



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 102B OF 2013

ISAAC KWANDO ONYANGO.....APPELLANT

VERSUS

WILLIAM KAMUREN CHIRCHIR CHEPKUT.....1ST RESPONDENT

MILKA JEPNGETICH BOTH T/A MARRIOT HOTEL...2ND RESPONDENT

DANIEL KIPROTICH CHIRCHIR.....3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

(An Appeal from the Judgment of the Principal Magistrate Honourable F. N Kyambia in Eldoret CMCC No. 196 of 2010, dated 19th July, 2013)

JUDGMENT

The appellant was an employee of the 1st and 2nd respondents and a fellow employee of the 3rd respondent. He instituted a suit against the respondents in Eldoret Chief Magistrates' court Civil Case No. 196 of 2010 seeking damages for malicious prosecution and damages for defamation. The suit was dismissed and the appellant filed the appeal being dissatisfied with the decision of the lower court.

APPELLANT'S CASE

The appellant did not file submissions perse, he stated that he shall rely on his grounds of appeal and his submissions in the lower court. The record is not paginated and therefore it is not clear to the court where the submissions referred to are.

However, upon perusal of the record, the submissions were indeed in the record. He submitted that the plaintiff was an employee of the 1st and 2nd defendants and they lodged unfounded complaints at Eldoret police station claiming that the plaintiff while working for the 1st and 2nd respondents as a manager, stole Kshs. 344,600/- and he was wrongly arrested and detained by officers twice. He was consequently charged in Eldoret Chief Magistrates' Court Criminal Case No. 408 of 2009.

He submitted that he had proven malice as there was no apology tendered by the defendant after he was acquitted. He suffered general and special damages owing to the defendant's actions and as a result his case had been proven on a balance of probabilities.

The 3rd defendant was an employee of the 1st and 2nd defendants and his actions made him vicariously liable. He further submitted that failure to follow up on the issue after making complaints at the police station was enough to establish malice as their intention was to have the plaintiff locked up.

The police failed to pursue the matter after taking statements and they detained the plaintiff for a longer period than required in law.

The actions of the defendants caused the plaintiff mental anguish and torture and he is entitled to compensation for general and special damages as prayed. He further submitted that he was entitled to damages of kshs. 4,000,000/- in general damages.

RESPONDENT'S CASE

The respondents submitted that the appellant was an employee of the 1st and 2nd respondents and the 3rd respondent was a fellow employee. He was the manager of Marriott hotel and was arrested and charged with the offence of theft by servant on account of money he stole between November and December 2008.

After investigations the appellant was arrested and arraigned in court and charged in Eldoret Chief Magistrates' Court Criminal Case No. 408 of 2009. The case was closed and the accused was acquitted as no evidence had been tendered owing to the prosecution's failure to summon witnesses to attend court and testify.

When the appellant appeared in court the newspapers reported that he had been charged with the offence of theft and this appeared in the daily nation of 28/1/2009.

The appellant was the manager of the hotel and received cash as an agent of the hotel. He was the one to account for it and he provided a false explanation that the payment was in cheques which the customers refuted. The customers provided proof of cash payment and therefore, there was reason to suspect the appellant had embezzled the funds. All witnesses who testified demonstrated that the appellant received cash and issued receipts to them. He was unable to account for the cash he had received and the suspicion that he had stolen the money was reasonable.

The arrest and confinement of the appellant was necessary to facilitate the investigations by the police into the theft.

He was in charge of the records and the employees and was in a position to frustrate investigations.

It was up to the police to decide how to deal with the arrest and confinement of the appellant once the hotel lodged the complaint of theft. It was up to the police to do whatever was necessary to carry out the investigations unhindered. The arrest and confinement of the appellant was outside the control of the 1st, 2nd and 3rd respondents.

There was reasonable presumption that the appellant had embezzled the funds entrusted to him and therefore the prosecution was not malicious. From the evidence tendered in the lower court it is obvious that the arrest and confinement was undertaken by the police and the 1st to 3rd respondents had no part in it. In the discharge of the power to arrest and prosecute the police do not do so under the direction of anybody.

The respondents did not in any way cause the publication in the daily nation and standard newspapers. They are not correspondents of the newspapers. If the appellant was aggrieved by the publication, he ought to have sued the two newspapers but he did not. What was reported in the newspapers was a factual reflection of what had taken place in the criminal case.

The defamation claim was not tenable as it ought to have been directed to the newspapers and ought to have been filed within a year of publication. It was filed a year outside the requisite one-year limitation period.

The appellant failed to prove his case against the 1st, 2nd and 3rd respondents and is therefore not entitled to damages.

ISSUES FOR DETERMINATION

- a. Whether the Appellant proved his case for malicious prosecution
- b. Whether the Appellant proved his case for defamation
- c. Whether the appellant is entitled to special damages for hiring an advocate in the criminal case

WHETHER THE APPELLANT PROVED HIS CASE FOR MALICIOUS PROSECUTION

The principles for one to establish a successful case for malicious prosecution were given in the case of Stephen Gachau Githaiga & another v Attorney General [2015] eKLR where Mativo J 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 fuelled 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.

It is evident that the prosecution was not at the instance of the 1st and 2nd respondents; they merely lodged a complaint after the theft of cash. The criminal case was terminated due to failure of witnesses to testify. The defendants had reasonable cause to prosecute him by virtue of his position as manager and the loss of cash. He has also not proven that the same was actuated by malice as there was reasonable cause to prosecute him given the fact that he was the manager and handled cash on behalf of his employer.

In **Mbowa v East Mingo 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. If the plaintiff does not prove them he would fail in his action.

The fact that the four requirements do not unite in this instance therefore mean that the appellant did not meet the threshold to prove malicious prosecution.

WHETHER THE APPELLANT PROVED HIS CASE FOR DEFAMATION

In his submissions in the lower court the appellant did not even submit on this issue. Further, the respondents are not correspondents of the newspapers and neither are the newspapers that published the stories included as parties in this suit. Therefore, the appellant has failed to prove a case for defamation.

WHETHER THE APPELLANT IS ENTITLED TO SPECIAL DAMAGES FOR HIRING AN ADVOCATE IN THE CRIMINAL CASE

The appellant did not submit on the same in the lower court. He did not table any evidence in this regard.

In **Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd [2013] eKLR** the court held;

"We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.

The appellant did not plead or prove the claim for special damages and as such he is not entitled to damages as sought. Given that the claim did not succeed he is not entitled to any damages and has failed to prove that he is.

In the premises the entire appeal fails and is hereby dismissed with costs to the respondents.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 22nd day of October, 2019

In the absence of:

Mr. Andabi for the Appellant

Mr. Momanyi for the Respondent

