



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 914 OF 2003**

**JARIBU CREDIT TRADERS LIMITED.....PLAINTIFF**

**VERSUS**

**AMEDO CENTRE (K) LTD.....1<sup>ST</sup> DEFENDANT**

**THE HONOURABLE ATTORNEY GENERAL....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The plaintiff herein Jaribu Credit Traders Limited filed the amended plaint dated 28<sup>th</sup> August, 2003 claiming General damages for detinue, loss of profits of Kshs.2,576,000, special damages of kshs.320,929 plus interest and costs of the suit; against the defendants herein.

The plaintiff avers that on or about the 28<sup>th</sup> day of March, 2002, the first defendant acting by itself through its authorized agents and/or servants, laid a complaint against the plaintiff with the department of weights and measures alleging that the plaintiff and its managing director then, Mr. Vihod Sejpal, were offering for sale goods with false trade description contrary to the Trade Description Act Cap. 505 Laws of Kenya.

It is alleged that the action of lodging the complaint was made maliciously, unlawfully and without justifiable reasons other than to instigate, actuate and cause the prosecution of the plaintiff and its managing director, Mr. Vinod Sejpal.

The particulars of malice on the part of the defendants are set out in paragraphs 5 and 11 of the plaint. It is pleaded that acting on the complaint, officers of the Department of Weights and measures moved quickly and on or about 28<sup>th</sup> March 2002, unlawfully seized 1076 sewing machines, the property of the plaintiff and proceeded to wrongfully detain them. That, the same officers charged the plaintiff and its managing directors in court with contravening Section 3(b) as read with Section 8(1) and (15) of the Trade descriptions Act, Cap. 505 Laws of Kenya. This was in criminal case number 879/2002 and on 7<sup>th</sup> January, 2003, the prosecution ended in the plaintiff's favour by an acquittal under Section 210 of the Criminal Procedure Code and the court ordered the release of the 1067 machines to the plaintiff forthwith.

The plaintiff avers that as a result of the matters aforesaid, the plaintiff suffered loss and damage, the particulars whereof are set out in paragraph 12 of the plaint. It has claimed general damages for detinue.

The first defendant filed its statement of defence on the 14<sup>th</sup> day of October, 2003, in which, it admitted having filed a complaint with the Anti-Counterfeit Secretariat about the presence in Kenya market of "singer" sewing machines that were not genuine but it denied that the allegations that it laid, were specifically against the plaintiff and its managing Director, Mr. Vinod Sejpal. It denied that the action of lodging the complaint was malicious, unlawful and without any justifiable reasons and avers that it had every justification in lodging the complaint about counterfeit "singer" sewing machines which were in the Kenyan Market.

The first defendant averred that the seizure of 1076 sewing machines by the officers of weights and measures was lawful and so was the detention. It contended that notwithstanding the acquittal of the plaintiff in the criminal case, the sewing machines that were seized from the plaintiff's premises were all counterfeits but averred that it did not prosecute the plaintiff nor detain its property as alleged or at all. It averred that the plaint does not disclose any cause of action against it.

The 2<sup>nd</sup> defendant filed its defence on the 26<sup>th</sup> day of January, 2004 wherein, it averred that the 1<sup>st</sup> defendant lodged a complaint against the plaintiff with the Anti-Counterfeit Secretariat and Kenya Revenue Authority. It contends that the officers from various Government Departments visited the plaintiff's premises and having reasonable cause to believe that an offence had been committed, seized 438 of the sewing machines and such seizure of the machines was lawful and an action for detinue does not lie against him.

In the alternative and without prejudice, the 2<sup>nd</sup> defendant pleaded that if the plaintiff and its director were charged, then the same was effected in accordance with the law and that the officers acted with reasonable cause to suspect and believe that an offence had been committed. Any general loss and damage suffered by the plaintiff is denied and it's put to strict proof.

During the hearing, Suresh Kandaria testified as PW1. He adopted his two witness statements filed on 22<sup>nd</sup> July 2015 and on 2<sup>nd</sup> August 2016. He is the chairman and the Managing Director of the plaintiff. It was his evidence that on 28<sup>th</sup> March 2011, the first defendant lodged a complaint with the department of weights and measures alleging that the plaintiff was offering for sale, goods with a false trade description contrary to Trade Descriptions Act. It was alleged that the plaintiff was selling fake "singer" machines. On the same day, the officers of weights and measures visited their godowns situated along Dar-es-Salaam Road in Industrial area and served the plaintiff with seizure notice of 1076 machines and the same were impounded and taken away for further investigations.

