



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 21 OF 2015

KENYA BREWERIES LIMITED.....APPELLANT

VERSUS

GEORGE GITHINJI KURIA.....1ST RESPONDENT

FEISAL ATHAMAN NDARAWA..... 2ND RESPONDENT

THE HON. ATTORNEY GENERAL..... 3RD RESPONDENT

(An appeal from the judgement of the Chief Magistrate Court of Kenya at Milimani delivered on 5th December, 2014, by Hon. Obulutsa (Mr.) in CMCC No. 6978 of 2010)

JUDGEMENT

1. George Githinji Kuria and Feisal Athman, the 1st and 2nd respondents respectively were employed by Pemco Agencies Ltd as forklift drivers and seconded to Kenya Breweries Ltd, the appellant herein. On the night of 25th May 2008, the respondents were on duty loading crates of beer into trucks. In the morning of the next day the duo were informed and accused of loading excess crates of beer of tusker into a truck.

2. The respondents were arrested and charged with others with offence of stealing contrary to Section 275 of the Penal Code before the Makadara Chief Magistrate's Court. The respondents were tried and eventually acquitted of the aforesaid charge under Section 215 of the Criminal Procedure Code.

3. Upon their acquittal, the respondents filed an action against Kenya Breweries Ltd and the Attorney General, the appellant and 3rd respondent respectively herein, in which they sought for damages for wrongful arrest, false imprisonment and malicious prosecution and loss of career plus special damages of ksh.100,000/= and costs. Hon. Obulutsa. Learned Chief Magistrate heard the suit and in the end gave judgment in favour of the 1st and 2nd respondent and against the appellant and the 3rd respondent in the sum of ksh.800,000/=.

4. The appellant being aggrieved, preferred this appeal and put forward the following grounds.

1. The learned Trial Magistrate erred in law and in fact in finding that the appellant had no reasonable cause to suspect the 2 plaintiffs.

2. The learned Trial Magistrate misapprehended the law and erred in failing to consider that the appellant was only seeking to secure the ends of justice after being wronged by reporting the theft to the police.

3. The learned Trial Magistrate erred in law and in fact in finding that the plaintiffs had established liability against the appellant.

4. The learned Trial Magistrate's decision is unsupported by the submissions adduced.

5. That the learned Trial Magistrate erred in law in failing to consider all the 1st defendant's submissions and authorities cited therein and as such came to a wrong conclusion.

6. The learned Trial Magistrate erred in law and in fact in awarding the plaintiffs general damages of kshs.300,000/= each, special damages of kshs.100,000 each and costs of the suit.

7. The learned Trial Magistrate's judgment is erroneous and based on wrong principles.

5. When the appeal came up for hearing, this court gave directions for the appeal to be disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also considered the rival written submissions. Though the appellant put forward a total of seven grounds of appeal, those grounds may be reduced to two main grounds. First, whether the 1st and 2nd respondents had established their case on a balance of probabilities to find the appellant and 3rd respondent liable for malicious prosecution. Secondly, whether the trial magistrate erred in awarding damages to the 1st and 2nd respondents.

6. On the first issue, it is the submission of the appellant that the 1st and 2nd respondents failed to discharge the burden of proof in their allegations of malicious prosecution against the appellant. The appellant pointed out that it did not actuate the criminal proceedings against the 1st and 2nd respondents nor was the prosecution founded on malice. It is further the submission of the appellant that the appellant has proven that the complaint made was reasonable and justified.

7. The 1st and 2nd respondents on the other hand are of the submission that they tendered evidence proving that the appellant and the 3rd respondent were actuated by malice in pressing for charges against them yet they had no reasonable or probable cause. The 1st and 2nd respondents pointed out that the 3rd respondent's officer who investigated the complaint appears to have based her decision to charge them on the doctrine of common intention yet no evidence was tendered to establish that doctrine.

