



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CIVIL APPEAL NO 142 OF 2017**

*(Being Appeal from Judgment of Hon. Eric Malesy, SRM*

*in Kakamega CMCC No. 439 of 2013 on 14/11/2017)*

**WEST KENYA SUGAR COMPANY LTD.....APPELLANT**

**VERSUS**

**1. CEDRICK MATHEWS KHAKABO**

**2. ATTORNEY GENERAL.....RESPONDENTS**

**JUDGMENT**

1. The appellant appeals from the decision of the trial Court in Kakamega CMCC No. 439 of 2013 in which the Court gave judgment for malicious prosecution in favor of the 1st respondent jointly and severally against the Appellant and 2nd Respondent for the sum of Ksh.400,000/= in general damages a together with costs of the suit. The civil suit for malicious prosecution arose from the Respondent's acquittal after full trial for the charge of stealing in Butali PMCCR. Case No. 491 of 2011.

2. Being dissatisfied with the Judgment, the Appellant filed this appeal via memorandum of Appeal which had 12 ground of appeal, but which parties agreed to reduce into the following issues for determination.

**1. Whether the 1st Respondent proved his case to the required standards.**

**2. Whether learned magistrate erred in apportioning liability at 100% jointly and severally against the Appellant and the 2nd Respondent.**

**3. Whether the award of damages awarded by the Learned Trial Magistrate is inordinately high.**

**Facts**

3. The plaintiff instituted the suit herein vide a plaint dated 4/11/2013 and filed in court on 5/11/2013. He averred that on or about 5/9/2011 the 1<sup>st</sup> defendant's agents without any reasonable cause gave false report to the Kakamega North Police Station to the effect that the plaintiff had stolen metal pieces belonging to the 1<sup>st</sup> defendant. The plaintiff was as a result of the said report arrested and prosecuted which prosecution terminated by way of an acquittal under Section 210 of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya (CPC). The plaintiff averred that the action by the defendants were driven by malice whose particulars he listed. The plaintiff went further to aver that as a result thereof he suffered damage and seeks damages.

4. The defendants filed separate statements of defence denying all the averments by the plaintiff. The suit was then set down for hearing. During the hearing the plaintiff testified as PW 1 and reiterated the averments in the plaint. He produced in evidence the proceedings of the criminal case (SRM Court at Butali, Case No. 491/2011). He also produced the notice prescribed in law that he sent to the 2<sup>nd</sup> defendant before instituting the said suit.

5. In his submissions, the plaintiff referred to the case of **Stephen Gachau Githaiga & Another vs. Attorney General [2015] eKLR**. The plaintiff through counsel urged that the prosecution was initiated by the 1<sup>st</sup> defendant and that the case was terminated in his favour. He went further to urge that the prosecution was devoid of reasonable and probable cause since the eye witness who testified in the case was never presented to the police. The 1<sup>st</sup> defendant is said to have been malicious since they did not carry out investigations before making a

report to the police.

6. The 1<sup>st</sup> defendant filed a defence denying all the averments in the plaint. In the alternative the defendant averred that the plaintiff was prosecuted on reasonable and probable cause, without malice and following illegal actions by the plaintiff.

7. The 1<sup>st</sup> defendant availed one witness, Amos Ogola. In his written statement which was adopted as his evidence in chief, he stated that on 5/10/2012 at around 5.00 a.m. he saw, though not clearly, the plaintiff throw scrap metals over a well to the other side. He immediately reported the incident to his supervisor. In court he stated that he had seen the plaintiff clearly and it was the uniform he was wearing that made it possible for him to recognize the plaintiff. The 1<sup>st</sup> defendant urged that the prosecution was instituted with reasonable and probable cause and that it was not actuated by malice.

8. The 2<sup>nd</sup> defendant denied all the averments in the plaint. The 2<sup>nd</sup> defendant did not call witnesses. In submissions, it was urged that the prosecution was not malicious and was instituted with reasonable cause.

#### Submissions

9. It is the Appellant's case that the 1<sup>st</sup> Respondent did not prove malice on the part of their security officer who made the report to the police based on reasonable ground that would lead any cautious man to conclude that the 1<sup>st</sup> Respondent was probably guilty. They relied on the case of Music Copy Right Society of Kenya vs. Tom Ogowl 2014 eKLR. They further submitted that the actions of the police ought not to have been blamed on the Complainant who had no control over police actions. They relied on the case of David Kirimi vs. Frederick Mwenda [2009] eKLR. They also submitted that the award is inordinately high and prayed that the same be reduced to Ksh 300,000.

