



IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 73 OF 2017

CORAM: D. S. MAJANJA J.

BETWEEN

KENYA WOMEN FINANCE TRUST.....APPELLANT

AND

ALEX KARIMI MURITHIA.....RESPONDENT

(Appeal from the original Judgment and Decree of Hon.S. K. Onjoro, SRM dated 8th September 2017 at the Chief Magistrates Court at Kisii in Civil Case No. 144 of 2017)

JUDGMENT

1. The appellant appeals against the judgment and decree of the subordinate court awarding the respondent Kshs. 800,000/- and Kshs. 100,000/- as general and special damages respectively for malicious prosecution. It is this judgment that has precipitated this appeal.
2. The genesis of this case was that on or about 1st February 2012, the appellant, through its employees or agents, reported to Kisii Police Station that the respondent had stolen money from it. Consequently, the respondent was arrested and charged with the offence of stealing by servant contrary to **section 281** of the *Penal Code (Chapter 63 of the Laws of Kenya)* in *Kisii CM Criminal Case No. 201 of 2012*.
3. The charge facing the respondent was that on diverse dates between November 2011 to February 2012 at Kisii Township in Kisii Central District within Kisii County, the respondent being a servant of the Kenya Women Finance Trust Deposit Taking Microfinance, stole Kshs. 2,052,030/-, the property of Kenya Women Finance Trust Deposit Taking Microfinance which came into his possession by virtue of his employment. At the trial, the prosecution called 4 witnesses while the respondent gave an unsworn statement in his defence. On 9th April 2014, he was acquitted under **section 215** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*.
4. Thereafter the respondent filed suit before the subordinate court claiming damages for wrongful arrest, false imprisonment and detention and malicious prosecution. The respondent pleaded the following particulars of malice against the appellant:
 - a. *Making malicious reports about the plaintiff.*
 - b. *Maliciously referring to the plaintiff as a thief.*
 - c. *Falsely referring to the plaintiff as a thief.*
 - d. *Maliciously damaging the reputation of the plaintiff.*
5. The appellant denied the respondent's allegations in its statement of defence.
6. 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*). Although the appellant filed a detailed memorandum of appeal, the main issue in this appeal is whether the respondent proved its case on the balance of probabilities at the trial court.
7. Both parties filed written submissions. It was agreed that the ingredients for the tort of malicious prosecution are settled. They cited several cases including *Murunga v Attorney General [1979] KLR 138* and *National Bank of Kenya Limited v Alfred Owinu Balla Kisii HCCA No. 94 of 2014 [2017] eKLR* which set out those elements 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.

8. There was no dispute as to the first and second ingredients. The trial magistrate rightly held that, *"It is not in dispute that the plaintiff herein was arrested pursuant to a complaint made by the 2nd defendant to the police and that the plaintiff was subsequently charged in court and that the case terminated in favour when he was acquitted under section 215 of the Criminal Procedure Code."*

9. The key issue for determination before this court and the subordinate court is whether the respondent established the prosecution was instituted without reasonable and probable cause and whether it was actuated by malice.

10. Before the subordinate court, the respondent testified on his own behalf while the appellant called Norman Malachi Ondego (DW 1) as its witness. The respondent testified that during the currency of his employment he decided to pursue further studies and to that end he tendered his resignation by a letter dated 6th February 2012 giving one month's notice. On 7th February 2012, the branch manager summoned him to his office and told him that some money had been stolen from 3 accounts. He denied that he had any knowledge of the said accounts or the theft but nevertheless police officers from Kisii Police Station were summoned and he was arrested and charged.

11. The respondent further testified that during the criminal trial, he was summarily dismissed with effect from 1st February 2012 whereas he worked until 7th February 2012. His position was that he was maliciously prosecuted after he gave his intention to resign which the manager misinterpreted to mean that he was going into business rather than study as indicated to him. As regards his work, the respondent testified that his work entailed data entry whereby he only initiated transactions and did not authorise the same as he did not have the mandate to do so and that the persons who authorised the transactions were not charged. The respondent also pointed to the fact that there were three accounts where money was allegedly lost yet the account holders never testified that they had lost money.