That on 8<sup>th</sup> April, 2002, the plaintiff and the then Managing Director, Mr. Vinod Sejpal were charged with the offence of offering to supply goods for sale to which a false trade description had been applied contrary to the provisions of section 3(b) as read with sections 8(1) (1) and 15 of Trade Descriptions Act. This was in criminal case No. 879/2002.

The criminal case continued until the 7<sup>th</sup> January 2003 when the court found that the plaintiff and its managing director Mr. Vinod Sejpal had no case to answer and they were acquitted under section 210 of the Criminal Procedure Code. He stated that the complaint was intended to cause damage to their business and give the first defendant a competitive advantage in the same industry. He testified that the machines were genuine and had been imported from Hala Trading Company a supplier in Dubai who had obtained the machines from Hermanos Kaybee an authorized singer agent in China. That the plaintiff paid all the import duty under the law and all the documents were produced to the officers of weights and measures but they did not pay attention.

On the loss that the plaintiff suffered, he stated that they received the machines on the 25<sup>th</sup> January 2002 but they were seized on 8<sup>th</sup> April, 2022 to 25<sup>th</sup> January 2003 and for that period the machines were in the custody of the 2<sup>nd</sup> defendant, the plaintiff incurred a loss in the sum of Kshs.2,576,000. In addition, the plaintiff incurred legal fees of Kshs.328,929 in defending the criminal case. He testified that the SGS report before the goods were shipped gave the goods a clean bill of health. He asked the court to award the reliefs sought for in the plaint.

John Muritu Muhinja gave evidence as DW1. He works with the 1<sup>st</sup> defendant as the general manager. He adopted his witness statement dated the 6<sup>th</sup> November, 2015 as his evidence in chief. His work involves general supervision of the 1<sup>st</sup> defendant's activities which includes the importation of "singer" sewing machine of which the first defendant is the exclusive distributor in Kenya as per the Distributorship Agreement entered into between the plaintiff and Singer N.V, dated the 1<sup>st</sup> January, 2000. That, singer is a registered company trade mark owned by the Singer company.

It was his further evidence that in February 2002, the 1<sup>st</sup> defendant discovered the presence in the Kenyan Market of "singer" sewing machines that were not genuine, following which, the 1<sup>st</sup> defendant lodged a complaint with the Anti-Counterfeit Secretariat and later placed a notice in the Sunday Standard dated the 16<sup>th</sup> February 2003 to notify members of the public of the existence of the counterfeit "singer" sewing machines. That, the said notice did not mention the plaintiff. He said he was aware that officers of the weights and measures carried out independent investigations alongside the Kenya Bureau of Standards, Kenya Revenue Authority and the Kenya police but the first defendant had no control over the said investigations and it was not involved in charging the plaintiff with contravening of the law.

The 2<sup>nd</sup> defendant did not call any witnesses.

The parties filed their respective submissions which the court will consider in its analysis. The plaintiff's cause of action is on malicious prosecution. The issues for determination by the court is whether the prosecution of the plaintiff was malicious and whether the plaintiff is entitled to damages as a result of the same.

The law surrounding the tort of malicious prosecution is well settled in the case of **Mbowa Vs East Mengo District Administration (1972) E.A 352** in which the court expressed itself as follows:-

***"The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than for public benefit ..... it's essential ingredients are:-***

***(1) The criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority;***

***(2) The defendant must have acted without reasonable or probable cause i.e. there must have been no facts; which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified.***

***(3) The defendant must have acted maliciously in that he must have acted in instituting criminal proceedings, with an improper and wrongful motive, that is, with an intent to use the legal process in question for some, other than, its legally appointed and appropriate purpose; and***

***(4) The criminal proceedings must have been terminated in the plaintiff's favour, that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge....***

The plaintiff in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been

fulfilled and that he has suffered damage. The same principles were enunciated in the case of **Kagame & others Vs The A.G (1969) E.A 643 and the case of Teresia Wanjiku Njoroge Vs Standard Chartered Bank Kenya Limited & Another (2015) eKLR.**