10. The 1<sup>st</sup> Respondent opposed the appeal. He submitted that he had proved his case to the required standards and that the award of general damages was suitable in the circumstances.

The core issues before the Court are three-fold, namely:

- a. whether liability for malicious prosecution has been established.
- b. whether learned magistrate erred in apportioning liability at 100% jointly and severally against the Appellant and the 2nd Respondent.
- c. Whether the Court will interfere with the award of damages by the trial Court.

11. The duty of a first appellate Court as was held in the cases of Mwana Sokoni vs. Kenya Bus Service Ltd [1985] KLR 931 and Selle vs. Associated Motor Boat Company Ltd [1968] EA 123 is to analyze and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses.

a) Whether liability for malicious prosecution has been established on the evidence before the Court

12. The ingredients for the tort of malicious prosecution have been settled in this jurisdiction in several cases among them; **Kagane and Others vs. Attorney General and Another** [1969] EALR 643, **Mbowa vs. East Mengo District Administration** [1972] EA 352, **Murunga vs. Attorney General** [1979] KLR 138 and they are as follows:

- a) The plaintiff must show that the prosecution was instituted by the defendant, or by someone for whose acts he is responsible.
- b) That the prosecution terminated in the plaintiff's favour.
- c) That the prosecution was instituted without reasonable and probable cause.
- d) That the prosecution was actuated by malice.

These elements were summarized by the East Africa Court of Appeal in **Mbowa vs. East Mengo District Administration** as follows;

***“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.”***

13. It has already been established and it is not in dispute that it was the appellant's Security officer who made the report to the police and thus the first ingredient was satisfied. The evidence adduced also shows that the 1st Respondent was acquitted of the charges. The parties herein are in dispute as to whether there was probable cause and whether the prosecution was actuated by malice.

b) Was there reasonable and probable cause?

14. According to *Halsbury's Laws of England*, 4<sup>th</sup> Edition - Reissue, Vol. 45 (2).

***[R]easonable and probable cause for a prosecution has been said to be an honest belief in the guilt of the accused person based on a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of an accuser, to the conclusion that the person charged was probably guilty of the crime.***

15. In **John Kamau Ndere vs. Ndetika Rural Sacco Society Ltd & another** [2019] eKLR the court observed as follows:

**“What constitutes a reasonable and probable cause was also defined in the case of *Simba V. Wambari* (1987) KLR 601 as;**

***“The plaintiff must prove that the setting of the law in motion by the inspector was without reasonable and probable cause. If the inspector believed what the witnesses told him then he was justified in acting as he did and I am satisfied the plaintiff has not established that he did not believe then or alternatively that he proceeded recklessly and indifferently as to whether there was genuine grounds of prosecuting the plaintiff or not”.***

16. It was the Appellant's evidence that their security personnel saw the 1<sup>st</sup> Respondent, a fellow guard, throwing some items over the perimeter wall. He then reported to the Security officer who made a complaint to the police.

From his evidence, it is clear that there was loss of scrap metal a fact that was confirmed by the 1<sup>st</sup> Respondent and that information was taken to the police. However, loss of scrape metal alone does not reveal who the actual thief is.

c) Whether the prosecution was actuated by malice.

17. At p. 991, the learned authors of ***Clerk and Lindsell*** discuss *Malice* as follows:

*“Improper motives*

*Malice in this context has the special meaning common to other torts and covers not only spite or ill-will but also improper motive. The proper motive for a prosecution is, of course, a desire to secure the ends of justice. If a claimant satisfies a jury, either negatively that this was not the true or predominant motive of the defendant or affirmatively that something else was, he proves his case on the point. Mere absence of proper motive is generally evidenced by the absence of reasonable and probable cause.”*

18. In **Attorney General & 2 others vs. Joseph Marangu** [2018] eKLR the court observed that

**“13. The law is clear that the mere fact that a person has been acquitted of the criminal charge does not necessarily connote malice on the part of the prosecutor. While it was correct to state that lack of reasonable and probable cause may be evidence of malice, actual spite or ill will must be proved. In *Nzoia Sugar Company Ltd v Funгутuti* [1988] KLR 399, the Court of Appeal held;**

***Acquittal per se on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will 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 company.”***

19. It was the Appellant's case that it was on the basis of the report from their contracted security agent that they made a complaint to the police. The 1<sup>st</sup> Respondent himself confirmed that it was one Ombera a security guard employed by K.K. Security and his colleague who made the report that he was the one who had been stealing the scrap metal. There was no direct connection between the report and the Appellant save for when the Appellant's security officer took him to the police station. He did not in his evidence establish ill will or malice on the part of the Appellant and he confirmed to court that the said security officer was unknown to him before his arrest. However, any prosecution which is not well thought out and which ends up eating into a person's freedom or dignity is embedded in implied malice.

