



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO.15 OF 2018**

**(CORAM: F.GIKONYO J)**

**AMEDO CENTRE KENYA LIMITED.....APPELLANT**

**VERSUS**

**PATRICK KAARIA NTONJIRA ..... 1<sup>ST</sup>RESPONDENT**

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

**(Being an appeal from the judgment of the Chief Magistrate's Court at Meru delivered by the Honorable Mrs. L. Ambasi (CM) on 23<sup>rd</sup> January, 2018 in Civil Suit No. 250 of 2016)**

**JUDGMENT**

[1] The appellant and the Attorney-General were sued in the trial suit as the 1<sup>st</sup> and 2<sup>nd</sup> defendant (1<sup>st</sup> and 2<sup>nd</sup> Respondent) respectively, for general, punitive, exemplary and/or aggravated damages for false and undignified arrest, wrongful incarceration and malicious prosecution.

[2] The 1<sup>st</sup> Respondent's claim before the lower court was that the Appellant's officers conspired and formulated a sham of criminal charges against him to the police in Embu that resulted in his arrest on 2<sup>nd</sup> April 2013. Subsequently, he was charged with five counts of stealing by servant. According to the 1<sup>st</sup> Respondent, he incurred loss and damage by the way he was greatly harassed during his arrest, incarcerated for four days and underwent a lengthy criminal trial that was not only expensive but emotionally traumatizing to him and his family. He was, however, acquitted on 4<sup>th</sup> November 2015.

[3] The Appellant, through its statement of defence, denied the allegations made by the 1<sup>st</sup> Respondent and put him to strict proof. On 23<sup>rd</sup> January 2018 judgment was entered in favour of the 1<sup>st</sup> Respondent and was awarded Kshs. 2,000,000/- in general damages, Kshs. 28,000/- in special damages as well as costs of the suit and interest. The appellant being aggrieved by the judgment and the award filed this appeal and cited 13 grounds in its memorandum of appeal where it faulted the trial magistrate for, *inter alia*, failing to assess the evidence, applying wrong principles in assessing damages and holding that the 1<sup>st</sup> respondent had proved his case to the required standards of the law.

**Submissions**

[4] On 15<sup>th</sup> November 2018 parties agreed to canvass the appeal by way of written submissions.

[5] The appellant submitted that the prosecutorial powers and mandate solely lies with the Director of Public Prosecution as established by the Constitution which exercises its powers independently. Therefore the appellant could not prosecute the 1<sup>st</sup> respondent as it lacks the powers to do so. Had the prosecution not been convinced that the complaint by the appellant had not met the requisite threshold to prefer charges, it would have directed the police to investigate further and provide more information. The prosecution was instituted with reasonable and probable cause as there were serious allegations of theft against the 1<sup>st</sup> respondent which were backed up by sufficient evidence. The court found that the 1<sup>st</sup> respondent had a case to answer but prosecution terminated the case in the 1<sup>st</sup> respondent's favor which does not mean that he was maliciously prosecuted. In the trial the 1<sup>st</sup> respondent had to prove mental element of spite or ill will of which he failed to prove. The award of Kshs. 2,000,000/- as general damages against the appellant was erroneous without providing comparative analysis of similar cases or justification whatsoever. The trial court erred in law and fact by taking into account irrelevant considerations on the 1<sup>st</sup> respondent's accusations and transfer to blame to another employee by the name of Grace hence leading to an erroneous conclusion.

[6] The 1<sup>st</sup> respondent submitted that the appellant had absolutely no evidence to prosecute him thus there was no reasonable or probable cause to compel his arrest, detention and prosecution even after being told by investigators that there was no evidence against him. It was

clear that the appellant's management attempted to force the 1<sup>st</sup> respondent to take responsibility for misappropriation by Grace Mwendwa. The appellant's managers' conduct in setting the criminal process in motion was fuelled by malice. Concerning the damages, the special damages were specifically pleaded and proved. As for general damages it was adequate following the manner in which the appellant authored his joblessness, arrest, days spent in remand and the three year period he spent until he was acquitted.

### Duty of court

[7] This being a first appeal, the court is to re-evaluate, re-assess and re-analyze the evidence on the record and make its own determination. But, having in mind that it did not have the advantage of hearing witnesses.

