



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CIVIL APPEAL NO 9 OF 2014

KIPKEBE LIMITED.....APPELLANT

VERSUS

JAVAN MICHIRA ORECHI.....RESPONDENT

(Being an appeal from the judgment and decree in Kericho Chief Magistrate's

Civil Suit No. 536 of 2006 (Hon. S.M. S. Soita (Ag. CM) dated 7th March 2014)

JUDGMENT

1. By an Amended Complaint filed in the Principal Magistrate's Court at Kericho on 3rd November 2008, the respondent, Javan Michira Orechi, sued the appellant, Kipkebe Ltd, as well as the Hon Attorney General for malicious prosecution. The respondent claimed in his complaint that on or about 7th April 2005, while he was at the appellant's Magura Tea Estate where he worked, the appellant caused its agents to procure police officers who arrested him, took him into custody on false allegations and charged him with involvement in fraudulent activities. He was thereafter arraigned before the Kericho Principal Magistrate's Court in Criminal Case No 716 of 2005. After hearing the case, the trial court acquitted the respondent for lack of evidence.

2. The respondent claimed that his arrest and prosecution were actuated by malice because there was no evidence against him. He contended that the appellant was responsible for his arrest because its agents gave false information to the police, which resulted in his confinement and prosecution, all of which subjected him to humiliation and disgrace, and plunged him into ridicule and contempt among right thinking members of society.

3. The respondent also stated that the Attorney General had acted maliciously towards him by failing to carry out sufficient and independent investigations before charging him, resulting in his being charged without a shred of evidence, confining him to a police cell for a period of seven days in total disregard of the law, and for being unduly influenced to charge the respondent when he knew or ought to have known that the charges were false and malicious. The respondent contended that the police failed to carry out independent and sufficient investigations before arresting and charging him, and for these reasons, he claimed to have incurred a loss of Kshs 8,500.00 as special damages being the legal fees expended in defending himself. He asked the court to award him the special damages incurred, as well as general, aggravated and exemplary damages for wrongful confinement, malicious prosecution and defamation, costs of the suit as well as interest.

4. The appellant denied these allegations. It averred in its statement of defence that in April 2005, one of its officers reported a case of fraud to the police. This report was well-founded and led to the police, acting independently, to arrest the respondent. It contended that the police, on their own volition and after conducting their own investigation arrested and subsequently prosecuted the respondent. It further contended that even though the respondent had been acquitted, this did not necessarily mean that he could sustain a claim for wrongful confinement and malicious prosecution as it was apparent that the criminal case was shoddily prosecuted. It denied that it ever acted maliciously toward the respondent and prayed that the suit be dismissed with costs.

5. The Attorney General also put in a statement of defence in which he contended that the prosecution of the respondent was not malicious. He maintained that the police officers who arrested the respondent had been acting within their statutory duty to investigate offences and charge suspects in court. He further contended that the fact of acquittal did not entitle the respondent to a claim for malicious prosecution, and he further denied that the respondent suffered any loss or damage. If he did, then the office of the Attorney General was not responsible for that loss.

6. The parties gave oral evidence in support of their respective positions. The respondent's testimony was that on 7th April 2005, he was at his work place at the Magura Estate when the police and one Patrick Kaweale (sic) Kamotho, the manager of the appellant, came and arrested him. They took him to the Sotik Police Station and later to the Litein Police Station. He remained in custody until the 14th April

2005 when he was arraigned in court and charged in Criminal Case No 716 of 2005. He was later acquitted on 8th March 2006. He claimed special damages of Kshs 8,500.00 which he had used to engage an advocate as well as general, aggravated and exemplary damages for wrongful confinement, malicious prosecution and defamation.

7. The appellant called one witness, Patrick Kamau Kimotho (DW1) who was working for it as a manager. His evidence was that in April 2005, a woman called Biyaki came to his office and asked to see him. She claimed to have found some documents relating to the appellant company in her husband's possession. Her husband was not an employee of the appellant, so she opted to bring the documents to the appellant.

8. Kimotho recognized the documents as those they used in compensation of employees who had work injury claims. Kimotho took the documents and noticed that they had a signature that looked like his. He took the documents to the Litein Police Station and narrated what had happened, and the police said that they would investigate. Sometime later, the police visited his offices and questioned some of the employees, including the respondent, whom they went away with. Kimotho came to learn later that the respondent had been implicated in the forgery. He denied having a grudge against the respondent, stating that it was only because of the suspected fraudulent activities that he terminated the respondent's employment. The respondent had also not reported back to work after his arrest and prosecution.

