



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CIVIL APPEAL NO. 16 OF 2017**

**NTHIGA NJIRU.....1ST APPELLANT**

**NYAGA IRERI.....2ND APPELLANT**

**V E R S U S**

**KANGAITA TAA FACTORY .....1ST RESPONDENT**

**KIRU TEA FACTORY.....2ND RESPONDENT**

**KIMUNYE TEA FACTORY.....3RD RESPONDENT**

**THE HON. ATTORNEY GENERAL.....4TH RESPONDENT**

**J U D G M E N T**

1. The appellants were aggrieved with the judgment of Siakago Principal Magistrate delivered on 6/04/2017 in PMCC No. 16 of 2016. The appellants' claim for general damages for false imprisonment and malicious prosecution was dismissed for lack of proof. The memorandum of appeal lists six (6) grounds which may be condensed as follows:-

*i. That the magistrate erred in his finding that the case had not been proved on the balance of probabilities which was contrary to the evidence.*

*ii. The magistrate erred in failing to make a finding for damages despite the fact that the same were specifically pleaded.*

*iii. That the magistrate erred in failing to consider the evidence and submissions of the appellant.*

2. The parties argued this appeal by way of submissions filed by the advocates on record.

3. Messrs Mugendi Karigi & Co. represented the appellant while the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents were represented by Waruhiu K'Owade & Nganga Advocates. The Attorney General for the 4<sup>th</sup> respondent also filed submissions.

4. The duty of the first appellate court was explained in the case of **SELLE & ANOTHER VS ASSOCIATED MOTOR BOAT CO. LTD. & OTHERS [1968] EA 123** as follows:-

*I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif -vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).*

5. The background of this appeal is that the appellants were charged in Siakago Criminal Case No. 306 of 2013 with the offence of malicious damage to property Contrary to Section 339(1) of the Penal Code. The court found them not culpable and acquitted them.

6. Subsequently, the appellants filed a suit for damages for false imprisonment and malicious imprisonment. The suit was dismissed in the judgment of the Principal Magistrate thus giving rise to this appeal.

7. In the plaint, the appellants alleged that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants lodged false and malicious complaints to the police which led to them being locked in the cells and subsequently charged in the criminal case. The police were blamed for acting on complaints without basis and acting on unreliable evidence. It was also alleged that the police failed to conduct investigations in the case and arraigned the appellants in court without good cause.

8. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants in their joint defence denied the allegations. The 4<sup>th</sup> defendant in its defence defended the legality of the acts of the police in arresting and/or confining the appellants.

9. It was the testimony of the appellants that they were arrested by police on 17/05/2013 which was a Friday. The two were held in custody at Siakago police station for four (4) days before being arraigned in court with charges of malicious damage to property. The case was fully heard and dismissed for lack of sufficient proof.

10. The respondents called the investigating officer DW1 who testified that the arrest of the appellants followed a report at Siakago police Station by the Manager of Kimunye Tea Factory and the workers of Kiiru Tea Factory. He said that he conducted Investigations whose outcome was that the appellants were responsible for the malicious damage of the factories properties. He concluded that the decision to charge the appellants was well founded on the evidence. DW1 said that the prosecution of the appellants was based on the evidence of the witnesses and was not actuated by malice.

11. The issue for determination in this appeal are as follows:-

(a) *Whether the appellants established a case for malicious prosecution on the balance of probabilities.*

(b) *Whether the appellants were entitled to damages.*

(c) *Who between the parties should bear the costs.*

12. The appellants in their submissions argued that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not tender evidence and as such the evidence of the appellants remained unchallenged. The case of **MOTEX KNITWEAR LTD VS GOPITEX KNITWEAR MILLS LTD Nairobi HCCC No. 834 of 2002** was cited to the effect that filing of a defence and filing to call evidence means that the plaintiffs case remains unchallenged.

13. The case of **TRUST BANK LIMITED VS PARAMOUNT UNIVERSAL BANK LTD & 2 OTHERS Nairobi HCCC No. 1243 of 2001** was relied on to support the appellants argument on the failure to call evidence. It was held that the plaintiffs evidence remains uncontroverted.

14. The appellants further submitted that the evidence adduced in support of their case was sufficient to make a finding that they were entitled to damages.

15. Relying on the case of **KENYA FLUORSPAK CO. LTD VS WILLIAM MUTUA MASEVE & ANOTHER [2014] eKLR** where the court held that the police were responsible for arresting the appellants without good cause, this court was urged to overturn the judgment of the learned magistrate.

16. The law of malicious prosecution has been discussed and settled in several court decisions. In the case of **WEST NILE DISTRICT ADMINISTRATION VS DRITTO [1969] EA 324** that a person instituting legal proceedings for malicious prosecution must prove the following:-

(a) *That the police were agents of the defendants (in case where the AG is sued solely).*

(b) *That the police acted without reasonable and probable cause.*

(c) *That the police officers acted maliciously.*

(d) *That the proceedings were terminated in favour of the plaintiff.*

17. The trial magistrate cited the case of **MBOWA VS EAST MENGO ADMINISTRATION [1972] EA 352** where similar principles were articulated by the East Africa Court of Appeal.

18. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents in their submissions relied in the case of **HENRY GIFLEX OMBATI VS UNIVERSITY OF NAIROBI [2001] eKLR** with similar facts where the court in absolving the respondent of liability held:-

*The defendant in the present case was not responsible for the confinement of the plaintiff neither was it responsible for his prosecution. All it did was to make a complaint to the police. It was the police who then decided to confine and prosecute the plaintiff and not the defendant. There is no evidence whatsoever that the defendant was motivated by malice. It has lost money and it made inquiries which suggested that the plaintiff and his colleague were responsible for and consequently made a report to the police. They did what any reasonable person would have done in the circumstances. The police were not its agents and the defendant did not have control over them once it had reported the matter. This claim could only be made against the police.*

19. The 4<sup>th</sup> defendant enumerated the same principles in the case of **KAGANE & OTHERS VS REPUBLIC [1969] EA 643.**

20. The 4<sup>th</sup> defendant also relied in the case of **KATERREGA VS ATTORNEY GENERAL [1973] EA 289** where the court held :-

*It is well established that in a claim for damages for malicious prosecution, malice in fact must be proved showing that the person instituting the proceedings was actuated either by spite or ill-will or by indirect or improper motives.*

21. On the failure by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents to call evidence, Section 107 of the Evidence Act is the applicable law.

22. Section 107 states:-

*(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

*(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

23. In this regard, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents relied on the case of **RAILA ODINGA & 5 OTHERS VS INDEPENDENT ELECTORAL BOUNDARIES COMMISSION & 3 OTHERS [2013] eKLR** where the Supreme Court of Kenya cited dicta in a Nigerian case as follows:-

*He who asserts is required to prove such fact by adducing credible evidence. If a party fails to do so, its case will fail. On the other hand if he party succeeds in adducing evidence to prove the pleaded fact it is said to have discharged the burden of proof that rests on it. The burden is then said to have shifted to the party's adversary to prove that the fact established by the evidence adduced could not on the preponderance of the evidence result in the court giving judgment in favour of the party.*

24. It is trite law that failure by the defendant or any of them to give evidence does not give an automatic right to the plaintiff of a favourable judgment. The burden of proof remains the plaintiff's obligation to prove the existence of the facts he alleges.

25. The appellants bore the burden of proof of the existence of the allegations in the plaint. I have perused the two authorities relied on by the plaintiff the **MOTTEX KNITWEAR (supra)** and the **TRUST BANK LTD (supra)**. The facts in those cases are different from those of this case in respect of the role played by the police in the investigations of the relevant cases.

26. In a case for damages for malicious prosecution, the core evidence is that of the investigator which helps in determining whether the police had a probable and reasonable cause in instituting criminal charges. The investigator is better placed than any other player to determine the merit of the complaint based on the evidence he puts together.

27. It is from this evidence that he decides whether to charge the suspect with a criminal offence or to let him free. In this case, the evidence of DW1 the investigating officer was very crucial and will in most cases help to build the defence of the other defendants.

28. The evidence of DW1 was that he received the complaints from the Manager of Kimunye Tea factory and from the workers of Kiiru Tea Factory. He conducted his investigations and formed the opinion that the evidence he gathered was sufficient to charge the appellants. He preferred the charges of malicious damage to property which was supported by the evidence in his possession.

29. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents were at liberty not to call witnesses after considering the evidence adduced by DW1.

30. It is not in dispute that criminal charges were preferred against the appellants and that the cases terminated in their favour.

31. In this regard, the issue is whether the police acted without a probable or reasonable cause and whether they acted maliciously. It was held in the case of **PENUEL OMARE SULEIMAN VS JUDICIAL SERVICE COMMISSION & ANOTHER [2012] eKLR** that:-

*In the instant case, the plaintiff alleges that the defendants were malicious in prosecuting him vide Migori Cr. Case No. 243 of 1998. Though it is true that that case was decided in favour of the plaintiff, there is no evidence on record to show that there was any spite or ill-will or improper motive in instituting the said criminal case. What is on record is that the plaintiff was suspected of having stolen certain amounts of money on diverse dates from his employer and as a result thereof a report was made to the police and subsequently the plaintiff was arrested and charged. In my humble view, there was reasonable or probable cause for the prosecution and even if the plaintiff proved that there was no such probable or reasonable cause, he would not have proved malice without the ingredients of spite, ill-will or improper motive. So, in this case, I find that no malice was proved by the plaintiff as against the defendants. The plaintiff's claim under this head must therefore fail.*

32. The fact that the criminal case ended in favour of the appellants is not proof of spite or ill will. It was held in the **PENUEL OMARE SULEIMAN case (supra)** that:-

*Though it is true that that case was decided in favour of the plaintiff, there is no evidence on record to show that there was any spite or ill-will or improper motive in instituting the said criminal case.*

33. The appellants in this case were acquitted but that does not mean that the allegations were unfounded. The burden of proof in a criminal case is beyond any reasonable doubt. The trial magistrate put it candidly thus:-

*I conclude by saying the prosecution has failed to discharge its duty (of proof) beyond any reasonable doubt that the accused*

*persons in the dock maliciously damaged the property herein and stole some of it.*

34. The police in this case received reports from two different tea factories of malicious damage. The appellants were arrested and investigations were carried out. DW1 acted in his capacity as the investigator to set the process of the law in motion. He told the court that the outcome of the investigations was that there was evidence to institute charges against the appellants. There was damage to the property of the 1<sup>st</sup> and 2<sup>nd</sup> respondents which prompted reports to be made to the police. The complainants had genuine complaints which were made in good faith.

35. The appellants did not adduce any evidence to show that DW1 was activated by malice in the action that he took. There was no evidence to prove lack of a probable cause on part of DW1.

36. In my considered view the police did their duty as guided by the law. There was no malice, ill will or improper motive established on their part by the appellants.

37. The finding of the magistrate that the appellants failed to prove their case for damages for false imprisonment and malicious prosecution was guided by an exhaustive analysis of the law and evidence before him.

38. It is my considered opinion that the appellants have failed to satisfy this court on the grounds of appeal.

39. I find that the appeal lacks merit and I hereby dismiss it with costs to the respondents.

40. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 2ND DAY OF JULY, 2018.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Ms. Muriithi for Mugendi for Appellants**

**Ms. Munyiva for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents**

**Both parties present**