



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 20 OF 2009

ISAAC RIBIRO KAMERE.....APPELLANT

- V E R S U S -

PATRICK NGANGA KAMAU & NANCY NJERI

NGANGA (Suing as the administrators of the estate of

PETER MBUGUA NGANGA (DECEASED).....1ST RESPONDENT

JOHN KAMAU NGANGA.....2ND RESPONDENT

SAMUEL KIMANDU NGANGA.....3RD RESPONDENT

SIMON KAMAU.....4TH RESPONDENT

(Being an appeal from the judgement and decree of Resident Magistrate's Court

at Githunguri delivered by Hon. S. Ndegwa on 18th September 2005

in SRMCC No. 105 of 2005)

JUDGEMENT

1) The respondent's herein filed an action for damages for unlawful arrest, detention and malicious prosecution against the appellant herein and the Attorney General before the Resident Magistrate's Court at Githunguri. The appellant and the Attorney General each filed a defence to deny the respondents' claim. In the end, judgement was entered in favour of the respondents and against the appellant and the Attorney General in the sum of ksh.300,000/= with costs.

2) Isaak Ribiro Kamere, the appellant herein, being aggrieved put forward the following grounds on appeal:

i. The learned trial magistrate misdirected herself in her assessment of the evidence and thus arriving at a wrong, erroneous, unjust conclusion and judgement.

ii. The learned trial magistrate erred in law and fact in making an inordinately high award in the sum of ksh. Three hundred thousand(Kshs.300,000/=) for each of the plaintiffs as general damages without quoting any decided cases in support.

iii. The learned trial magistrate erred in law and the entire judgment is totally misconceived in law.

3) When the appeal came up for hearing, learned counsels appearing in this matter recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court and the rival submissions.

4) The background of this appeal appears to be short and straightforward. The respondents were arrested on 29.1.2004 by police officers from Githunguri Police Station on the basis of a complaint allegedly lodged by Isaac Ribiro Kamere the appellant herein. The respondents were placed in police custody and later charged with the offence of creating a disturbance likely to cause a breach of peace contrary to Section 95(1) (b) of the Penal Code.

5) The respondents were tried and were acquitted on 12th August 2004. Upon their acquittal, the respondents filed the suit alluded hereinabove seeking for damages. At the end of the trial of the civil matter, judgement was given in favour of the respondents as against the appellant.

6) On appeal, the appellant put forward a total of three grounds. The first ground is to the effect that the trial court erred in its assessment of evidence thus arriving at a wrong, unjust and erroneous conclusion. It is the submission of the appellant that the respondents failed to tender evidence proving that the elements of malicious prosecution were present and more so that their prosecution was without reasonable or probable cause and that the prosecution was initiated with malicious intent.

7) The respondents are of the submission that the threshold for malicious prosecution were met and therefore the trial magistrate arrived at the correct decision to enter judgement in favour of the respondents.

8) The ingredients which must exist to prove a case of malicious prosecution were restated in the case of **Kasana Produce Store =vs= Kato** where it was held inter alia:

“I find useful guidance in the wise words of Duffus V. P. In the case of Kasana produce Store Vs kato at page 191, paragraph G-I where he laid down the ingredients for malicious prosecution as follows:-

i. The plaintiff was prosecuted by the defendant in that the law was set in motion against him by the defendant on a criminal charge. The test is not whether the criminal proceedings have reached a stage at which they may be described as a prosecution but whether they have reached a stage at which damage to the plaintiff result.

ii. That the prosecution was determined in the plaintiffs favour.

iii. That it was without reasonable or probable cause-on the evidence the defendant did not believe in the justice of his own case.

iv. It was malicious – the defendant had improper and indirect motives in pursuing the false charge against the plaintiff.

9) In the case before the trial court, the trial magistrate concluded that the respondents had proved their case on a balance of probabilities. The learned Resident Magistrate further formed the opinion that there was no probable or reasonable cause to arrest the respondents. The trial magistrate further held that the respondents' arrest was actuated by malice.

10) I have carefully re-evaluated the evidence presented before the trial court. The 1st and 2nd respondents told the trial court that they were evicted by an order of eviction obtained by the appellant from plot no. Githunguri/Githunguri/1310 on 29.1.2004 vide Nairobi H.C.C.C no. 462 of 202.

11) The 1st respondent stated that she put up a tent outside the house they had been evicted from and left her children to keep vigil as she went to seek for a place to spend the night. The respondent stated that she was later informed that the police came and arrested her sons.

12) PW1, the 1st respondent stated that the appellant had malice against the respondents because of the dispute over the plot they were evicted from. PW1 stated that it was not possible for the respondent to throw stones at their house.

13) The 3rd respondent (PW3) told the trial court that he was arrested by police while he was guarding the goods which were thrown out during the eviction. PW3 further stated that the police did not carry out any investigations to establish whether or not stones were thrown at the appellant's home.

14) Samuel Kimando (PW4), the 4th respondent said he was keeping watch of the goods which had been thrown out when he saw a police landrover drive to where they were. Inside the landrover was Naomi Nduta, the

appellant's daughter who pointed at them before the police arrested them.

15) John Kamau Nganga (PW5), the 5th respondent gave near similar evidence as that of PW4. He stated the police came with the appellant's daughter aboard a police landrover and arrested them while they were keeping vigil on the goods which were lying outside after they were evicted.