[8] **PW1 Patrick Kaaria Ntonjera** adopted his witness statement dated 19<sup>th</sup> September 2016 as his evidence in chief. He stated that he was previously employed by the appellant and rose to the rank of branch manager, Embu Office. In December, 2012 the appellant sent Eliud Keru Muhoro with a letter demanding that he hands over to him. He did so by January 2013 and then ordered to report to the head office where he was forced to resign if he did not want to lose his benefits. On 2<sup>nd</sup> April 2013 police officers together with Mr. Keru and the company's auditor came to his home and dragged him away from his house in front of his wife, children, nieces, nephews and neighbors. Members of the crowd pleaded for him to be treated decently but it was in vain to the extent that the police had to draw out their guns.

[9] The appellant was holding him liable for the wrongs of his juniors as it was one Grace Mwendwa who collected money and never banked it. She never gave it to the cashier who was the one mandated to receive. The audit report filed by the appellant made reports on Grace and copies to clients who were complaining. Grace was not charged, reprimanded or sacked as she is still in employment. The audit report used in criminal case is not the same as produced by the defendant. Although, he was eventually acquitted.

[10] **PW2 David Mutembei Rukaria** adopted his witness statement dated 19<sup>th</sup> September 2016 as his evidence in chief. He stated that his shop is opposite the plaintiff's office. That the way the plaintiff was arrested was like a terrorist and thought he was a criminal. The gentlemen who arrested him were in civilian and 3 of them removed guns when the crowd threatened to stone them.

[11] At the close of his case the defendant called two witnesses. **DW1 Elizabeth Kanini Samuel** who works in human resource for the appellant adopted her witness statement dated 17<sup>th</sup> July 2017 as her evidence. She averred that she was employed after the incident had occurred. She confirmed that the plaintiff was employed by the plaintiff and that there was loss of funds of Kshs. 581,890/- in Embu which was reported to the police. The audit report implicated the plaintiff and not Grace who still works for the 1<sup>st</sup> defendant but they have not taken any action against her for the matter is still under investigation. She asserted that she was not aware that Eliud Kero and Mike Wanyanga, the internal auditor, were part of the team that arrested the plaintiff or that there was another audit report in Embu.

[12] The issues of determination are *whether or not the tort of wrongful and malicious prosecution was proved to the required standard and whether the general damages issued by the trial court were appropriate.*

[13] Malicious prosecution is an intentional tort designed to provide remedy for an unjustified prosecution. It is defined in the **Black's Law Dictionary, Ninth Edition at page 1102** as:

**"The institution of a criminal or civil proceeding for an improper purpose and without a proper cause. The tort requires proof of four elements: (1) the initiation or continuation of a lawsuit; (2) lack of probable cause for the lawsuit's initiation; (3) malice; and (4) favorable termination of the original lawsuit."**

In **Mbowa vs. East Meno District Administration [1972] EA 352**, the East African Court of Appeal expressed itself as follows:

**"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... 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. If the plaintiff does not prove them he would fail in his action."**

It is settled law that the four ingredients that need to be proved to ascertain whether or not there was malicious prosecution are:

1. Criminal proceedings instituted against the plaintiff must have been instituted by the defendant who set it in motion
2. The criminal proceedings must have been terminated in the plaintiff's favour
3. The defendant must have acted maliciously in instituting the criminal proceedings
4. There was absence of reasonable and probable cause

[14] It is not in dispute that criminal proceedings were instituted against the 1<sup>st</sup> respondent following a complaint lodged by the appellant at the Embu Police. The criminal proceedings were terminated in favour of the 1<sup>st</sup> respondent; that is, he was acquitted.

[15] Thus, the court should establish whether the appellant had reasonable and probable cause to make the complaint and whether the criminal proceedings were instigated out of malice.

[16] The test for determining whether there was reasonable and or probable cause was discussed in the *Kagane and others v Attorney-General and another* [1969] EA 643 where it was held:

