



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CIVIL APPEAL NO.57 OF 2017

(FORMERLY NKR.HCCA.17/2015)

(Appeal Originating from Nyahururu CM's Court Civ.No.34 of 2013

by: Hon. P.O. Muholi- R.M.)

JOHN MUNENE MAINA.....APPELLANT

- V E R S U S -

PETER MURAGE KAMANJA.....RESPONDENT

J U D G M E N T

By a plaint dated 7/2/2013, the appellant/former plaintiff, **John Munene Maina**, sought the following prayers against the respondent/defendant.

- a) General and punitive damages for false arrest, unlawful detention and malicious prosecution;***
- b) Kshs.180,800/= being unpaid salary arrears;***
- c) Special damages of Kshs.10,650/=;***
- d) Costs of the suit and interest.***

In the plaint, the appellant alleged that on 29/1/2010, the respondent unlawfully and without any just cause, maliciously made a report at Rumuruti police station to the effect that the appellant had stolen 10 Kilograms of Mithane super chemical and one litre of nulead chemical worth Kshs.8,000/= following which the appellant was arrested and locked up at Rumuruti Police Station, was arraigned before the court on 30/11/2010 charged with the offence of stealing by servant contrary to section 281 of the Penal Code at SPM's Court Nyahururu in Cr.Case 2883/2010; that the appellant was detained in custody for 5 days before he was released on bond. He was prosecuted but consequently acquitted on 22/7/2011 for lack of evidence.

According to the appellant, the arrest and prosecution was activated by malice and was without any reasonable and probable cause.

The respondent, **Peter Murage Kamanja** filed his statement of defence dated 20/4/2013 disputing the applicant's claim by stating that he lodged a genuine complaint at Rumuruti Police station touching on theft of his farm chemicals at his farm; that on lodging the complaint, the police commenced investigations; the respondent denies having been involved in the investigations, arrest or prosecution of the appellant; that though the appellant was acquitted of the charge, he denies that the arrest and prosecution was activated by malice or that the complaint was lodged without reasonable or probable cause. He also denied that the appellant suffered any loss as pleaded and is not under any obligation to pay the appellant arrears of salary.

The parties testified before the trial court and upon considering the evidence, the trial court found that the appellant had not satisfied the ingredients of the claim and dismissed the suit with costs. The dismissal of the suit provoked this appeal.

The appeal raise to grounds of appeal as follows:

- (1) That the learned trial magistrate erred in law and fact in finding that it was the appellant who initiated the process which led***

to his arrest and arraignment in court by reporting to the respondent that the chemicals were finished;

(2) That the court erred in finding that the respondent's report to the police to the appellant was not activated by malice;

(3) That the court erred in failing to find that the prosecution of the appellant in Nyahururu Cr. Case No. 2883/2010 was without reasonable and probable cause;

(4) That the court erred in finding that the respondent had no control over Nyahururu Cr. Case 2883/2010 against the appellant;

(5) That the trial magistrate erred in finding that the appellant had not proved a case of false arrest unlawful detention and malicious prosecution against the respondent and by dismissing his claim;

(6) That the learned magistrate erred by failing to assess the damages payable to the appellant had he succeeded in the case.

The appellant therefore prays that the judgment delivered on 27/1/2015 be set aside and judgment be entered against the respondent as prayed in the plaint.

Mr. Waichungo, counsel for the appellant filed submissions on 29/3/2019 while Mr. Nderitu Komu, counsel for the respondent filed his submissions on 14/4/2018. Both counsel highlighted the submissions in court.

In the trial court, the appellant testified that he had been employed by the respondent on his farm at Thome in 2009; that he used to help the manager in mixing medicine; that while at work on 29/11/2010, he called the respondent to inform him that medicine was finished; that the respondent said that he was on his way to the farm and arrived at 9.00 a.m.; that at 9.20 a.m., the appellant saw police officers from Thome Administration Police Post; that the respondent said that his medicine had been stolen, the appellant was arrested and taken to the Administration Police Post then to Rumuruti Police station. Thereafter, he was charged at Nyahururu Court with the offence of stealing by servant but was acquitted on 22/7/2011.

According to the appellant, no chemical was stolen from the farm.

In his defence, the respondent admitted that the appellant worked for him on casual basis; that on 26/11/2010, he left the appellant with some chemicals to spray tomatoes, that is Methane and Millae; that he was to give the chemicals; that the appellant lived where chemicals were kept; that on 29/11/2010, the appellant called to inform him that the chemicals had been stolen; that police went there to investigate; that the appellant was arrested by the Administration Police who later preferred charges against him. The respondent denied having had any control on the arrest, investigations or the charges; that when police went to the farm, they interrogated 3 people and took away the appellant and one Muchoki who was later released; that the appellant is the one who took the chemicals because he had the store keys and in charge of it. He denied having been malicious.