12. On behalf of the appellant, DW 1 testified that the respondent's duties at the bank involved data entry in respect of account opening, initiating borrowing and capturing of payments. He testified that he discovered that some accounts were closed yet they did not have zero balances and after contacting the IT Department, an investigation was done wherein monies from the accounts that were closed was directed to three accounts and the money in those accounts subsequently withdrawn from the counter or ATM. Following the investigation, an audit report was compiled and submitted to the police who arrested the respondent after interrogation and charged him. DW 1 denied that the respondent was charged after he tendered his resignation and asserted that the resignation letter came while investigations were ongoing.

13. After reviewing the evidence, the trial magistrate found that there was no reasonable and probable cause for commencing the prosecution because CCTV footage which would have captured the respondent withdrawing money from ATM was never produced and the account holders of the said accounts were not called as witnesses. He further held that the that the, *"so called supervisors were never called to court to deny that they approved the transactions by the plaintiff."*

14. Turning to this appeal, was there reasonable and probable cause? The trial magistrate correctly held that the test to be applied was that stated in ***Kagane v Attorney General [1969] EA 643*** where the court observed:

Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded on reasonable grounds of existence of a state of circumstances which assuming them to be true, would lead to an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty.

15. The test is to be applied based on the evidence that was available at the time the respondent was charged. In my view, the trial magistrate fell into error when he focused more on the proceedings and failure to call evidence rather than the material that was available to the prosecutor at the time the appellant was charged. It is instructive to note that DW 1 reported the theft after the audit report was done. The police appraised themselves of the contents and decided to charge the appellant. The failure to call certain witnesses during the trial could not be put at the feet of the appellant who had no control over the prosecution.

16. Having evaluated the evidence as required by the first appellant court, I find that there was reasonable and probable cause for several reasons. First, the respondent was a data entry clerk who was responsible for input of data. The internal audit report done pointed to the respondent as a suspect and additionally DW 1 testified that the respondent received large sums of money in his account that were not commensurate with his salary. My reasoning is fortified by the fact that the trial magistrate in the criminal case put the respondent on his defence and he was only acquitted under **section 215** of the ***Criminal Procedure Code***. Before putting an accused on his defence, the court must be satisfied that a reasonable tribunal directing its mind to the law and the evidence could convict if no explanation is offered by the defence (see ***Ramanlal Trambakal Bhatt v R [1957]EA 332***). It is thus difficult to see how the learned magistrate could hold that there was no reasonable and probable cause when the criminal court held that there was a case which the respondent ought to have answered. It is for this reason that the magistrate in the criminal case expressed the view in the judgment that, *"It is strongly suspicious that he (the respondent) transacted in colossal sums of money but that is as much as it can go because suspicion however strong cannot be a basis for conviction (sic)."* I therefore find that there was reasonable and probable cause to mount the prosecution.

17. On the issue of malice, the trial magistrate found that malice was proved on the basis that the respondent was arrested and charged after expressing his desire to resign from employment and the fact that the persons who are said to have supervised the plaintiff and authorised the transactions were never charged alongside him or an explanation given as to why they were not charged.

18. The law is settled 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.

19. Malice may be implied from the lack of a reasonable and probable cause but in this case, I have already held that there was already reasonable and probable cause. However, there is a more fundamental issue. In ***Gitau v East African Power and Lighting Company Limited [1986] KLR 365*** the court held that:

In a claim alleging malice the facts constituting malice ought to be particularized as per Order V rule 8(1) Civil Procedure Rules. In order for a claim of malicious prosecution to succeed, the plaintiff must not only show that he was prosecuted but that he was prosecuted upon the instigation of the defendant and that there existed malice and which malice he must prove. In this instant the plaintiff failed to prove malice.

20. I have looked at the particulars of malice pleaded against the appellant and which I have set out in paragraph 4 above. The statements do not demonstrate any ill will or spite against a particular person in the employ of the defendant. Counsel for the respondent referred to the case of ***National Bank of Kenya Limited v Alfred Owino Balla (Supra)*** where Okwany J., held that in that case the prosecution was malicious because from the totality of circumstances the claimant was arrested and charged with an offence prematurely without ascertaining and verifying all the facts. The court noted that the malice can be inferred from, *“the hurried and flippant manner in which the appellants agents acted in making of their audit report without involving the respondent or seeking clarification.....[and the fact that]the respondent had been a faithful employee therefore the more reason why the appellant ought to have exercised extreme caution and diligence in dealing with his case bearing in mind the far reaching consequences a criminal prosecution had on the respondent’s illustrious and untainted career as a banker.”*

21. In my view, the case cited by the respondent can be distinguished. First, the allegation of resigning and then being sacked were not pleaded in the particulars of malice. Second, the audit report was taken to the police for investigations and a decision reached to charge the respondent. I therefore find that the malice was not proved.

22. In ***Mbowa v East Menago District Administration [1972] EA 352***, the court held that in order for the cause of action for malicious prosecution to succeed, *“[T]he 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.”* In light of the evidence I have outlined, I find and hold that the appellant failed to prove his case.

23. Despite the conclusion I have reached, I must consider the issue of damages raised by the appellant. Counsel contended that the award of damages was wholly erroneous as it was based on the status and reputation of the respondent which was not proved at the trial. On the other hand, counsel for the respondent submitted that the award was reasonable in the circumstances.

24. The award of damages is within the discretion of the court and the respondent’s case being a case for malicious prosecution, the damages awarded are at large. The court does its best taking into account the position of the party injured and recent decisions of other superior court in other similar cases to reach a conventional award. In such an appeal, this court will only interfere where trial court either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is not based on any evidence (see ***Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727*** and ***Mariga v Musila [1984] KLR 257***).

25. As regards special damages, the legal fee paid was specifically pleaded and proved as required by law (see ***Maritim and Another v Anjere [1990 – 1994] EA 312***). As regards general damages, the appellant suggested a sum of Kshs. 2,000,000/- based ***Thomas Mboya Oluoch and Another v Lucy Muthoni Stephen and Another*** NRB HCCC No. 1729 of 2001 [2005]eKLR where the plaintiffs were awarded Kshs. 500,000/- each as damages for malicious prosecution in 2005 and ***Crispus Karanja Njogu v Attorney General*** NRB HCCC No. 574 of 2002 [2008]eKLR where the plaintiff was awarded Kshs. 800,000/- in 2008 as damages. In ***Thomas Mutsotso Bisembe v Commissioner of Police and Another*** NRB HCCC No. 220 of 2011 [2013]eKLR the plaintiff was awarded Kshs. 800,000/- in 2013.

26. The appellant did not submit on the quantum of general damages before the trial court but the Attorney General suggested a sum of Kshs. 60,000/-. It relied on ***Kenya Flouspar Company Limited v William Mutua Maseve and Another*** ELD HCCCA No. 118 of 2010 [2014]eKLR where the plaintiff was awarded Kshs. 40,000/- for false imprisonment and ***Douglas Odhiambo Apel and Another v Telkom Kenya Limited*** NRB CA Civil Appeal No. 115 of 2006 where the plaintiff was awarded Kshs. 50,000/- as general damages.

27. In awarding the sum of Kshs. 800,000/- the trial magistrate considered that the plaintiff worked as an accountant in a position that requires trust and the fact that it would be difficult for him to be employed in a financial institution. He also took into account the manner of arrest, the length of trial and decisions cited. Based on the factors cited by the trial magistrate and the decisions considered, I cannot say there was any error in assessing the award.

28. For the reasons I have set out, I allow the appeal and order as follows:

(a) The judgment and decree of the subordinate court set aside and substituted with an order dismissing the suit with costs to the appellant.

(b) The appellant is awarded costs of this appeal assessed at Kshs. 30,000/-.

DATED and DELIVERED at KISII this 9th day of NOVEMBER 2018.

D.S. MAJANJA

JUDGE

Mr Abisai instructed by Abisai and Company Advocates for the appellant.

Mr Ochoki instructed by Ochoki and Company Advocates for respondent.