



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 26 OF 2016

CORAM: D. S. MAJANJA J.

BETWEEN

MANSON MOREKA MONYENYE.....APPELLANT

AND

ATTORNEY GENERAL.....1ST RESPONDENT

DANIEL OMOKO OUKO.....2ND RESPONDENT

(Appeal from the original Judgment and Decree of Hon. S. N. Makila, CM dated 7th April 2016 at the Chief Magistrates Court at Kisii in Civil Case No. 64 of 2016)

JUDGMENT

1. The appellant appeals against the judgment and decree of the subordinate court where his case for damages for malicious prosecution was dismissed with costs.
2. It is not in dispute that the appellant was arrested on 8th November 2004 and charged with the offence of causing actual bodily harm contrary to **section 251** of the *Penal Code (Chapter 63 of the Laws of Kenya)* for assaulting one Sospeter Okongo and occasioning him actual bodily harm and tampering with boundary features contrary to **section 4** the *Trespass Act (Chapter 294 of the Laws of Kenya)* for tampering with a boundary and removing beacons on the property of Daniel Omoko Ouko in *Keroka SRM Criminal Case No. 973 of 2004* which was later transferred to Kisii as *Kisii CM Criminal Case No. 306 of 2005*.
3. During the hearing, the prosecution called 6 witnesses and on 13th August 2008 the trial magistrate ruled that the prosecution had made out a prima facie case and put the appellant on his defence. The defence called 3 witnesses and the matter was reserved for judgment. Before delivery of judgment, the prosecution entered a *nolle prosequi* to terminate the proceedings and by a ruling dated 13th February 2009, the appellant was duly discharged.
4. Thereafter the appellant filed suit seeking damages for malicious prosecution claiming that the charges against him were actuated by spite and malice and instituted without any reasonable cause. He complained that the respondents gave false information which led to the prosecution of the appellant and causing the appellant to be charged knowing that no offence was committed. He further contended that the respondent failed to withdraw or terminate the case against him before acquittal. He accused the respondents of failing to carry out adequate investigations and charging him without sufficient evidence.
5. In its statement of defence, the 1st respondent denied the appellant's allegations but asserted that the charges were preferred against the appellant based on a valid complaint showing that the appellant had committed a cognizable offence. The 2nd respondent also denied the allegations against him.
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). 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 appellant's case was the claim for malicious prosecution and counsel for the appellant and respondents do not dispute the elements of the tort of malicious prosecution.
7. 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 Mengo 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.

8. Before I consider the case before the trial court, I will set out, in summary, the outline of the appellant's case. The appellant (PW 1) testified that he was a farmer and on 8th November 2014 while he was in Kisii town, he was informed that his name had been called out at the Keroka Court. He went to court and presented himself and was informed that he had been charged with assault and trespass. He stated that the trial went on for 6 years whereupon he was acquitted. He complained that the police did not investigate the matter and that no occurrence book was available and was said to be lost. He blamed the complainants of falsely accusing him.

9. The 2nd respondent (DW 1) testified that he was at home on 3rd September 2004 doing his chores when the appellant trespassed on his land and started removing beacons whereupon he reported the incident to Keroka Police Station. He denied that he made a false report and that it is the police who investigated the matter.

10. On the basis on the facts I have outlined, the trial magistrate found that the appellant had not made out a case for malicious prosecution. There is no dispute regarding the first two elements. On the first element of the tort of malicious prosecution, the trial magistrate found that the proceedings were instituted by the 1st respondent at the behest of the 2nd respondent and the other defendant who had died during the proceedings and the suit against him abated.

11. On the second element, it was not disputed that the appellant was charged and the proceedings terminated in his favour. Although the court did not make any finding in favour of the appellant, he was discharged after being put through a trial hence for purposes of the tort of malicious prosecution, the proceedings were terminated in his favour. In **Stephen Gachau Githaiga v Attorney General [2015] eKLR**, Mativo J., held that:

The second element of the tort demands evidence that the prosecution terminated in the plaintiff's favour....The favourable termination requirement may be satisfied no matter the route by which the proceedings conclude in the plaintiff's favour, whether it be an acquittal, a discharge at a preliminary hearing, a withdrawal or a stay.

12. The thrust of the appellant's appeal hinges on whether there was reasonable and probable cause. Counsel for the appellant submitted that the facts of the case show that there was no basis for the prosecution based on the manner in which the appellant was charged and the case instituted without his knowledge. He contended that the multiplicity of witnesses did not imply that there was reasonable and probable cause and on the facts, the prosecution did not prove its case.

13. Counsel for the 1st respondent submitted that there was reasonable and probable cause as the witnesses testified to the assault and tampering with beacons while counsel for the 2nd respondent submitted that the fact that the appellant was put on his defence shows that there was reasonable and probable cause. He added that the appellant was never acquitted but only discharged as the proceedings were terminated by a nolle prosequi.

14. Was there reasonable and probable cause? 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 ...

15. The trial magistrate found that there was sufficient evidence as there was eye witness testimony of the altercation between the appellant and the 2nd respondent in the criminal case and a P3 form was produced in support of the assault charge. I agree with this conclusion having reviewed the evidence in the criminal case. Sospeter Okongo testified that the appellant hit him with a stick on the shoulder and he fell. While Daniel Omoko testified that the appellant was among the person who came to the property and uprooted the beacons after the surveyor had demarcated the land. The testimony of Joseph Mogaka Ouko was that he found the appellant and others uprooting boundary features.

16. 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 I find and hold that there was sufficient basis for laying the complaint. My finding is augmented by the fact that the appellant was put on his defence after the trial magistrate found that there was a prima facie against him. I therefore hold that there was reasonable and probable cause established to charge and prosecute the appellant.

17. 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.

18. Malice may be implied from the lack of a reasonable and probable cause. The appellant pleaded particulars of malice that did not implicate any spite or ill-will against the 2nd respondent. The complainants, as the evidence showed, had a basis for reporting the complaint and the police investigated it and charged the appellant.

19. In *Mbowa v East Mengo District Administration* (Supra), 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.

20. The appeal is dismissed with costs to the respondents which I assess at Kshs. 20,000/- for each respondent.

DATED and DELIVERED at KISII this 6th day of NOVEMBER 2018.

D.S. MAJANJA

JUDGE

Mr Gichana instructed by Bosire Gichana and Company Advocates for the appellant.

Ms Chepkurui, Litigation Counsel, instructed by the Office of the Attorney General.

Mr Ndege instructed by Nyachiro Nyagaka and Company Advocates for the 2nd respondent.