9. In its judgment, the trial court held that there was no dispute that the respondent was apprehended while at his work place and that he was subsequently acquitted for lack of evidence. The court also considered that no one from the appellant's company was called to testify in the criminal case and neither was there any evidence from the Attorney General to explain why the respondent was charged. Moreover, there was uncontroverted evidence that the respondent was detained in police custody for a period of 7 days, and there was no explanation as to why he was held for such a long period of time before being arraigned in court. The trial court held therefore that the appellant and the Attorney General were jointly liable to the respondent. It made an award of damages of Kshs 500,000.00 for wrongful confinement and malicious prosecution, as well as Kshs 8,500.00 as special damages, costs of the suit and interest on the amount until payment in full.

10. The appellant was aggrieved with the decision of the trial court and it filed the present appeal in which it sets out six grounds of appeal in its Memorandum of Appeal. These are that the trial court erred in finding in favour of the respondent despite the lack of evidence and proof of all the elements of wrongful confinement and malicious prosecution; putting more weight on the respondent's evidence while disregarding its evidence and submissions; that it erred in making a finding on liability that was neither supported by facts or precedent; failing to analyse or evaluate the evidence from both sides and holding the appellant liable against the weight of the evidence; failing to apportion liability and finding both respondents jointly liable for the damages; and finally, making an award that was manifestly harsh and excessive in the circumstances of the case.

11. The appellant therefore asks the court to set aside the decision of the trial court and replace it with a decree dismissing the respondent's case.

12. In its submissions, the appellant framed two issues for determination. The first is whether the trial court erred in finding in favour of the respondent despite the lack of evidence and proof of wrongful confinement and malicious prosecution, and in putting more weight on the respondent's evidence while disregarding the appellant's evidence, and thus arriving at a wrong decision.

13. On the first issue, the appellant submitted that the evidence was that its involvement was only to the extent that its employee had reported a case of forgery after which the police commenced their investigations. The police had found that the respondent could shed some light on the investigations, and he was arrested. The appellant's employee had received this information from someone who came to his office and he went and reported the matter to the Litein Police Station. The appellant had then left the matter to the police, and it had no hand in the arrest or the detention of the respondent. In its view, the trial court had erred in finding it liable for the respondent's misfortunes.

14. It was its submission further that the respondent did not demonstrate that it should be held liable for his prosecution. First, he did not clearly satisfy the court that the ingredients of a malicious prosecution as outlined in **Mbowa vs. East Meno District Administration [1972] EA 352**, **Murunga v Attorney General [1979] KLR 138** and **Music Copyright Society Of Kenya v Tom Odhiambo Ogowl [2014] eKLR (Civil Appeal No. 17 Of 2014)** had been established. According to the appellant, the respondent was required to show that the prosecution was instituted by the appellant or by someone for whose acts it is responsible. Further, that it was instituted without reasonable and probable cause and that it was actuated by malice. The circumstances of this case as emerged from the evidence were that the appellant made a complainant on forgery of its documents and thereafter left the matter for investigation by the police.

15. The appellant further submitted that while it is true that the respondent was acquitted because there was no evidence to link him to the alleged offence, it was on account of the prosecution which failed in its duty to avail witnesses in court. Moreover, relying on the judgment of the court in **Socfinaf Kenya Ltd v Peter Guchu Kuria [2002] eKLR**, the appellant was of the view that the acquittal was not sufficient grounds for filing a civil suit to claim damages for malicious prosecution or false imprisonment. It reiterated that the respondent was arrested for reasonable cause and that the trial court failed to consider that if the investigations had not revealed any reasonable suspicion, then the respondent would never have been arrested. The appellant states that instead, the trial court put undue weight on the respondent's case. It urged this court to find, as the court in **Pauline Waruiru Gicheru v Robert Kiragu Kimwaki & Another [2015] eKLR** did, that it is the person alleging that there was no reasonable cause for his arrest to prove it.

16. The second limb of the appellant's appeal relates to the award made by the trial court. The appellant contends that the trial court erred in relying solely on the respondent's evidence and making a finding on liability and an award that was not supported either by the facts of the case or by judicial precedents. It contends that the finding of the lower court was made in error and urged this court to set it aside and replace it with an order dismissing the suit with costs.

17. In his submissions in response, the respondent identified two issues for determination. These were whether he had established his case for malicious prosecution, and whether he was entitled to damages. The respondent argued that he had established that malice was the key to striking the balance that the tort of malicious prosecution was designed to maintain, between the society's interest in effective administration of criminal justice and compensation for the individual who has been wrongly prosecuted for a purpose other than carrying the law into

effect. He also cited in support the case of **Chrispine Otieno Caleb v Attorney General (supra)** and **Stephen Gachau Githaiga & another v Attorney General** in support.