16) The appellant testified in his defence. He confirmed that he was aware of the criminal case which was preferred against the accused persons (respondents). The appellant stated that on the material date he was at home when he heard people making noise outside. He stated that the respondents had been evicted on 28.2.2004 and they used to stay outside with their belongings.

17) The appellant stated that on 29.2.2004 the respondents were throwing stones and hurling insults. He said police came and arrested them and he was summoned to record a statement the next day.

18) The appellant also stated that he wasn't the complainant in the criminal case and that he did not know who made the report to the police.

19) He also denied authorising his children namely David Kamere and Naomi Nduta to make a report to the police. He further denied framing the respondent .

20) He also admitted while testifying in cross examination that he did not identify the persons who were making noise and throwing stones. He denied instigating the case against the respondents.

21) Wilson Mwangangi (DW2), a police officer attached to Githunguri Police Station told the trial court that on 29.01.2004, David Kamere and Naomi Nduta, the appellant's children visited the police station and booked a report on a case of creating disturbance on behalf of the appellant.

22) DW2 said he then visited the scene with other police officers and arrested the respondents. DW2 further claimed he conducted investigations and decided to arrest the respondents.

23) It is curious to note that the appellant contradicted the evidence he gave before the court which tried the criminal case preferred against the respondents in many respects. He stated before the court trying the criminal that he called his son and daughter to call the police while he told the court which heard the civil case that he did not instruct his children to report to the police.

24) P.C. Mwangangi (DW2) is on record that the complainant in the case was the appellant and that his children booked the complaint with the police on his behalf thus contradicting the appellant's assertion that he was not the complainant.

25) DW2 admitted having arrested the respondents before conducting investigations. He also admitted that he did not collect stones as exhibits from the scene. In fact both DW1 and DW2 agree that the appellant recorded his statement the next day at the police station.

26) It is clear from the material placed before this court that though the appellant denied having contacted the police, it is clear that he actually did not so through his children namely David Kamere and Naomi Nduta.

27) It is also apparent that he was the complainant in the criminal charge preferred against the respondents. There is credible evidence that the appellant and the respondents had a dispute over plot no Githunguri/Githunguri/1310 in which the respondents were eventually evicted from. The question which should be answered is whether the trial court erred in finding the appellant liable for malicious prosecution.

28) I have already stated the ingredients which must exist in order to establish liability for malicious prosecution. There is no doubt that the respondents were prosecuted on the basis of a complaint lodged by the appellant.

29) It is also not in dispute that the respondents were acquitted of the criminal charge hence the prosecution was

determined in their favour.

30) The question as to whether the appellant had any reasonable or probable cause in prosecuting the respondent is not difficult to answer. To begin with, the appellant called his children to book a report with the police. David Kamere and Naomi Nduta confirmed having booked a report with the police. The police swung into action and arrested the respondents even before carrying out any meaningful investigations.

31) The appellant merely stated that he heard people making noise and throwing stones at his house. That complaint was not investigated. In fact the appellant went to the police station upon being summoned to record his statement. In my humble view, the appellant completely had no reasonable or probable cause to call the police to arrest and prosecute the respondents.

32) The other ingredient is that relating to malice. The record shows that the appellant obtained orders from the High Court to have the respondents evicted from plot no. Githunguri/Githunguri /1310. At the time of their arrest, the respondents were staying outside the plot in dispute keeping vigil on their properties which had been thrown out upon their eviction. It is clear in my mind that there was a serious dispute between the appellant and the respondents. In the circumstances the court can infer that the appellant's conduct in the whole saga is a manifest of malice on his part.

33) In the end, I am convinced that the ingredients necessary to establish liability for malicious prosecutions existed.

Consequently, the trial magistrate came to the correct conclusion.

34) The other ground which the appellant argued is on quantum. It is the submission of the appellant that the trial magistrate made an inordinately high award and without taking into account comparable awards. It is also argued that the awards were made without assigning any reasons.

35) The respondents are of the submission that the award should not be disturbed since it was neither high nor excessive.

36) It is not in dispute that the trial court awarded each respondent a sum of ksh.300,000/= for general damages. The learned Resident Magistrate noted he had considered the submissions of both parties and the authorities submitted. It was pointed out that the respondents had asked to be awarded ksh.500,000/= each but the learned Resident Magistrate found the award of ksh.300,000/= to be adequate compensation.

37) The appellant merely argued that the award was inordinately high but did not propose any figures.

38) It is clear from the record that the respondents relied on the following cases before the trial court:

i. Zablon Mwaluma Kadori =vs National Cereals & Produce Board H.C.C.C no. 152 of 1997 where the plaintiff was awarded ksh.500,000/=.

ii. Odongo =vs= A.G H.C.C.C no. 195 of 1997, where this court awarded ksh.150,000/=.

iii. Njuguna =vs= A.G and another H.C.C.C. no. 2007 of 2001 in which this court awarded ksh.300,000/=

39) A careful perusal of the above authorities will show that this court over time has awarded between ksh.150,000/= and ksh.500,000/= as damages for malicious prosecution. In fact the award of ksh.500,000/= was made in the year 2005 about 13 years ago. The value of shilling has suffered from inflation hence the need to adjust the kind of award made by the trial court to be reasonable. I therefore find no merit in the appeal as against quantum.

40) In the end, this appeal is found to be without merit. It is dismissed in its entirety with costs as to the respondent.

Dated, Signed and Delivered in open court this 9th day of November, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondents