



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 14 OF 2018

CORAM: D. S. MAJANJA J.

BETWEEN

CHARITY KARAMBU.....APPELLANT

AND

JOSEPH KINYUA.....RESPONDENT

(Appeal from the original Judgment and Decree of Hon.L. Ambasi, CM dated 27th September 2017 at the Chief Magistrates Court at Meru in Civil Case No. 54 of 2016)

JUDGMENT

1. The appellant appeals against the judgment and decree of the subordinate court where she was found liable for malicious prosecution and awarded the respondent Kshs. 350,000/- as general damages. The case against the Attorney General, who was sued as the 2nd respondent, was dismissed with costs.

2. It is not in dispute that the respondent was arrested on 28th May 2014 and charged on the next day with the offence of attempted arson contrary to **section 333(a)** of the *Penal Code (Chapter 63 of the Laws of Kenya)* in **Meru Chief Magistrates Court Criminal Case No. 1038 of 2014**. It was alleged that the respondent on diverse dated between 3rd and 20th 2014 at Kinoru Village, Meru North District of Meru County, he attempted to unlawfully set fire to a building namely rental houses, the property of the appellant.

3. The respondent was acquitted on 14th October 2015 under **section 210** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)* after the court concluded that he had no case to answer. In his plaint, the respondent blamed the appellant for instigating the criminal process maliciously by filing the complaint and by causing him to be arrested and detained without any justifiable reason or basis.

4. The appellant did not file a defence or attend the proceedings to either cross-examine the respondent or make her defence. The Attorney General did not file a defence but its counsel attended court and cross-examined one prosecution witness.

5. As this is a first appeal, I am called upon to examine and evaluate the evidence and reach an independent conclusion bearing in mind that I did not hear or see the witnesses testify (see *Selle and Another v Associated Motor Boat Company Ltd* [1968]EA 123). The main issue in this appeal is whether the respondent proved its case on the balance of probabilities at the trial court. The substance of the respondents' case was the claim for malicious prosecution and both counsel for the appellant and respondent do not dispute the elements of the tort of malicious prosecution before this court.

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

- a) The plaintiff must show that 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

7. These elements were summarized by the East Africa Court of Appeal in *Mbowa v East Mengo District Administration (Supra)* 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.

8. As to the first element, there was no dispute that the appellant was charged and acquitted. He was however acquitted under **section 210** of the *Criminal Procedure Code*.

9. The facts emerging from both the civil and criminal trial are that the appellant claimed on that on 3rd May 2014, an attempt had been made to torch her rental houses. She made a report to the local administration but to no avail. She then hired a guard, Kinyua Kobia, who testified that on 20th May 2014, he was in one of the houses when he heard matches being ignited so he went to check into that house, beamed a spotlight through the window and saw the respondent attempting to light a fire. He confronted the respondent who took off. He then went and informed the appellant of the incident whereupon she raised alarm. The neighbours responded and thereafter the respondent was arrested from his house.

10. Was there reasonable and probable cause? On this issue the trial magistrate relied on the finding of the criminal court that, “*evidence was not sufficient to prove that the Accused person attempted to torch the rental houses prior to 20th May 2014 and that suspicion and not evidence.*” According to *Halsbury’s Laws of England, 4th 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 reasonable 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 ...

11. The issue is not whether there was sufficient evidence at the trial but whether at the time the complaint was laid, there was reasonable and probable cause. In this case there was evidence of Kinyua Kobia that he had seen the respondent attempt to set the houses on fire and that when he confronted him, he ran away. This was sufficient basis for laying the complaint whether or not the evidence was dismissed subsequently. That the respondent was finally acquitted does not negate the finding of reasonable cause as to hold otherwise would mean that an acquittal per se means that the element of reasonable and probable cause is established.

12. One of the reasons the charges against the respondent were dismissed was that she did not prove ownership of the property. She had testified that the property belonged to her husband and that she had taken out successions proceedings but that there was an object to the cause. While it is correct to note that she was not the actual owner, the question for purposes of the suit is whether she honestly believed that she was the owner, real or apparent, of the property. Since she claimed that the property belonged to her husband she had reasonable cause to complain if there was a risk of arson.

13. With respect to malice, 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. Actual spite or ill will must be proved. In *Nzoia Sugar Company Ltd v Fungututi [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.

14. Malice may be implied from the lack of a reasonable and probable cause. As I understand, the law is that the appellant had to show that the respondents or their agents were actuated by ill-will or spite against him or that there was an improper motive. In concluding that there was malice the trial magistrate relied on the finding by the criminal court that the appellant did not own the property, that it was the subject of succession and objection proceedings had been lodged by the respondent, who was the appellant’s brother in law, and her mother in law. She proceeded to observe that;

This to my mind was the root problem, and I take judicial notice that land cases in Meru tend to generate other criminal cases. Further, from the proceedings, the 1st Defendant dragged the 2nd Defendant into this matter with nothing more than false allegations. This clearly comes out in the Criminal case where the evidence by the Police Officers were at such variance that this was one of the grounds on which the case was lost.

15. As I observed earlier, the complaint by the appellant was triggered by information given to her by her guard that he had seen the respondent attempting to set the fire. The matter was investigated by the police who deemed it fit to prosecute the respondent. Even though there was a succession dispute between the parties, the element of malice, ill-will or spite was not established.

16. As I conclude, I note that counsel for the respondent submitted that the respondent’s evidence was unchallenged and that he was entitled to judgment in any event. It is the duty of the party who comes before the court to prove all allegations as contained in his claim against the respondent on a balance of probability. In *Kirugi & Another v Kabiya & 3 Others [1987] KLR 347*, the Court of Appeal held that, “*The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof.*” Likewise, *failure by the defendants to contest the case does not absolve the a plaintiff of the duty to prove the case to the required standard.*

17. Having evaluated all the evidence as required by the first appellate court, I find and hold that the respondent failed to prove all the essential elements of the tort of malicious prosecution.

18. This appeal is allowed and the judgment of the subordinate court is substituted with one dismissing the suit. It is apparent that the appellant and respondent have an outstanding succession dispute concerning the property subject of this case. An award of costs would aggravate the dispute. I therefore order that each party bears their respective costs in this court and in the subordinate court.

DATED and **DELIVERED** at **MERU** this 6th day of **June** 2018.

D.S. MAJANJA

JUDGE

Mr L. Kimathi instructed by L. Kimathi Kiara and Company Advocates for the appellant.

Mr Wamache instructed by Wamache and Associates Advocates for the respondent.