REPUBLIC OF KENYA

CORAM: R.E. OUGO J

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 78 OF 2015

SHADRACK KIRUI.....APPELLANT

VERSUS

WILSON SOI.....1ST RESPONDENT

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

(Being an appeal from the judgment and decree of Hon. Munyendo (Resident

Magistrate) dated and delivered on 15th day of May 2015 in Kilgoris PMCC No. 4 of 2014)

JUDGMENT

1. Pursuant to a complaint made by the 1st respondent the appellant was arrested and charged with the offence of interfering with a demarcated boundary, contrary to Section 33 (d) of the Land Adjudication Act, Chapter 284, and Laws of Kenya. The criminal proceedings commenced vide Kilgoris PMCR No. 662 of 2009. The appellant was found not guilty and acquitted on 11th January, 2013. Subsequently, the appellant instituted Kilgoris PMCC No. 4 of 2014 against the 1st and 2nd respondents for compensation for unlawful arrest, wrongful confinement and malicious prosecution. The 1st respondent filed his statement of defence and called two more witnesses in support of his case. The 2nd respondent did not file a statement of defence but participated in the proceedings.

2. The events leading up to the matter began in Mogori location within Mogondo sub location where the appellant had served as an assistant chief. He told the trial court that on 5th October, 2009 the 1st respondent complained that he had interfered with his boundary which led to his arrest and arraignment in court on 6th October 2009. He admitted that the court had put him on his defence after it established that he had a case to answer but pointed out that he was acquitted as the court found that he was not at fault. The appellant laid claim for expenses he had incurred in prosecuting the criminal matter including advocate's fees, fare for public transport and accommodation.

3. On his part, the 1st respondent testified that in November 2008, the appellant who was his neighbour closed an access road to his home prompting him to report the matter to the area chief. An elders' meeting was convened where it was resolved that the road be opened. When the appellant failed to comply, the 1st respondent was advised by the chief to report the matter to the District Officer who came to the land and reopened the road. The 1st respondent testified that after the road had been closed three times, he reported the matter to the police who said they would take action and later called him to give evidence in court. He recalled that during the course of the proceedings, the court had made an order that the road remain open. He was adamant that his complaint had been truthful and that he reported the matter after exploiting all other avenues.

4. David Korir (DW2), the area chief, told the trial court that when he was informed about the matter, he visited the scene and confirmed that the road had certainly been closed. He stated that on 2nd December 2008 he discussed the matter with the village elders and asked the appellant to open the road but he declined to do so. DW2 referred the matter to the District Officer who wrote a letter to the OCS Kilgoris after which the police took over the matter.

5. Kipsang Milgo (DW 3) the 1st respondent's son testified that he had witnessed the appellant closing the road. He reported the matter to his father who informed DW2. He confirmed that DW2 had called a *baraza* where it was resolved that the road be opened but the appellant closed the road each time, causing the matter to be taken to court. He stated that before the closure of the road, they had no dispute with the appellant.

6. The trial court's dismissal of that suit prompted the appellant to file this appeal. The appellant set out 11 grounds of appeal, which the parties canvassed in their written submissions. I have considered them together with the record of appeal.

7. Being a first appellate Court, the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter, bearing in mind that it did not see or hear the witnesses. (See ***Selle & Another. vs. Associated Motor Boat Co. Ltd (1968) EA 123***).

8. For the appellant's claim to succeed he was required to prove the following four elements as held by Cotran J. in ***Murunga v Attorney General [1979] KLR 138*** as follows;

a. That the prosecution was instituted by the respondents;

b. That the prosecution terminated in favour of the appellant ;

c. That the prosecution was instituted without reasonable and probable cause; and

d. That it was actuated by malice.

9. The first two elements are not contested. The 1st respondent submits that he was constrained to report the incidences to the police, the 2nd respondent's agents, after exhausting all methods to resolve the dispute. It is also not in issue that the prosecution terminated in favour of the appellant. What is disputed is whether the trial court erred in finding that there was reasonable and probable cause to institute criminal proceedings against the appellant and that the appellant had not proved malice.

10. On whether there was reasonable and probable cause, the appellant submits that in as much as the 1st respondent had a right to complain, he was required to give honest and credible information that was not calculated to mislead the police. The appellant contends that the trial court failed to observe that the 1st respondent had left out important information when he made his report to the police and that the police were equally culpable for failing to conduct independent investigations before deciding to commence the case.

11. The 1st respondent counters that having failed to resolve the issue through the chief and elders his only option was to report the occurrences to the police. He argued that there was probable cause for him to make the complaint and that it is public policy for citizens to report any wrong doing so that appropriate steps may be taken by the law enforcing agencies. The 2nd respondent on its part submitted that the police carried proper and thorough investigations before arraigning the appellant to court. That the statements recorded by the police were consistent and that the appellant was arrested and charged based on a genuine believe that he had committed the offence.

