



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 28 OF 2015

BENJAMIN IRAVONGA.....APPELLANT

VERSUS

ROSE IRAVONGA.....1ST RESPONDENT

THE HONOURABLE THE ATTORNEY-GENERAL.....2ND RESPONDENT

(An appeal arising from the judgment and decree of the Hon. G Mmasi, Senior Principal Magistrate, in Vihiga CMCCC No. 6 of 2011 of 31st March 2015)

JUDGMENT

1. The appellant lodged a memorandum of appeal herein dated 13th April 2015, in which it is averred that the trial court erred in ignoring the weight of the evidence on record which tilted heavily in favour of the appellant, erred in failing to grasp the principles governing malicious prosecution, and erred by failing to consider the evidence and submissions of the appellant in reaching the impugned judgment. It is prayed that the judgment and decree of 31st March 2015 be set aside and substituted with an order allowing the appellant's claim *in toto*.
2. This is a first appeal and, in determining it, I shall be guided by the principle stated in *Selle vs. Associated Motor Boat Company Limited* (1968) EA 123, that in a first appeal the court is obliged to reconsider the evidence, assess it and make appropriate conclusions about it, remembering that it has not had the opportunity to see or hear the witnesses.
3. The factual background to the matter, gleaned from the material on record, is that the appellant claims to have been attacked on the night of 20th December 2008 by unknown persons at a public thorough fare within Vihiga County while he was on his way to church for overnight prayers. The said unknown persons forced him into the compound of the 1st respondent, where they robbed both the appellant and the 1st respondent, and in the process of which they caused injury to the duo, who had to be hospitalized. The appellant was able to identify one of the assailants, who was apprehended and charged with robbery with violence in Vihiga SRMCCRC No. 2678 of 2008, and both the appellant and the 1st respondent testified against him in the said criminal case as prosecution witnesses. Subsequently, the appellant was arrested and charged in Vihiga SRMCCRC No. 682 of 2010 with the offence of robbery with violence, where the 1st respondent was the complainant, and where the charge was founded on the same facts as those in Vihiga SRMCCRC No. 2678 of 2008. He was held in remand custody at Kodiaga GK Prison, Kisumu. The prosecution was eventually terminated by the state through withdrawal. He claims that the charges were instigated by the 1st respondent, and that the same were malicious. He subsequently sued the 1st respondent and the state, through the 2nd respondent, for malicious prosecution, particulars of the alleged malice are set out in the plaint. Both the respondents entered appearance and filed defences, denying the claim on grounds that are stated in their respective defence statements.
4. The trial court heard two witnesses, the appellant and the 1st respondent. In the end it found that malicious prosecution had not been established as the criminal case was terminated before it went into trial, and that the 1st respondent had a probable case and reasonable ground to report the appellant to the police. The trial court dismissed the case with costs to the 1st respondent.
5. Directions were given on 20th July 2017 that the appeal was to be canvassed by way of written submissions. The parties have complied, and have each filed their respective written submissions, complete with the authorities that they relied on. I have perused through them and noted the arguments advanced.
6. The appellant collapsed his grounds of appeal into one. He argued that the trial court had misapprehended the principles surrounding the tort of malicious prosecution. Firstly, he cited the decision in *Mbowe vs. East Mengo District Administration* (1972) EA 352, to outline the ingredients of the tort of malicious prosecution – that the defendant must have been instrumental in setting the law in motion by laying an information before a judicial authority leading to the arrest of the plaintiff and his presentation before the judicial authority, that the defendant must have acted without reasonable or probable cause in terms of there being no facts upon which the criminal proceedings could

be justified, that the defendant must have acted maliciously with improper and wrongful motive with an intent to use the legal process to attain his own selfish purposes, and that the criminal process must have been terminated in the plaintiff's favour in terms of it coming to a legal end in a manner leading to his acquittal. Secondly, he cited the decision in *Gitau vs. Attorney-General* (1990) KLR 13, where the term setting the law into motion was defined as attributable to that person who causes a person with some judicial authority to take action that involve the plaintiff in a criminal charge against another before a magistrate. It was said to be the person who sets in motion the judicial process by laying an information before court, and it was specifically stated that that person was the officer in charge of a police station, who must have acted without reasonable or probable cause. It is submitted that it was the 1st respondent who set the process in motion by making the report at the Serem Police Station, which the police then acted upon.