18. The respondent further submitted that he had established that he was entitled to damages, and he relied in this regard on the decision in **Dr. Willy Kaberuka vs Attorney General of Kampala HCCC No. 163 of 1993** for the proposition that a party wrongly prosecuted is entitled to damages for injury to his reputation and for the indignity and humiliation that he must have suffered. He urged the court, in reliance on, among others, the decision in **Kemfro Africa Limited t/a Meru Express Services (1976) & another v Lubia & another [1982-88] 1 KAR 727** not to interfere with the trial court's assessment of damages.

19. I have considered the record of appeal and submissions of the parties in this matter, as well as the authorities they have relied on. This being a first appeal, I am under a duty to re-evaluate the evidence tendered before the trial court and reach my own conclusions, bearing in mind that I have neither seen nor heard the witnesses-see **Pauline Waruiru Gicheru v Robert Kiragu Kimwaki & another [2015] eKLR**.

20. I have already set out above the evidence that was presented before the trial court. The respondent had made a claim for malicious prosecution against the appellant and the Attorney General. The fact of prosecution, however, is not of itself a wrongful act. As the Court of Appeal stated in **James Karuga Kiiru v Joseph Mwamburi & 2 others [2001] eKLR**:

“To prosecute a person is not prima facie tortious, but to do so dishonestly or unreasonably is. Malicious prosecution thus differs from wrongful arrest and detention, in that the onus of proving that the prosecutor did not act honestly or reasonably, lies on the person prosecuted.”

21. The ingredients for malicious prosecution were outlined in **Murunga vs the Attorney General (supra)** to include:

- 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.*

22. In **Chrispine Otieno Caleb v Attorney General [2014] eKLR**, the court noted that for the purpose of proving that prosecution is malicious, a termination that ends in favour of the plaintiff would include a finding that the plaintiff had no case to answer. It stated that:

“It is now trite law that acquittal whether after hearing both prosecution and defence witnesses or on a finding that there is no case to answer amounts to a termination in favour of the accused. The law is that for the purposes proof that the criminal proceedings have been determined in the appellant's favour it is enough that the criminal proceedings have been terminated without being brought to a formal end.”

23. I note that the parties are essentially in agreement on the principles applicable in a case of malicious prosecution, and they indeed rely on the same authorities in their submissions. Where they differ is in the application of those principles to the facts of the present matter.

24. The evidence before the trial court indicates that the prosecution terminated in favour of the respondent, who was acquitted because the prosecution adduced no evidence to implicate him in the crime for which he was charged. There is therefore no doubt that the criminal case against the respondent terminated in his favour. The question is whether, as a result of the acquittal, it can be concluded that the prosecution of the respondent was malicious. Further, whether it was instituted by the appellant, or someone for whom he is responsible.

25. The evidence shows that the complaint that led to the arrest of the respondent was made by one Patrick Kamau Kimotho (DW1) who was working as a manager at the appellant's estates. He testified that he reported a case of forgery that came to his attention and then left the matter to the police. The police later came back and asked to speak to some of the employees of the appellant, one of whom was the respondent. The respondent was thereafter taken away by the police, it would appear for further questioning. On his part, the respondent testified that on the date that he was arrested, DW1 came with the police and he was arrested.

26. From this evidence, it seems that the only role played by DW1 in the matter was to report the claim of forgery as well as avail the employees of the appellant, who included the respondent, to the police. The responsibility for investigating the complaint fell on the office of the Attorney General-see **Susan Mutheu Muia v Joseph Makau Mutua [2018] eKLR** in which the court expressed this view in the following terms:

“57. 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 Kenya Police were the ones who were responsible for investigating and taking out public prosecution on behalf of the Attorney General (now Director of Public Prosecution).

58. The appellant had neither control nor discretion over the matter. The investigation discretion and decision as to whether to charge or not to charge, the appellant was not (sic) the responsible of the police for whose action the Attorney General was responsible.”

27. In his decision in **John Ndeto Kyalo -v- Kenya Tea Development Authority & Anor 2005 eKLR** Maraga J (as he then was) examined the facts in a claim for malicious prosecution and stated as follows:

“The first defendant did not point an accusing finger at the plaintiff or in any way imply that the plaintiff was the one or was suspected to have been among those who stole the teas. It is the police who on their own decided to charge the plaintiff. In such circumstances where a complainant only reports to the police the commission of an offence without implicating any particular person and the police on their own decide who may have committed the offence and charge him, the complainant cannot be said to have instituted the prosecution against such person. It is the police who are liable to such person for instituting proceedings against him.”

28. In **Douglas Odhiambo Apel & Anor –vs- Telkom Kenya & Attorney General HCCC 2547 OF 1998 NBI**, Kihara Kariuki J (as he then was), faced with a similar issue but in a rather strange case in which the police and the Attorney General had been removed as defendants and judgment on liability entered by consent against the remaining defendant, rendered himself as follows:

“The Plaintiffs were arrested and charged by the Police. And the prosecution was undertaken by the Attorney-General as the public prosecutor. Telkom Kenya was merely a complainant. The decision to charge and prosecute the Plaintiffs was taken by the Police and the Attorney-General. Telkom Kenya as a complainant would not have been involved in that process. Once Telkom Kenya had made a complaint to the Police, it was left to the Police to investigate the complaint and decide whether or not to charge the Plaintiffs. That is why in a claim for damages for unlawful arrest, false imprisonment and malicious prosecution, the proper defendant is always the Attorney-General.”

29. The evidence available in the present case as it emerged from the testimony of DW1 at the trial court shows that not only did the appellant have no say with regard to who was prosecuted, but also that no one from the appellant’s office was called to give evidence during the criminal trial against the respondent. It is evident therefore that no malice on the part of the appellant or its agents in making the complaint to the police was demonstrated. From the available evidence, and in the absence of evidence from the Attorney General, it would appear that the prosecution against the respondent may have been brought by the police without any probable or reasonable cause. In **Stephen Gachau Githaiga & another v Attorney General [2015] eKLR** it was noted that:

“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.”

30. During the criminal proceedings, the prosecution failed to bring evidence to link the respondent to the crime with which he was charged. In the case from which the present appeal arises, the Attorney General did not adduce evidence to show how his office arrived at the decision to proceed with the prosecution of the respondent. In the absence of this, the trial court had uncontroverted evidence that the decision to prosecute by the Attorney General was not based on reasonable or probable cause.

31. In determining a matter in which the Attorney General failed to call evidence to support its assertion that a prosecution was proper, the court in **Stephen Gachau Githaiga & another v Attorney General (supra)** held that:

“Without any evidence emanating from the first Respondent on how the decision to arrest and charge the first Respondent (sic) was arrived at the Court has no option but to find that there was no probable and reasonable cause.”

32. Similarly, in **Thomas Mutsotso Bisembe v Commissioner of Police & Another [2013] eKLR** the court took the view that:

“In the absence of any evidence as to the facts and circumstances upon which the defendants relied, the court can only conclude that there was no probable and reasonable cause for charging the plaintiff and that constitutes malice for the purposes of the tort of malicious prosecution.”

33. In the present appeal, the appellant set out the circumstances under which it reported the fraud and showed that it was not called for any further action by the police or the Attorney General during the trial of the respondent. The appellant was therefore not involved in the decision to prosecute the respondent, nor was it called upon to provide any evidence or testify in the prosecution of the respondent. It had not pointed out the respondent as the person responsible for the alleged fraud, and there cannot therefore have been said to have been any evidence of malice on its part.

34. In his decision in **John Ndeto Kyalo -v- Kenya Tea Development Authority & Anor (supra)** Maraga J observed as follows:

“In a claim for malicious prosecution it is incumbent upon the plaintiff to prove, of course on a balance of probabilities, four essential aspects. Not one, not two, not even three but all four essential aspects. These are that:-

- 1. The defendants instituted the prosecution against the plaintiff;***
- 2. The prosecution ended in the plaintiff’s favour;***
- 3. The prosecution was instituted without reasonable and probable cause; and***
- 4. The prosecution was actuated by malice.***

If the plaintiff's case includes a claim for special damages he has not only to specifically plead but also strictly prove it."

35. In this case, it is apparent that the respondent was able to establish only one of the elements required in a claim for malicious prosecution. While the appellant reported the matter to the police at Litein Police Station, it did not report the respondent as the person who perpetrated the fraud, and it did not carry out the prosecution- the decision to prosecute was taken by the Attorney General. While the prosecution ended in an acquittal of the respondent, there was no malice established against the appellant. This is a critical element which the respondent recognises and underlines in his submissions as the key in a matter such as this. Further, no evidence was placed before the trial court to show collusion between the appellant and the Attorney General, which would have gone some way in supporting the allegation of malice against the appellant.

36. Accordingly, I agree with the appellant that the trial court fell into error in finding the appellant liable for the malicious prosecution of the respondent. This appeal therefore has merit, and it is hereby allowed. The respondent's claim against the appellant is hereby set aside with costs both in this court and the lower court.

Dated and Signed this 10th day of June 2019

MUMBI NGUGI

JUDGE

Dated Delivered and Signed at Kericho this 26th day of June, 2019.

GEORGE DULU

JUDGE