



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 56 OF 2014

FAMILY FINANCE.....APPELLANT

-VERSUS-

KHALIF ADAN MOHAMED.....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

(Appeal from the judgment of Honourable Mungai, (Mr.) Chief Magistrate, delivered on the 26th March, 2014 in Nakuru Cmcc No. 401 of 2007)

JUDGMENT

1. The Appellant made a report to the Kenya Police that the 1st Respondent had attempted to obtain money for himself by false pretences from which the 1st respondent was arrested and detained in police custody for six days.

He was later charged with the offence of obtaining Kshs.200,000/= from the appellant by false pretence contrary to **Section 313 as read with Section 389 of the Penal Code in Criminal Case No 1081 of 2005**. Upon trial he was acquitted under **Section 210 of the Criminal Procedure Code**.

2 He then sued the appellant for malicious arrest and prosecution for damages.

By a judgment delivered on the 26th March 2014 the trial court found in the 1st respondent's favour and awarded him damages for malicious prosecution in the sum of Kshs. 650,000/= and Kshs.600,000/= for wrongful arrest and detention and special damages of Kshs.35,000 it is these findings and awards that are the subject of the appeal.

3. The appellant in its collective grounds of Appeal attack the Learned magistrates findings as having been against the weight of evidence, failure to consider submissions by the appellant and thus made awards that were not supported by evidence tendered.

This court has been urged to set aside the trial magistrate's judgment and allow the appeal.

I have considered the evidence tendered.

ISSUES

- 1. Whether there were probable and reasonable grounds for the arrest detention and prosecution of the 1st Respondent.***
- 2. Whether the 1st Respondent's prosecution was actuated by malice.***
- 3. Whether the trial court's awards in damages to the 1st Respondent are founded and supported by the evidence on record.***

5. The elements to be proved in a tort of malicious prosecution are that:

- 1. The prosecution must have been initiated by the defendant.***
- 2. The proceedings must have been terminated in favour of the plaintiff.***

3. There must be an absence of reasonable and probable cause.

4. There must be malice.

6. What I am mandated to determine is whether the evidence on record satisfies the above ingredients - **David Mungai Kinyanjui and 2 Others -vs- AG (2012) e KLR.**

It is important to note here that it is not all acquittals that qualify for a suit for malicious prosecution. It is trite that to prosecute a person is not *prima facie* tortuous, but to do so dishonestly unreasonably and maliciously is.

7. Reasonable and probable cause for the prosecution

The 1st respondent's claim against the Appellant as can be discerned from the plaint is that being a customer and holder of an account with the Appellants Bank, the appellant made a complaint to the Kenya Police maliciously and without probable and reasonable cause that the respondent had attempted to obtain money from it by false pretense hence his arrest, detention and prosecution.

8. I have considered the evidence by the appellant's two witnesses, **DW2 the operations manager** of the Appellant Bank and a police officer (**PW1**) who produced the OB as well as written submissions.

I have also considered the 1st Respondent's evidence and submissions before the trial court. There is no doubt that it was the Appellant's agent who initiated the complaint to the police that the 1st respondent had attempted to obtain money by false pretences.

9. The appellant did not deny having made the complaint to the police nor having detained the respondent in their offices until when the police officers came to arrest him.

The 1st respondent's evidence was plain and straight forward that his arrest was malicious there being no probable cause or reasons as he only wanted to withdraw his own money.

10. Loss of bank or identity cards are not offences *per se*. In its defence before the trial court the appellant's witness **DW2 the Bank manager** who caused the arrest could not state any plausible reason as to why he thought the appellant was/or attempted to obtain money illegally, by false pretences.

11. In its submissions which I have re-evaluated and reconsidered as demanded of an appellate court - **Eastern Produce (K) Ltd -vs- Gilbert Muliunzi Makotsi (2013) KLR** it was admitted that the appellant was the complainant in the criminal case. That it was the police officers who decided to press charges against the respondent citing the case **Benjamin Kaswii -vs- Capital Construction Ltd – Nairobi HCCC No 2463 of 1993** when **Visram J** dismissed a case against the defendant as she was only a mere complainant and was not involved in prosecution of the matter.

12. The part played by a complainant is very crucial and it is through the complainant's statement that the police department makes a decision after investigations to either charge or release a suspect. The circumstances in the case that **Visram J** was dealing with is distinguishable to the circumstances of the present appeal.

13. I agree that the appellants submissions before the trial court were well researched. But looking at them as against the evidence before the court I find that they were more of an academic exercise stating the law on the issues but failed to pinpoint the relevance to the circumstances of the 1st respondent's arrest, detention and prosecution.

14. I have considered the trial Magistrate's judgment to determine whether he failed to consider the submissions.

I must state that the trial Magistrate's judgment demonstrates the lengths to which the trial Magistrate went into in analysis the entire evidence as well as the parties submissions and specifically the appellants submissions.

He stated clearly what constitutes a malicious prosecution and the ingredients that he further analysed. Having done so, I cannot come to a finding that the trial magistrate failed to consider both the evidence and submissions of both parties. No demonstration of such failure has been demonstrated. It is not enough to state. Proof must be tendered.

15. I am of the same opinion with the Learned Magistrate that:

“the bottom line is therefore that the finding that the defendants are guilty of maliciously causing the plaintiff to be charged. His arrest and detention was also devoid of any legal basis and therefore unlawful...”

16 In **James Karuga Kiiru -vs- Joseph Mwamburi & 3 Others, Nairobi CA 171 of 2000** the court stated:

“That to prosecute a person is not prima facie tortious but to do so dishonestly and unreasonably is.”

17. The evidence presented to the trial court is plain and clear that there were no probable or reasons to prosecute the 1st Respondent. Looking at the evidence of **DW2** the Bank Manager one would wonder on what basis he made a complaint and recorded a statement to the

police for the 1st respondent's arrest as no offence or at all or any intention to commit such crime was exhibited in his evidence. It could only have been malicious. I find no misdirection or misapprehension of the law by the trial magistrate into arriving at the decision he did.

18. I am satisfied that the 1st respondent satisfied the trial court upon a balance of probability.

a) that he was prosecuted on the initiation of the appellant without any reasonable or probable cause.

b) that upon prosecution, the prosecution was determined in his favour – under Section 210 of the Criminal Procedure Code

c) that the prosecution was actuated by malice -

See **Teresia Wanjiku Njoroge -vs- Standard Chartered Bank Kenya Ltd & Another (2015) e KLR.**

19. I have considered the totality of the Appellant's appeal as stated in the Memorandum of Appeal.

Having come to the finding that the trial magistrate's decision was adequately based on the evidence on record and its weight and having come to the conclusion that the appellant's submissions were fully considered and analysed, then the said appeal that does not challenge the *quantum* of damages awarded to the 1st respondent must fail.

20. Accordingly, I find no sufficient persuasion and grounds to set aside the trial court's judgment delivered on the 26th March 2014. The appeal is dismissed with costs to the 1st Respondent.

Dated, signed and delivered this 13th day of December 2018.

J.N. MULWA

JUDGE