7. Thirdly, he cited the decision in *Kagane & others vs. AG & another* (1969) EA 643, where the court defined reasonable and probable cause to mean an honest belief in the guilt of the accused based on a full conviction founded upon reasonable grounds founded on a state of circumstances which would lead an ordinary prudent and cautious person placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed. It was submitted that there were no reasonable or probable grounds to warrant his arrest and presentation in court on the charges brought against him. He argues that there was no probable cause that he committed the offence charged to justify his arrest and prosecution. He points to the proceedings in Vihiga SRMCCRC No. 2678 of 2008 to justify his argument that the police ought to have established from them that he was not complicit in the offence committed against the 1st respondent. He further argues that the initial investigation and prosecution did not incriminate him. He further submits that the trial court did not seek to correlate Vihiga SRMCCRC No. 2678 of 2008 and Vihiga SRMCCRC No. 682 of 2010. Fourthly, he cited *Thomas Mutsotso Bisembe vs. Commissioner of Police & another* (2013) eKLR, to make the point that his prosecution had not met the legal threshold for reasonable and probable cause. In that case, the point was made that the police, and other state agencies responsible for investigations and prosecutions, are not mere conduits for complainants, they must conduct thorough investigations and mount prosecutions only in cases where they have considered all sides of the case, after hearing the versions of all the parties involved, for otherwise they would expose themselves to accusations of malicious prosecution should it turn out that the case they have mounted was so improbable that no ordinary prudent and cautious man would have embarked upon it. He relies on the said decision to say that the 1st respondent never mentioned him in her statement in negative light neither did she at that stage treat him as a suspect.

8. Finally, he cited the decisions in *Egbema vs. West Nile Administration* (1972) EA 60 and *Thomas Mutsotso Bisembe vs. Commissioner of Police & another* (supra), where it was said that for purpose of proof that the criminal proceedings have been determined in the appellant's favour it would suffice that they terminated without being brought to a formal end, by either acquittal upon the finding that there was no case to a formal end, or after hearing both the prosecution and defence witnesses. In *Thomas Mutsotso Bisembe vs. Commissioner of Police & another* (supra), it was specifically stated that a withdrawal of the charges under section 87A of the Criminal Procedure Code, Cap 175, Laws of Kenya, without further charges being brought amounted to a termination in favour of an accused person for the purposes of malicious prosecution. The appellant asks the court to allow the appeal and award him Kshs. 800, 000.00 for malicious prosecution, following *Thomas Mutsotso Bisembe vs. Commissioner of Police & another* (supra).

9. The 1st respondent has urged me to uphold the judgment of the lower court, on the basis that the appellant had failed to place before the court, through the record of appeal, a copy of the proceedings in Vihiga SRMCCRC No. 682 of 2010, which is the foundation of the instant proceedings. She further points me to the decision in *Crispine Otieno Caleb vs. the Attorney-General* Nairobi HCCC No. 782 of 2007, which she urges analyzed the requirements that a plaintiff must meet to succeed in a case for malicious prosecution.

10. The 2nd respondent on his part, argues that the trial court did consider the evidence that was placed before it before arriving at the decision that it arrived at. He submits that the appellant failed to satisfy the court that the report made to the police by the 1st respondent and his prosecution in court were actuated by ill will. He urges that the evidence placed the appellant at the scene of the robbery and there was justification therefore for the respondents to act as they did. He submits that the trial court properly considered and applied the principles that relate to malicious prosecution, as defined in *Murunga vs. Attorney Gnarl* (1976-80) KLR 1251, properly. He states that the fact that the charges against the appellant were withdrawn did not mean that there was no reasonable or probable cause saying that the facts as presented could lead a reasonable an ordinary and cautious person to conclude that the appellant was probably guilty of the offence. He further argues that the fact of acquittal by itself was not sufficient to establish malice.

11. The law on malicious prosecution is well settled in a number of cases, which both sides herein have cited, such as *Kagane & others vs. AG & another* (supra), *Egbema vs. West Nile Administration* (supra), *Mbowa vs. East Menago District Administration* (1972) EA 352, *Murunga vs. Attorney General* (supra), *Simba vs. Wambari* (1987) KLR 601, *Gitau vs. Attorney-General* (supra), *Thomas Mutsotso Bisembe vs. Commissioner of Police & another* (supra), among others. The principle is that for a party to succeed on a case of malicious prosecution they must establish four items – the institution or continuation of the proceedings by the defendant, the defendant having acted without any reasonable and probable cause, the defendant having acted maliciously, and the proceedings having terminated in favour of the plaintiff. What constitutes institution and continuation of proceedings, acting without reasonable and probable cause, acting maliciously and proceedings terminating in favour of the plaintiff are well defined in the decisions cited above. The task ahead of me is to determine whether the appellant had brought a case before the trial court, which met the test set out in the said decisions.

