



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL NO. 74 OF 2012**

**ISAIAH MAGOMA.....APPELLANT**

**VERSUS**

**JAMES OLIVER GUTO.....1<sup>ST</sup> RESPONDENT**

**RIFT VALLEY BOTTLERS.....2<sup>ND</sup> RESPONDENT**

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

**COMMISSIONER OF POLICE.....4<sup>TH</sup> RESPONDENT**

*(An Appeal from the Judgement of the Hon. A.G. Onginjo SPM delivered on 28.6.2012 in Eldoret)*

**JUDGEMENT**

The Appellant herein, one James Oliver Oguto was an employee of the 2<sup>nd</sup> Respondent and worked as a Clerk. On 17<sup>th</sup> August 2009 while on duty, a customers' vehicle expected to be carrying 255 crates of soda was found carrying 355 crates of soda. The 1<sup>st</sup> Respondent lodged a complaint with the police that 100 crates of soda had been stolen from the 2<sup>nd</sup> Respondent by the Appellant, together with 5 others. The police arrested the 6 suspects and charged them with theft of sodas on 20/8/2009. The matter was heard and on 13/10/2009 the Court found that the prosecution had failed to establish a prima facie case against the Accused Persons and acquitted them under Section 210 of the C.P.C.

The Appellant herein who had been dismissed from employment on the basis of the allegation and prosecution, filed a case for malicious prosecution and the same was dismissed on 15/6/2012, and hence the current appeal.

The Appellant contends that it was obvious that there was no theft and that his prosecution for a charge of theft was undertaken without reasonable and probable cause. His acquittal in Criminal Case No.5132 of 2009, under Section 210 of the C.P.C. is a clear indication that there was no reasonable and probable cause for his prosecution. The police had no cause to lodge the case and are therefore liable for malicious prosecution. The Appellant further submitted that when Civil Case No.560 of 2010 was dismissed the Court ought to have indicated the damages it would have awarded had the case succeeded. Failure to do so denies the Appellate Court the benefit of the subordinate Court's assessment. He prays that the Appeal be allowed and he be awarded Kshs.1,000,000/= as damages.

The Appeal is opposed by the 1<sup>st</sup> Respondent who submitted that for a case of malicious prosecution to succeed, the Appellant ought to establish the elements laid down in the case of *Murunga -vs- Republic (1979) KLR 138* as:-

- a) Prosecution was at the instances of the Defendants.
- b) The Criminal Case was terminated in his favour.
- c) The Defendant had no reasonable cause to prosecute him.
- d) The prosecution was actuated by malice.

The Respondent citing *Mkowa -vs- East Menyo District Administration*, asserted that the above elements must unite in order to establish a cause of action on malicious prosecution.

The Respondent further contends that on the date of the alleged offence the lorry in question had been cleared by the Appellant and was found carrying 355 crates of soda while the Appellant had signed a dispatch voucher for 255 crates. He could not explain the difference and this was a probable cause for a complaint to be filed with the police. It is the police who investigated the complaint and preferred the charge to which the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had no control. Acquittal on its own is not enough ground to sustain a suit for malicious prosecution, malice on the part of 2<sup>nd</sup> Respondent ought be established.

The 3<sup>rd</sup> and 4<sup>th</sup> Respondents joined hands with the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on principles on which a claim for malicious prosecution must be founded. They further submitted that failure by the Court to mention the damages it would have awarded if the claim was successful, is not fatal. They urges this Court to dismiss the Appeal.

(A) The Principles required for one to establish a successful case for malicious prosecution were given in the case Stephen Gachau Githaiga & Another -vs- Attorney General (2015)Eklr WHERE Mativo Judge held:-

***Malicious prosecution is an intentional tort designed to provide redress for losses flowing from an unjustified prosecution. Under the first element of the test for malicious prosecution, the plaintiff must prove that the prosecution at issue was initiated by the Defendant. This element identifies the proper target of the suit, as it is only those who were actively instrumental in setting the law in motion that may be held accountable for any damage that results.***

***The second element of the tort demands evidence that the prosecution terminated in the plaintiff's favour. This requirement precludes a collateral attack on a conviction properly rendered by a criminal court, and thus avoids conflict between civil and criminal justice. The favourable termination requirement may be satisfied no matter the route by which the proceedings conclude in the plaintiff's favour, whether it be an acquittal, a discharge at a preliminary hearing, a withdrawal, or a stay.***

***The third element which must be proven by a Plaintiff – absence of reasonable and probable cause to commence or continue the prosecution – further delineates the scope of potential plaintiffs. As a matter of policy, if reasonable and probable cause existed at the time the prosecutor commenced or continued the criminal proceeding in question, the proceeding must be taken to have been properly instituted, regardless of the fact that it ultimately terminated in favour of the accused.***

***Finally, the initiation of criminal proceedings in the absence of reasonable and probable grounds does not itself suffice to ground a plaintiff's case for malicious prosecution, regardless of whether the defendant is a private or public actor. Malicious prosecution, as the label implies, is an intentional tort that requires proof that the defendant's conduct in setting the criminal process in motion was fueled by malice. The malice requirement is the key to striking the balance that the tort was designed to maintain: between society's interest in the effective administration of criminal justice and the need to compensate individuals who have been wrongly prosecuted for a primary purpose other than that of carrying the law into effect.***

In summary, the key elements are:-

- a) Prosecution was at the instance of the defendant.
- b) The criminal case was terminated in his favour.
- c) The defendant had no reasonable cause to prosecute him.
- d) The prosecution was actuated by malice.

In **Mbowa -vs- East Mengo Administration** (1972)1 EA 352(CAK) the court held:-

***It seems to me 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.***

In order for the cause of action to succeed the plaintiff must prove that the four elements have been fulfilled. Failure to prove any of the elements will cause the claim to fail.

(B) The Appellant has failed to proof that the prosecution was at the instance of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. They merely reported a case of possible theft of a 100 crates of soda to which the police investigated and found grounds to prefer charges. The Prosecution was in agreement and prosecuted the charge. The ruling of 13/10/2009, in which the Appellant was acquitted under Section 210 of the C.P.C, shows it was on a technicality or poor investigations. The crates of sodas marked were 405 and what was produced as exhibit was 355. The Court wondered what happened to 50 extra crates. The discovery and arrest was within the 2<sup>nd</sup> Respondent compound and the Court wondered whether the offence was of theft or attempted theft. It was also not made clear of the 355 crates of sodas, the 100 crates which were allegedly stolen, probably distinguishable by evidence of the types of sodas legitimately loaded into the vehicle.

The Court never specifically found that the charge had no basis, was malicious and unfounded. There is also no evidence that no offence was committed. In determining whether the Respondent had a reasonable cause to prosecute the claimant and whether the prosecution was actuated by malice, there is need to consider the evidence in place and the reasons for acquittal. Having done so, I do find there was reasonable cause to prosecute the Appellant and the prosecution was not actuated by malice on the part of the Respondents. On these grounds the Appeal fails. It is therefore dismissed with costs to the Respondents.

Dated and delivered at Eldoret this 12<sup>th</sup> day of March, 2019

S. M. GITHINJI

JUDGE