**“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...Excluding cases where the basis for the prosecution is alleged to be wholly fabricated by the prosecutor, in which the sole issue is whether the case for the prosecution was fabricated or not, 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 is to say, to constitute reasonable and probable cause the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material consisted of facts discovered by the prosecutor or information which has come to him or both, 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. If and insofar as that 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...If it is shown to the satisfaction of the judge that a reasonable prudent and cautious man would not have been satisfied that there was a proper case to put before the court, then absence of reasonable and probable cause has been established. If on the other hand the judge considers that prima facie there was enough to justify a belief in an ordinary reasonable prudent and cautious man that the accused was probably guilty then although this would amount to what I call primary reasonable and probable cause the judge may have to consider the further question as to whether the prosecutor himself did not believe in the probable guilt of the accused, and this is obviously a matter which is to be judged by a subjective test. This subjective test should only be applied where there is some evidence that the prosecutor himself did not honestly believe in the truth of the prosecution...Inasmuch as this subjective test only comes into operation when there were circumstances in the knowledge of the prosecutor capable of amounting to reasonable and probable cause, the subjective test does not arise where the reason alleged as showing absence of reasonable and probable cause is merely the flimsiness of the prosecution case or the inherent unreliability of the information on which the case was based, because this is a matter for the judge alone when applying the objective test of the reasonable prudent and cautious man. Consequently the subjective test should only be applied where there is some evidence directly tending to show that the prosecutor did not believe in the truth of his case. Such evidence could be afforded by words or letters or conduct on the part of the prosecutor which tended to show that he did not believe in his case, as for example a failure or reluctance to bring it to trial, a statement that he did not believe in it and, I think possibly, an unexplained failure to call an essential witness who provided a basic part of the information upon which the prosecution was based.”**

What does the evidence portend? According to the trial magistrate he stated that:

***“On the same note, the source document that is the books of accounts used in compiling the audit report were never availed to court to establish the loss of money. Similarly, the bank statement of Amedo Centre (K) Ltd, Embu branch was not availed in court to show there was differences between the books of accounts and the actual account received by Amedo centres.”***

From thorough perusal of the lower court record, important support or source documents were not produced in court. Nothing shows that they were even tabled before the prosecutor. In such circumstances, malice may be imputed on the complainant and the prosecution. This is a border-line case as in the absence of such material one doubts the basis on which one could have believed in the guilty of the 1<sup>st</sup> Respondent. This state of things supports a possibility of malice in the prosecution of the 1<sup>st</sup> Respondent. The prosecution ought to have sufficient data or information that supports reasonable suspicion that the defendant may have committed the crime. Lack of probable and reasonable cause evidences malice in mounting the prosecution. However, I will repeat that this case is quite on the borderline which may be resolved in favour of the 1<sup>st</sup> respondent.

[17] **DW1** was the only witness of the appellant and was employed years after the incident happened. The witness was noted to be recalcitrant witness. Moreover, the audit report that was among their exhibits was not conclusive, yet it was made by the appellant who is said to have led the malicious prosecution. I find the appellant liable and so is the AG for the state organs herein.

### **Damages**

[18] On the issue of damages, the principles to be applied by an appellate court to determine whether or not to interfere with a trial court's finding on quantum was discussed in *Loice Wanjiku Kagunda -vs- Julius Gachau Mwangi C A No. 142 of 2003 (UR)* where the Court held:

***“We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence, an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (See *Mariga -vs- Musila (1984) KLR 257.*)”***

[19] Comparable decisions are important consideration here. In the following cases the court made the following awards:

a) In the case of **Johnson Muendo Waita v Odillah Mueni Ngui [2018] eKLR** the High Court in its appellant jurisdiction set aside the award of Kshs. 500,000/- as general damages with Kshs. 300,000/- for malicious prosecution.

b) In the case of **Stephen Gachau Githaiga & another v Attorney General [2015] eKLR** the High Court in its appellant jurisdiction upheld the award of Kshs. 300,000/= as general damages for two prosecutions actuated by malice and gross abuse of process by the police.

c) In **Thomas Mutsotso Bisembe vs. Commissioner of Police & Another [2013] eKLR**, this Court awarded the plaintiff Kshs 800,000.00 for general damages for malicious prosecution.

[20] In light of these decided cases, and the circumstances of this case, general damages awarded by the trial court were excessively high and is hereby set aside. In lieu thereof, I award a sum of Kshs. 400,000/= in general damages.

[21] Special damages of Kshs. 28,000/= was proved. I so award.

[22] The appeal succeeds to that extent and I make the following orders:

a) The award of Kshs. 2,000,000/= as general damages issued by the trial court is set aside and substituted with an award of Kshs. 400,000/=

b) I award Kshs. 28,000/= in special damages.

c) Costs of the suit and interest in the lower court.

d) Each party to bear its own costs on the appeal.

Dated, signed and delivered this 7<sup>th</sup> day of May 2019

**F. GIKONYO**

**JUDGE**

In presence of

Mutuma for Munityalo for appellant

Kariuki for Mbogo for Respondent

**F. GIKONYO**

**JUDGE**