12. On the question of the proceedings being initiated by the respondents, there is no doubt. The 1st respondent made two reports to the police. I do not have the police Occurrence Book numbers, or even the report itself, before me, so I will rely on the statements that were recorded from her. The first statement was recorded from her on 28th December 2008, the same day that the police took a statement from the appellant. She stated in that statement that it was the appellant who had called out to her to open the door, but reading through the statement it does not appear that she regarded him as one of the intruders. Indeed, it is recorded in her statement that while she was being hustled about with demands for money, and while some of the intruders were removing property from her house, the appellant had been forced under a bed. It was on the basis of the statements of the appellant and the 1st respondent recorded on 28th December 2008, that charges were brought in Vihiga SRMCCRC No. 2678 of 2008 against a Oliver Sultani, on two counts, of having robbed both the appellant and the 1st respondent. Both the appellant and the 1st respondent testified as prosecution witnesses in those proceedings. In the end, Oliver Sultani was acquitted. The second statement was recorded on 14th July 2010, in it the 1st respondent implicated the appellant in the robbery incident, and the same formed the basis for the charge brought against him in Vihiga SRMCCRC No. 682 of 2010. So the proceedings in question were initiated by the 1st respondent, and the police decided to have the appellant arrested and arraigned in court for prosecution purposes.

13. The second consideration is whether the charges brought in Vihiga SRMCCRC No. 682 of 2010 were so brought without reasonable or probable cause. Both the appellant and the 1st respondent had recorded statements with the police at the Serem Police Station on 28th December 2008, and the criminal charges brought in Vihiga SRMCCRC No. 2678 of 2008 had named the two of them as complainants. Both testified in the proceedings in Vihiga SRMCCRC No. 2678 of 2008 according to the material before me. The statements are explicit that the appellant had come to the home of the 1st respondent while in the company of a group of people. He had explained that they had attacked him first, and forced him into the home of the 1st respondent. I have had occasion to see the police P3 form put in evidence in Vihiga SRMCCRC No. 2678 of 2008, as Plaintiff's Exhibit No. 10. It issued out of Serem Police Station, and it depicts the appellant as a victim of the robbery the subject of Vihiga SRMCCRC No. 682 of 2010 and reflects that he sustained injuries that were fresh. It was the police at Serem Police Station who had recorded the statements in 2008, and referred the appellant to a medical facility for purposes of obtaining evidence. It was also they who arrested a suspect and charged him in Vihiga SRMCCRC No. 682 of 2008, with robbery with violence arising from the incident and at that prosecution relied on the statements recorded from the appellant and the 1st respondent, and also the police form P3 which characterized the injuries suffered by the appellant. Having handled those materials in 2008 it cannot, in my view, be said that both the respondents had a reasonable or probable cause, in 2010, to believe that the appellant had committed an offence. A reasonable person with the facts that the police at Serem Police Station had since 2008 could not possibly conclude that a reasonable cause existed to mount a prosecution of the appellant in 2010. In *Maundu vs. Kiwia and others* (2003) 1 EA 144, it was said that the test whether a prosecution was instituted without reasonable or probable cause is whether the material before the prosecutor would have satisfied a prudent and cautious man that the plaintiff was probably guilty of the offence.

14. Closely related to the issue of reasonable or probable cause is the element of malice, that the institution and prosecution of the appellant was actuated by malice. What constitutes malice has been defined in several cases. In *Mbowa vs. East Mengo District Administration* (supra), it was said that a defendant must have acted maliciously if he instituted the criminal proceedings with an improper and wrongful motive, which was defined as an intent to use the legal process in question for some other purpose other than the appointed and appropriate purpose. In *Gwajilo vs. Attorney-General* (2002) 2 EA 381, it was stated that the appellant could prove malice by showing, for instance, that the prosecution did not honestly believe in the case they were making, that there was no evidence upon which a reasonable tribunal could convict, that the prosecution was mounted for a wrong motive and show that motive, among others. In *Dr Willy Kaberuka vs. Attorney-General* (1994) 11 KALR 64, the court inferred malice from the fact that the police neglected to get correct information about the driver who had control of the vehicle, and found that the police was not genuinely concerned with seeing to it that justice was done, rather their prosecution of the plaintiff appeared to have been driven by an ulterior motive, and, in the opinion of the court, that could be evidence of malice. In *Kariuki vs. East African Industries Ltd and another* (1986) KLR 383, it was opined that lack of reasonable and probable cause may be taken as some evidence of malice.