8. In his judgment, the learned Chief Magistrate stated that the report made to the police by the appellant's packaging manager did not implicate the 1st and 2nd respondents. He also stated that there was nothing to show that the 1st and 2nd respondents were questioned to find out if they know about those crates. He also came to the conclusion that there was no reasonable cause to suspect the 1st and 2nd respondents without carrying out a thorough investigation of the complaint therefore the police action of charging them was activated by malice.

9. The ingredients necessary to exist to establish the action for damages for malicious prosecution were restated by the East African Court of Appeal in the case of **Mbowa vs= Mengo District Administration (1972) E.A 352**. inter alia as follows:

a. "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.

b. It's essential ingredients are:

c. 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;

d. 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;

e. 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

f. 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.....

g. 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.

h. 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 failed in his action. The damage that is claimed is in respect of reputation but other damages might be claimed, for example, damage to property.....The damage to the plaintiff results at the stage in the criminal proceedings when the plaintiff is acquitted or, if there is an appeal, when his conviction is quashed or set aside. In other words, the damage results at a stage when the criminal proceedings came to an end in his favour, whether finally or not. The plaintiff could not possibly succeed without proving any or all of the first three essentials of malicious prosecution without the fourth which forms part of the cause of action, would not take him very far. He must prove that the court has found him not guilty of the offence charged.

i. The law in action for malicious prosecution has been clearly defined and in so far as the ordinary criminal prosecution is concerned the action does not lie until the plaintiff has been acquitted of the charge.

10. After a careful re-evaluation of the evidence tendered before the trial court, it is apparent that the 1st and 2nd respondents were on duty during the night when the alleged crates of beer were said to have been stolen. The process of loading the crates of beer into the trucks involved four parties. The process involved the collection of beer from the production point after being verified by the brand manager. Secondly, that the transportation of the same using forklifts to the loading point before loading the beer onto the lorry upon verification by the vehicle checker. The whole process included a brand manager, fork lifters (1st and 2nd respondents) and a vehicle checker. The quartet

were charged with the offence of theft in Criminal Case no. 1985 of 2008.

11. The appellant tendered evidence showing that the 1st and 2nd respondents each had a loading sheet just like the brand manager and the vehicle checker which indicate how much beer was loaded. In my humble view, the investigating officer came to the correct decision to have the 1st and 2nd respondents charged on the basis of the evidence gathered and in the circumstances of this case. The 1st respondent stated in his evidence that he recorded a statement with the police to explain his role in the saga. The chain of events in this process started with packing manager who initiates the process and followed by the fork lifter from the production point to the parking bay and then the fork lifter loads the crates of beer onto the truck and the vehicle checker confirms the brand and quantity of the beer loaded.

12. According to the evidence tendered showing the chain of events, the presumption of involvement by the 1st and 2nd respondents as being part of the persons responsible for the theft was reasonable. The investigating officer therefore had a probable cause to charge the 1st and 2nd respondents. It cannot be concluded in the circumstances that the charge was without a probable cause. The learned Chief Magistrate therefore came to the wrong conclusion that the 1st and 2nd respondents' prosecution was actuated by malice. The evidence tendered did not establish any elements of malice on the part of the appellant and the 3rd respondent. Having carefully re-evaluated the evidence presented before the trial court, I have come to the conclusion that the 1st and 2nd respondents failed to establish the case of malicious prosecution against the appellant.

13. The second issue is in respect of quantum. It is obvious that a successful party in an action for malicious prosecution should be given damages. However, the appeal turning successful means the award of damages must be set aside.

14. In the end, this appeal is allowed. Consequently, the order entering judgment is set aside and is substituted with an order dismissing the suit with costs to the appellant and the 3rd respondent. The appellant is awarded costs of the appeal. Since the 3rd respondent did not participate in this appeal, this court declines to make an award on costs to the 3rd respondent.

Dated, signed and delivered at Nairobi this 11th day of October, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent