



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 56 OF 2009**

**MERU CENTRAL FARMERS' CO-OPUNION LTD.....APPELLANT**

**VERSUS**

**JUSTUS MURIUKI ANDREW.....RESPONDENT**

**(Being an appeal from the judgment and decree in SRMCC No. 527 of 1999 at Meru by Mr. J. O. Omburah, SRM delivered on 11<sup>th</sup> July, 2005)**

**JUDGMENT**

1. The appellant being the defendant in the trial court was sued by the respondent, then the plaintiff, together with three others for general and special damages for malicious prosecution, unlawful arrest and false imprisonment as well as costs and interest.
2. The plaintiff's claim before the lower court was that on or about the 23<sup>rd</sup> day of March 1990 the Meru Farmers Co-operative Union Ltd through its officers made a false and malicious report to Nkubu Police Station to the effect that the plaintiff who was a dairy cashier in the dairy section of the union had jointly together with other people stolen Kshs. 540,000/-. He stood trial but was acquitted on 9<sup>th</sup> March 1999 under **Section 215 of the Criminal Procedure Code**.
3. The defendant through their statement of defence denied the allegations and put him to strict proof. On 11<sup>th</sup> July 2005 judgment was entered in favour of the plaintiff against the defendants jointly and severally in the sum of Kshs. 377,000/- together with costs of the suit. The appellant being aggrieved by the award preferred this appeal based on nine grounds in its memorandum of appeal where it faulted the trial magistrate for, *inter alia*, assessment of the evidence, applying wrong principles in assessing damages and holding that the respondent had proved his case to the required standards of the law.
4. It was agreed that the appeal be canvassed by way of written submissions. The appellant submitted that the trial court erred when it looked at two of the ingredients of malicious prosecution, which is prosecution instituted without any reasonable or probable cause and prosecution actuated by malice jointly instead of examining each one separately. All persons in the affected sections were jointly charged as none of them would succeed without the co-operation of the others. It referred to the cases of **Murunga v AG [1979] KLR 138** and **Nzoia Sugar Company Ltd v Fungututu [1988] KLR 399** to support its claim. On the other hand, the respondent failed to submit his submissions.
5. 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 having in mind that it did not have the advantage of hearing witnesses. Accordingly, this court has carefully considered the record of appeal and submissions brought before this court.
6. **PW1 Justus Muriuki Andrew** he stated that he was a cashier at the Union at the dairy section. He recalled that on 2<sup>nd</sup> March 1990 he was arrested by police officers called Nkonge and Humphrey Kimunya as the Union was the complainants. He was taken to Nkubu Police Station where he spent 3 days. During the day he was being taken to C.I.D offices in Meru. Eventually he was charged with the offence of stealing by servant and remanded until 6<sup>th</sup> April 1999 when he was released on bond.
7. He did not know whether there was any theft or that the union lost some money relating to insurance. But he was charged with James Kirimi who used to work as a cashier at the dairy section, Livingstone Mutumbi cashier in the head office, and also Stephen Kiruki, the accountant. His case was heard and he was acquitted. As a result, he suffered loss due to the arrest, incarceration and subsequent prosecution.
8. At the close of the plaintiff's case, the defendant called two witnesses. **DW1 Fredrick Mburugu** Insurance and Estate Manager at the Union stated that he joined the Union on 2<sup>nd</sup> June 1990 and was not there when the matter started and only knows the circumstances of the case from the record. That money was stolen in the form of cheques which were banked as milk sales and money withdrawn. There is no evidence to show that the plaintiff received cheques but he was a cashier charged with the responsibility of receiving and banking money. That the Union only played the role of providing the documents which made no mention of any person in particular upon which the police made the decision to charge.

9. **DW2 Gabriel Kaburu M'Aburi** told the court that in 1990 he worked with the Union as a chief accountant. When some money went missing he was involved with the investigations. This was prompted because the Union was selling insurance to affiliated societies as agents of Co-operative Insurance Company who refused to renew their premiums because they owed them monies in outstanding premiums. A report was made by the internal auditor Justus Kiugu to the management committee concerning the misappropriation of insurance premiums.

10. He discovered some monies were being misappropriated at the dairy section. He made a report addressed to the general manager but did not mention names but offices of the assistant clerk and cashier. The committee decided the matter be reported to the police. But it was not the Union who directed the police to arrest the plaintiff.

11. 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 and special damages issued by the trial court were appropriate.*

12. Malicious prosecution is an intentional tort designed to provide remedy for an unfounded 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: proceedings were set in motion by the defendant, the proceedings were terminated in favour of the plaintiff, they were instituted without any reasonable and probable cause and were activated by malice.

13. It is not in dispute that the criminal proceedings were instituted against the respondent when the appellant report the issue of misappropriation of funds. It resulted in the respondent being acquitted, in which case, the said proceedings were terminated in the respondent's favour. Accordingly, the first two elements have been established.

14. The third ingredient is whether the appellant initiated the proceedings without any reasonable or probable cause. 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... 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.”**

15. According to the respondent he pleaded that the appellant made a false report to the police alleging that its money had been stolen when it knew the allegation was false. When he stood trial the officers of the Union limited vigorously participated as prosecution witnesses.
16. However, **PW1** told the court that he did not know whether there was any theft or that the Union lost some money relating to insurance. Moreover, he does not know whether the people of the Union did anything to have him arrested.
17. Alternatively, the appellant’s argued that money paid through cheques from affiliated co-op societies intended for insurance premiums would be banked as milk sales and the equivalent cash milk sales would be siphoned by some officers. Accounts clerks from the dairy section, insurance section and head office were jointly charged as none of them would succeed without the co-operation of the others.
18. **DW2** told the court that he did not mention names but offices. During cross- examination he stated that it appears that the police have arrested the wrong people. He did not find the respondent with any offence but the insurance clerk and cashier Livingstone Matumbi. People involved were the cashier, insurance clerk and others. During re-examination he stated that he believed the respondent was among those who had stolen money and he stills believes so. In spite of the indecisive evidence, the decisive conclusion is that there was a reasonable and probable cause on the face of it.
19. Was there malice? The respondent is the one alleging malicious prosecution, unlawful arrest and false imprisonment therefore the burden of proof is on him to proof so for whoever alleges must proof. In the case of **G.B.M KARIUKI –VS- ATTORNEY GENERAL (2016) eKLR** where the Court held:

***“...Malice however, can either be express or can be gathered from the circumstances surrounding the prosecution. A prosecution can either be mounted based on an offence committed in the presence of law enforcement officers or by way of a complaint lodged by a person to the said officer or agencies. However, the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any prosecution arm of the government is not a mere conduit for complainants. The police must act impartially and independently on respect of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect....”***

20. From the evidence adduced it shows that the appellant relied on the reports made to establish how money was being stolen. They then presented the information to the prosecution. According to **PW1** he stated that when he was arrested and before being arraigned in court for three days he was at the C.I.D offices in Meru. This evidences that he would not have been there if they were not conducting their duty of investigation to test the veracity of what had been presented to them.

21. Consequently, the respondent has failed to show how a false report was relied upon considering investigations were conducted. In addition, he himself stated that he does not know whether the people of the Union had anything to have him arrested. The fact that he was acquitted does not guarantee him a successful claim of malicious prosecution, unlawful arrest and false imprisonment. This was so expressed by the Court of Appeal in the case of **Nzoia Sugar Company Ltd v Fungututi[1988] eKLR** the Court of Appeal stated as follows:

***“It is trite law that acquittal, per se, on a criminal case charge is not sufficient basis to ground a suit for malicious prosecution. Spite or illwill 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 Cmpany.”***

22. From what has been adduced it is clear that money was stolen and that all the suspected parties were charged, that is, the respondent, the other cashier he worked with in the dairy section, cashier at the head office and accountant. I disagree with the trial magistrate as he failed to assess the evidence produced by the respondent to establish whether there was malicious prosecution. He tended to place high reliance on evidence adduced by the witness of the appellant which was indecisive.

23. Consequently, I am of the view the respondent failed to prove malicious prosecution, unlawful arrest and false imprisonment. As a result, the respondent was not entitled to be awarded damages in the sum of Kshs. 377,000/-. I am of the view that the appeal succeeds and set aside the judgment and decree of the trial court. The money of Kshs. 300,000 plus all the accrued interest deposited at Consolidated Bank of Kenya in the joint names of counsel for the parties be released to the appellant. As for costs, each party to bear its own costs.

**HON A. ONG’INJO**

**JUDGE**

**JUDGMENT DELIVERED, DATED AND SIGNED IN COURT ON 18<sup>TH</sup> DAY OF JULY 2019.**

**In the presence of :**

C/A: Kinoti

Appellant:-M/s Mwenda Mwarama Advocate for Appellant – No appearance

Respondent:-Mr Ashaba holding brief for M/s Murethi for Respondent

Appellant –Present in person

Respondent : No appearance

**HON A. ONG'INJO**

**JUDGE**