Mr. Waichungo submitted that the case of *Nelles v Ontario* which was cited in *Stephen Gacharu Githaiga HCA.27/2014 (Nyeri)* discussed the elements that need to be satisfied in a case of Malicious prosecution which are that:

“(1) The prosecution must have been initiated by the defendant;

(2) The proceedings must have been terminated in favour of the plaintiff;

(3) There must be absence of reasonable and probable cause;

(4) There must be malice or a primary purpose other than that of carrying the law into effect.”

On ground 1, counsel submitted that the appellant was employed by the respondent as a farm manager in 2009; that on 29/11/2010, the appellant called the respondent to inform him that the chemicals were finished; that the respondent went to the farm with Administration Police Officers who arrested him on claims that he had stolen the chemicals for which he was charged; that the appellant reported to the respondent that the chemical was finished and they required more but instead the respondent reported to the police that the chemicals had been stolen; that the respondent accused the appellant of stealing yet there was no evidence of loss; that the trial court upheld the appellant's defence and acquitted him hence the magistrate was wrong in holding that the appellant initiated the arrest.

On ground two, it was submitted that the respondent acted out of malice when he reported to the administration police because the respondent had not visited the farm to ascertain if there was indeed loss of chemicals that he had supplied on Friday. According to the appellant, the respondent has his salary arrears and that must be the reason why he made a false report and that is why the respondent did not reinstate the appellant even after the acquittal.

As to whether the arrest and prosecution was without reasonable and probable cause, counsel relied on the decision in *Hicks v Faulkner, Herniman v Smith and Glinski* which was cited in *Kagane v A.G. (1969) EA 643* where the court held that:

“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..”

It was counsel's view that the fact that the respondent left chemicals with the appellant did not result in stealing; that the police never investigated whether the chemicals had been used or stolen and that there was no reasonable and probable cause in reporting the matter to the police.

As to whether the respondent had no control over the criminal case, it was argued that upon making a report to the police, the arrest was done the same day and charges preferred next day and later the respondent testified in support of the charges.

Lastly, counsel urged that the criminal proceedings were terminated in the appellant's favour and that court erred in not assessing general damages that would have been due to the appellant had the appellant succeeded.

In opposing the appeal, Mr. Nderitu submitted that the prayers are damages for false arrest, unlawful detention and malicious prosecution; that it was upon the appellant to prove that it is the respondent who arrested him, unlawfully detained him and maliciously prosecuted him; that the appellant failed to prove that the respondent had the capacity to arrest him, detain him and prosecute him; that the applicant failed to enjoin the In-Charge of police to the suit because it is the police who received the complaint, conducted investigations and recommended that the appellant be charged; that since the appellant lodged the complaint, the respondent had no control over how the police conducted their investigations; that the respondent relied on report of loss of his chemicals, went to the farm and confirmed the loss, reported to the police who took over; that the appellant admitted that it was within the respondent's right to lodge a complaint and there was no malice on the part of the respondent in making the report and that the fact of acquittal is not sufficient to sustain a case of malicious prosecution. Counsel further urged that the appellant was acquitted because there was no sufficient evidence to convict him but there was probable cause to have him arrested. Counsel also urged the court to dismiss the appeal with costs and that respondent be awarded costs of the appeal and lower court. Counsel relied on the decision of Susan Muthoni Muia v Joseph Makau Mutua HCC.128/2017 (Makau), for appellant's counsel submitted later the issue of non-joinder of the Attorney General and In-Charge was dismissed by the lower court and the respondent did not base the appeal on the issue and the court should disregard it.

I have considered the proceedings, judgment of the trial court the grounds of appeal, rival submissions and authorities cited. The law is settled on the ingredients necessary to prove the tort of malicious prosecution. These ingredients have been discussed in many decisions. In Stephen Gachau Githaiga & another v Attorney General J. Mativo stated that **"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."**

J. Odunga in the case of Chrispine Otieno Caleb v Attorney General (2014) eKLR was guided by the decision of the Court of Appeal in Mbowa v East Mengo District Administration (1972) EA 352 where the court expressed itself that:

"The action for damages for malicious prosecution is part of the common law of England.....The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than for the public benefit. It originated in the medieval writ of conspiracy which was aimed against combinations to abuse legal procedure, that is, it was aimed at the prevention or restraint of improper legal proceedings.....It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion of the truth."