15. There is no doubt that the prosecution did not believe in the case it had brought against the appellant. The case was terminated shortly after the taking of the plea. It was never fixed for hearing. No witnesses ever testified on any of its aspects. The statement that the police recorded from the appellant on the 28th December 2008 gave a background of the events that preceded the attack at the 1st respondent's home. It would appear no investigations were undertaken to verify the veracity of the said statement. Secondly, the 1st respondent had recorded a statement on 28th December 2008, at the same time as the appellant. She also testified alongside the appellant in the first criminal case. She recorded a second statement on 14th July 2010, shortly after the first case collapsed. The police at Serem Police Station had access to both statements, and no doubt had noted that the two differed in material particulars. It can only suggest that the second prosecution was driven by an ulterior purpose, and it is no surprise that the state chose to terminate the case almost immediately after the arraignment of the appellant in court. The prosecution of the appellant was not intended for the purpose of bringing him to justice, but rather to serve a purpose that was only known to the police and the 1st respondent.

16. The next consideration is whether the prosecution in Vihiga SRMCCRC No. 682 of 2010 terminated in favour of the appellant. I have seen a certified copy of the typed proceedings in Vihiga SRMCCRC No. 682 of 2010. The appellant pleaded not guilty to the charge of robbery with violence on 16th July 2010. The matter was mentioned on 26th July 2010 and 9th September 2010. During another mention on 23rd September 2010 the prosecutor told the court that there was an issue which he did not disclose, and asked that the matter be mentioned the following day. On 24th September 2010, the prosecutor placed before the court a *nolle prosequi*, which terminated the prosecution. In *Mbowa vs. East Mengo District Administration* (supra), the court made the point that no cause of action for malicious prosecution can arise until the determination of the criminal proceedings complained of in favour of the plaintiff. It was said in *Daniel Kirimi Julius vs. Frederick Mwenda* civil appeal number 270 of 2003 that malicious prosecution is founded whether a prosecution determines in favour of the accused, such as in cases where a prosecution is withdrawn and the accused is not recharged or where prosecution has been terminated with the acquittal of the accused.

17. In Vihiga SRMCCRC No. 682 of 2010, the appellant was only charged, the case did not proceed beyond that. No witnesses testified, for the case was terminated by way of *nolle prosequi* two months following the arraignment of the appellant in court. What amounts to a prosecution in a criminal case was addressed in the Ugandan case of *Dr Willy Kaberuka vs. Attorney-General* (supra), where it was said that a prosecution exists where a criminal charge is placed before a judicial officer, and the person who places such a charge before a court is deemed to prosecute it. It was emphasized that for there to be a prosecution, a criminal charge must be placed before a court whether that charge is competent or otherwise, or the charge is ignored or not, or the charge is defective. A criminal trial commences when an accused person is called to take his place in the dock, see PLO Lumumba, *Criminal Procedure in Kenya*, lawAfrica, 1998, 73. The prosecution commences when the charges are read to the accused and he pleads to them. So in the instant case, the trial and prosecution of the appellant had begun by the time the trial was terminated by way of *nolle prosequi*. A *nolle prosequi* is a device in the hands of the prosecutor to terminate a prosecution that is in motion, see *Crispus Njogu vs. The Attorney-General* High Court criminal application number 39 of 2000. Was the termination of the trial in favour of the appellant? The answer to that question is in the affirmative, to the extent that the said termination naturally resulted in his discharge or release from the proceedings. The terminated criminal proceedings ended and no liability or culpability was ascribed to him. In *Mbowa vs. East Mengo District Administration* (supra) it was said that all what the appellant needed to show was that the criminal case to a legal end.

18. From the above, it would be evident that there was material upon which the trial court ought to have found that the prosecution of the appellant was malicious. The court ought to have found in his favour. I shall therefore allow the appeal, set aside the decision of the trial court in the judgment delivered on 31st March 2015 and substitute the same with the holding that the appellant's suit in Vihiga CMCCC No.

6 of 2011 is hereby allowed on the finding that the appellant had been maliciously prosecuted. I shall accordingly award general damages at Kshs. 250, 000.00, noting that the prosecution did not go beyond arraignment, and costs of the suit at the lower court. The appellant shall have the costs of this appeal. Should any party be dissatisfied with the outcome of these proceedings, there is a right of appeal to the Court of Appeal within twenty-eight (28) days.

DATED, SIGNED and DELIVERED at KAKAMEGA this 3RD DAY OF DECEMBER, 2018

W. MUSYOKA

JUDGE