20. It is not in dispute that the plaintiff was at material times providing guard services within the 1<sup>st</sup> defendant premises. It was alleged that he was involved in theft of scrape metals belonging to the 1<sup>st</sup> defendant. An employee of the 1<sup>st</sup> defendant made a report to the police who arrested the plaintiff and preferred a charge of stealing contrary to Section 275 of the Penal Code. Criminal prosecution ensued vide Butali SRMC CR No. 491/2011. The plaintiff was acquitted under Section 210 of the Criminal Procedure Code.

21. The issue is whether the prosecution was instituted without reasonable and probable cause. In his evidence in chief, the plaintiff stated that he received information at his place of work in the premises of the 1<sup>st</sup> defendant about the two incidences of robberies. He followed up the matter and was asking around whether 'any metals' had been stolen. Things were turned around and he was instead arrested and one Ombeva recorded a statement with the police that the plaintiff had stolen pieces of scrap metals. The security officer for the 1<sup>st</sup> defendant then made a report to the police about the alleged theft even before conducting internal investigations to establish the allegations. The police took action by arresting the plaintiff without carrying out their own investigations, preferred criminal charges against the plaintiff and commenced in court criminal prosecution against the plaintiff.

22. Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable ground and existence which assuming them to be true would lead an ordinary prudent and cautious man placed in the position of an accuser to the conclusion that the person charged was probably guilty of the crime. 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 the facts discovered by the prosecutor, or information which has come to him or both, must be such as capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty.

23. The learned trial magistrate in the Ruling stated thus:

“the chronology of events as outlined in the criminal proceedings preceding the arrest of the plaintiff shows that the plaintiff was seen stealing scrap metals; the report is relayed to his immediate supervisor; there is no indication what action is taken by the supervisor but somehow the incident is reported to the security manager of the 1<sup>st</sup> defendant who immediately reports the matter to the police and together they go looking for the plaintiff who is arrested and charged in court on the following day.”

24. Clearly as noted by the learned magistrate there was contradiction as to whether the Respondent stole the scrape metal. Therefore the test for reasonable and probable cause was not satisfied when it came to the arrest, charging and prosecution of the plaintiff in the criminal case.

25. As to whether the prosecution was actuated with malice, the plaintiff listed particulars of malice in the plaint both in respect for the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant. The plaintiff repeated these particulars in his testimony in court. On this issue the evidence by the witness availed by the 1<sup>st</sup> defendant is more telling. He recorded a statement which indicated that he did not clearly see the plaintiff steal the scrap metals. In court he stated that he was able to identify the plaintiff by the uniform he was wearing. He never went with his supervisor to the scene where the incident was taking place, but he went on to ‘outline’ what happened thereafter. And why did this witness not testify in the criminal case?

26. As for the security manager of the 1<sup>st</sup> defendant, he was not present when the alleged incident happened, yet he never interrogated the report he received. As the security manager he ought to have availed to the police all the relevant witnesses but the same was never done. This court is satisfied that the action by the 1<sup>st</sup> and 2<sup>nd</sup> defendants was accentuated with malice. Therefore, I find the 1<sup>st</sup> and 2<sup>nd</sup> defendants 100% jointly and severally liable.

27. The upshot is that the appeal on conviction is dismissed.

28. However, on general damages the amount awarded of Kshs. 400,000/= was excessive. This court finds and holds that a sum of Kshs. 250,000/= is adequate compensation. The award is therefore reduced to Kshs. 250,000/=. The same shall be paid by the Appellant and the 2<sup>nd</sup> Respondent jointly and severally.

29. Since the appeal has only partly succeeded, parties shall bear own costs of the appeal.

**Dated, Signed and Delivered in Open Court at Kakamega this 13<sup>th</sup> day of December, 2019.**

**E. K. OGOLA**

**JUDGE**