Briefly put:

- "(a) That the prosecution was instituted by the defendant or by someone for whose acts he is responsible;***
- (b) That the prosecution was instituted without reasonable or probable cause;***
- (c) That the prosecution was actuated by malice;***
- (d) That the prosecution was terminated in the plaintiff's favour."***

With regard to the first ground, the appellant must prove that the respondent initiated the prosecution and was actively instrumental in causing a person with some judicial authority to take action that involves the plaintiff in a criminal charge against another before a magistrate.

In the case before me, there is no doubt that it is the respondent who made a complaint to the Administration Police that his chemicals had been stolen. According to the respondent, it is the appellant who informed him of the loss and he then called the police.

The fact that the respondent made a report cannot of itself make the respondent responsible to the prosecution. The other three ingredients must be proved.

When a complainant lodges a complaint with the police, it is the police who are charged with the duty to investigate and determine whether there are good grounds to prosecute or not. The Office of the Directorate of Public Prosecution (ODPP) then takes up the matter of prosecution if a case is made out to do so.

In the instant case, the respondent reported to the Administration Police who went to the farm, interrogated three people, picked up two including the appellant. They later released one but by the next day they had made up their minds to prosecute the appellant.

In the case of James Karuga Kiiru v Joseph Mwambuu & 3 others CA.171/2000.

The court said *“To prosecute a person is not prima facie tortuous; but to do so dishonestly or unnecessarily is. And the burden of proving that the prosecutor did not act honestly or reasonably lies on the person prosecuted.”*

It was the duty of the appellant to prove that there was malice in the prosecution.

Once the police arrested the respondent, there is no evidence on record to show that it is the respondent who influenced them in some way, to charge the appellant. Once the matter was in the hands of the police the respondent neither had control nor direction over the matter. In HCC.2547/1995, Douglas Odhiambo Apel and another v Telkom Kenya & Attorney General, J. Kihara said, *“The accused were arrested and charged by the police and the prosecution was undertaken by the Attorney General as the Public Prosecutor. Telkom Kenya (complainant) was merely a complainant. The decision to charge and prosecute the plaintiffs was taken by the police and the Attorney General. Telekom Kenya, as the complainant would not have been involved in that process....that is why in a claim for unlawful arrest, false imprisonment and malicious prosecution, the proper defendant is always the Attorney General.”* Presently, the proper defendant would be the Director of Public Prosecution.

Although the trial court said that the Director of Public Prosecution was not a necessary party to these proceedings, in my view, it was necessary to join him because questions as to why the police decided to charge the appellant cannot be answered by the respondent.

Reasonable and probable cause was discussed in Kagane v Attorney General (Supra) where the judge said *“Reasonable and Probable cause is a honest belief in the guilt of the accused based upon a full conviction founded upon reasonable ground 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 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 the objective test. That is to say, to consider 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.”*

Since the appellant has not tendered any evidence to show that there was no reasonable and probable cause that prompted the police to charge him and having omitted the Director of Public Prosecution from the case, the only decision this court can arrive at is that there was indeed reasonable and probable cause to charge and prosecute the appellant.

The next issue is whether the lower court proceedings were terminated in favour of the appellant: No doubt the appellant was acquitted after having been placed on his defence.

Whether malice was proved;

In the case of James Karunga Kiiru Supra, it was held that the mere fact that a person has been acquitted of a criminal charge does not necessarily connote malice on the part of the prosecution or complainant. Malice can be express or can be inferred for the circumstance surrounding a prosecution. So far, no malice has been proved.

The appellant alleged that he was owed salary arrears and that is why the respondent called the police. However, the respondent denied that the appellant was a regular employee but was hired on casual basis nor was he owed money. The question is, would the appellant have worked for the respondent from October, 2009 till November, 2010 without pay? How was he surviving and why did he not complain earlier? That allegation sounds too far-fetched.

In any event, on this eventful day of 29/11/2011, it is the appellant who called the respondent to inform him that chemicals were missing or had been stolen. It is not the respondent who set the ball rolling. It is after that report that the respondent reported to the police who followed up with investigations. The allegation of salary owing is not true.

In a case of malicious prosecution, the appellant has to prove that the prosecution was actuated by malice or that the complainant and the prosecutor colluded. So far, there is no evidence that the prosecution was actuated by ill motive or malice in deciding to prosecute the appellant.

In the end, I find that the appellant did not prove the elements necessary to prove the test of false arrest and malicious prosecution. The appeal lacks merit and should be dismissed. Had the appellant proved his case, the court may have awarded him Kshs.600,000/= as damages.

In the end, I dismiss the appeal with costs of the appeal and lower court to the respondent.

Dated, Signed and Delivered at NYAHURURU this 9th day of October, 2019.

.....

R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Wanjiru for appellant

Eric – Court Assistant