



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL APPEAL NO. 7 OF 2017

(Appeal arising from judgment and decree in Kitale Chief Magistrate's Court Civil Suit No. 73 of 2009 delivered by J.M. Nang'ea Chief Magistrate on 12/3/2015)

NELSON KIPTUI KIBERAS.....APPELLANT

VERSUS

THE BOARD OF GOVERNORS KITALE TECHNICAL

TRAINING INSTITUTE.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

J U D G M E N T

1. From the proceedings in the lower court, there is no doubt that the appellant was the principal of the 1st Respondent institution. He was accused of 3 offences namely **Stealing by servant contrary to Section 281 of the Penal Code, Making a false document contrary to Section 347 (a) of the Penal Code and Abuse of office contrary to Section 101(1) of the Penal Code.**

2. The criminal case No. 2453 of 2000 Kitale did proceed to full trial and he was acquitted under Section 215 of the Criminal Procedure Code.

3. The appellant then proceeded to sue the Respondent seeking inter alia damages for malicious prosecution, unlawful

confinement and defamation. The trial court found for the appellant in respect to malicious prosecution and awarded him general damages of kshs 300,000/=. His prayer for defamation was rejected.

4. The gist of this appeal therefore is on the ground that the award of Kshs 300,000/= was too little in the circumstances. He also contends that he should have been awarded damages for defamation.

5. On the other hand the 1st Respondent has cross-appealed and the crux of the said cross-appeal is that the trial court erred on law and fact in finding that the appellant's prosecution was malicious. In other words the lower court suit should be dismissed with costs.

6. The court has perused the criminal proceedings at the lower court as well as the judgment thereof. The court has equally perused the proceedings in the criminal case produced as evidence during the trial. This court has equally perused the submissions by the parties and the attendant cited authorities.

7. For the offence of malicious prosecution to be satisfied the grounds which must be established were clearly set out in the case of **Mbowa Vs East Mengo District Administration (1972) EA 352** in which the East African Court of Appeal determined them as;

- 1. Whether the criminal proceedings were instituted by the defendant.**
- 2. Whether there was reasonable cause and or justification to make the complaint to the police.**
- 3. Whether the said prosecution was actuated by malice.**
- 4. Whether the Criminal proceedings terminated in the plaintiff's favour.**
- 5. Whether the plaintiffs were wrongly arrested.**

6) Whether the defendant is liable to compensate the plaintiffs and if so what should be the award of damages.

7) Who should bear the costs of the suit.

8. The above issue as of first instance ought to be determined as it would dispose off the cross-appeal. If it is disposed off in the affirmative then the next logical thing would be to deal with the question of damages, complained of by the appellant.

9. The first and the 4th grounds are easily answered. They were instituted by the respondent and the same ended in favour of the appellant.

10. But were the complaints made maliciously?

Black Law Dictionary 10th Edition has defined malice as;

“The intent, without justification or exercise, to commit a wrongful act, (2) Reckless disregard of the law or of a persons legal rights.”

11. The trial court found for a fact that the complainants witness failed to testify as they all passed away. The trial court opined that at leased records from the store ought to have been availed as this was an institution with continuity. The trial court found that the appellant was able to account through production of the purchase receipts all the money allegedly taken illegally or unlawfully by the appellant.

12. In my view, had the respondent addressed itself to the issues surrounding the complaint then it would have found that the money from the institution was rightfully utilised. In short the prosecution was rushed. The same was malicious and there was no justification and it was recklessly done in total disregard of the law. Both the institution and the police acted without considering the evidence on record.

13. On this score I do not fault the finding of the trial court. There was no cause to arrest the appellant who had infact accounted for the sum allegedly wrongfully taken.

14. For the above reason I do not find any merit in the cross appeal and I hereby dismiss it with costs to the appellant.

15. As to the prayer for defamation, I do agree with the trial court that the same was not proved. Other than the appellant alleging that his name was defamed as well as his character, nobody else was called to ascertain this. There was nothing to suggest that his reputation was messed up so to speak.

16. Having stated so, could it be said that the sum of Kshs 300,000/= awarded to the appellant manifestly low in the circumstances? I have perused the authorities cited by the appellant and I do not think that they were manifestly low. The authority cited of ***David Kinyanjui & Another Vs The AG, Civil App No. 318/2009*** related to the offence of Murder. The facts and circumstances were intricate in the matter.

17. However considering that the appellant was held in custody for 8 days and beside this the matter ought generally to have been investigated without such hasty, I shall enhance the same to Kshs 500,000/=. I have also taken into consideration that the appellant must have suffered mental anguish and all the years he had worked for the respondent wasted through a single allegation which was malicious.

18. The appeal is therefore allowed as follows;-

- 1. The general damages of Kshhs 300,000/= awarded by the trial court is enhanced to Kshs 500,000/=.**
- 2. The same shall attract interst from the date of the lower court judgment till payment in full.**
- 3. The cross-appeal is hereby dismissed.**
- 4. The appellant shall have the costs of this appeal as well as the cross-appeal.**

Orders accordingly.

Delivered, signed and dated at Kitale this 1st day of November, 2018.

H.K. CHEMITEI

JUDGE

1/11/18

In the presence of:

Khisa for Analo for Applicant

Kaoza for Onyancha for 1st Respondent

Kirong – Court Assistant

Court – Judgment read in open court.