic. In the premises the Attorney General cannot be stated to have acted as the agent of the Appellant.

30. Having re-considered evidence adduced in total, I find the Respondents having failed to prove all the essential ingredients of tort of malicious prosecution. Regarding the counterclaim no assessment report was tendered of the damage occasioned therefore the trial Magistrate did not fall into error in dismissing the claim.

31. Therefore, I allow the Appeal. The Judgment of the Lower Court is hence set aside and substituted by an order dismissing the suit with costs to the Appellant.

32. On Appeal, considering the fact that they have a pending dispute before the Minister of Lands, each party will bear its costs.

33. It is so ordered.

Dated, Signed and Delivered at Kitui this 18th day of February, 2019.

L. N. MUTENDE

JUDGE