12. The test to be applied in determining whether there was reasonable and probable cause was set out in ***Hicks v Faulkner (1878), 8 Q.B.D. 167*** and restated in ***Kagane and Others v Attorney General and Another (1969) EA 643*** as follows;

> *"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 was probably guilty of the crime imputed."*

13. The court in ***Kagane v Attorney General (supra)*** further held that ;

> *"Before leaving the legal aspect of reasonable and probable cause I would say it is sufficient to constitute primary reasonable and probable cause if the prosecutor proceeds on such information as a prudent and cautious man may reasonably accept in ordinary affairs of life (Lister v Perryman (1870), L.R. 4. H.L. 521)"*

14. Applying the above test to this case, it is my considered view that there was reasonable and probable cause to institute the proceedings against the appellant. The prosecution called 6 witnesses in support of its case that the appellant had interfered with a demarcated boundary by blocking access to the 1st respondent's land parcel number 2069. The witnesses in Criminal Case No. 662 of 2009 including the area chief (DW2) and a land surveyor testified that the road leading to the 1st respondent's home had been blocked several times by a person they genuinely believed was the appellant. The trial court in the criminal proceedings was convinced that there existed a boundary dispute between the appellant and the 1st respondent and observed;

"I can well see how the accused would be a suspect there being a boundary dispute between him and the complainant ..."

15. The uncontroverted evidence of the 1st respondent that he sought help from the area chief, the District Officer and the registrar of lands in a bid to reopen the access road weakens the appellant's contention that the 1st respondent knew that road had been blocked by children and that he deliberately misled the police in making his report. The 1st respondent held an honest belief that the appellant was the perpetrator and cannot be faulted for reporting the matter.

16. The investigation done by the police officers certainly had some room for improvement; nevertheless I find that in the circumstances, it was reasonable for the prosecution to commence proceedings against the appellant based on the information presented which they believed to be credible. This finding is fortified by the decision in ***Gitau v Attorney General Civil Case No 1511 of 1979 [1982] eKLR*** where the court held;

> *"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 witnesses told him then he was justified in acting as he did, and I am not satisfied that the plaintiff*

has established that he did not believe them or alternatively, that he proceeded recklessly and indifferently as to whether there were genuine grounds of prosecuting the plaintiff or not."

17. Further, the fact that the trial court put the appellant on his defence was sufficient proof that there was reasonable and probable cause for prosecuting the appellant.*(see* ***Murunga v Attorney General (supra)***

18. As for whether the prosecution was actuated by malice, I am guided by the Court of appeal's decision in ***Nzoia Sugar Company ltd v Fungututi [1988] KLR 399*** where it was held;

> *"Acquittal per se 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 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." [Emphasis mine]*

19. The appellant submits that the 1st respondent's action to report the matter was malicious but he did not demonstrate how this was so. The 1st respondent testified that the appellant's alleged actions to block the road started in November 2008 and that he took steps to settle the matter out of court before resorting to lodging a formal complaint. I find no reason to depart from the trial court's find that the appellant did not prove that the prosecution had been actuated by malice. The trial court held as follows;

> *"I expected during trial that the Plaintiff would demonstrate the particulars of malice. The Plaintiff remained mute on this very important ingredient. Infact, he stated that he did not have any disputes with the defendants prior to the filing of the criminal cases. Similarly the 1st defendant confirmed this by stating that he did not have any other dispute with the Plaintiff that would cause the filing of this instant case..."*

20. For the foregoing reasons, I find that the appellant failed to prove his claim against the 1st and 2nd respondent and the trial court rightly dismissed the suit.

21. The appellant was also aggrieved by the trial court's failure to assess the quantum of damages it would have awarded had the appellant's case been successful. It is common practice that damages be assessed even when a case is dismissed. The appellant in his written submissions before the trial court proposed an award of Kshs. 1,000,000/= for general damages. The respondents provided no authorities in this respect.

22. The appellant relied on the case of ***John Kamau Icharia versus Paul Njiru and another Civil Case No. 1774 of 1994****(unreported)* where the court awarded a global sum of Kshs. 520,000/= as general damages for unlawful arrest, wrongful confinement and malicious prosecution. In that case, the appellant was arrested and detained for a day and released without any charges being preferred against him. That case can be distinguished from the present case as the appellant herein testified that he was arrested on 5th October 2009 and released on cash bail and that he was arraigned in court the following day and thus did not spend time in custody.

23. In ***George Ngige Njoroge v Attorney General Civil Case No. 205 of 2013 [2018] eKLR*** the court awarded a sum of Kshs. 1,000,000/= for malicious prosecution where the plaintiff had spent a night in custody where he was beaten up and sustained injuries. In ***Thomas Mutsotso Biseme v Commissioner of Police & Another Civil Suit 220 of 2011 [2013] eKLR*** the court awarded general damages of Kshs. 800,000/= where the plaintiff spent 3 days in custody. Taking all these into account, I would have awarded general damages of Kshs. 800,000/= and a sum of Kshs.165, 580/= for special damages if the appellant had sufficiently proved his case.

24. In conclusion I find that appeal has no merit and it is dismissed with costs to the 1st respondent.

Dated, **signed and delivered at Kisii this 4thday of April 2019.**

R.E.OUGO

JUDGE

In the presence of;

For the Appellant Absent

Mr. Nyagwencha h/b Mr. O. M. Otieno For the 1st & 2nd Respondent

Mr. Omwoyo Court clerk