On whether the defendants were instrumental in instituting the criminal proceedings against the plaintiff, it is on record that on the 28<sup>th</sup> March, 2001, the first defendant lodged a complaint with the department of weights and measures alleging that the plaintiff was offering for sale, goods with false trade description. This was confirmed by Mr. John Muritu who testified as the only witness on behalf of the 1<sup>st</sup> defendant. The plaintiff, therefore, blames the first defendant for lodging the complaint without which the 2<sup>nd</sup> defendant would not have acted. The plaintiff further contended that the 2<sup>nd</sup> defendant was responsible for instituting criminal proceedings against it as it was its officers who charged the plaintiff and its managing director.

The first defendant on its part contended that once it made a report to the police, it was left to them to investigate the complaint and decide whether or not to charge the plaintiff. The case of **Douglas Odhiambo & Another Vs Telkom Kenya Limited Civil Appeal No. 115 of 2006** was relied on where the court stated:-

***“All that the respondent did was to report the fraudulently obtained certificate to the police. This is the duty of every citizen including public and private institutions. The rest was up to the police who conducted their own independent investigation that formed the basis of the criminal proceedings .....”***

The 2<sup>nd</sup> defendant submitted that the 1<sup>st</sup> defendant instigated the prosecution when they lodged a complaint after which the 2<sup>nd</sup> defendant investigated the complaint which concluded in the plaintiff being charged in the criminal case.

From the evidence on record, it is clear that the 1<sup>st</sup> defendant made a formal complaint which the 2<sup>nd</sup> defendant acted upon by carrying out investigations which culminated in the prosecution of the 2<sup>nd</sup> Plaintiff and its director. As rightly submitted by the first defendant, it is the duty of every citizen to report crimes/suspected crimes. This was the holding in the case of **Catherine Wanjiku Kariuki Vs A.G & Another (2011) eKLR** where the court held that:-

***“It is the duty of every citizen to report to the police any crime suspected, upon reasonable ground to have been committed or being committed, or about to be committed. Once that civic duty is done, it is the business of the police to independently investigate the matter and arrive at their own conclusion whether crime has been committed or is about to be committed and whether to charge anyone with such a crime. The further role of any person making the initial report or complaint to the police can only be that of a witness. (Emphasis added)***

In this case, though the first defendant made the report it was not involved in making the decision to charge and prosecute the plaintiff. The decision was solely taken by the 2<sup>nd</sup> defendant and the only role played by the first defendant was to appear in court as a witness through its director. It was the sole responsibility of the 2<sup>nd</sup> defendant to decide to prosecute the plaintiff depending on the outcome of their investigations which they independently carried out without any direction from the first defendant. Though the plaintiff had argued that the report was made due to business rivalry, the court is of the view that it has not been shown by way of evidence that the first defendant must have influenced the 2<sup>nd</sup> defendant to charge the plaintiff. I therefore find that the first defendant is not liable.

On whether the defendants acted without reasonable and probable cause; what amounts to reasonable and probable cause for purposes of malicious prosecution, was explained by Rudd J in **Kagame & Others Vs the A.G (1969) E.A 643** citing **Hicks Vs Faulkner (1878) 8 QB 167 at 171 of 2000, Herniman Vs Smith (1938) A.C 305 and Glinsia Vs Malver (1962) A.C 726** wherein the learned Judge stated:-

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

What constitutes reasonable and probable cause was also defined in the case of **Simba Vs Wambari (1987) KLR 601** as:-

***“The Plaintiff must prove that the setting of the law in motion by the inspector was without reasonable and probable cause ..... if the inspector believed what the witnesses told him then he was justified in acting as he did and I am satisfied the plaintiff has not established that he did not believe them or alternatively that he proceeded restlessly and indifferently as to whether they were genuine grounds of prosecution of the plaintiff or not.”***

In the case of **Josephat Kugeria & 2 others Vs Sabina Njiru Muthungu (2016) eKLR Civil appeal NO.99/2009**, the court had this to say about reasonable or probable cause:-

In a tort of malicious prosecution:-

***“Reasonable 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 reasonably 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. This test recognizes two important constitutional realities (1) the innocence of the accused until proven guilty and (2) the constitutional mandate of government to arrest and prosecute offenders.”***

To balance these two realities, the law makes it imperative that the belief in the guilt of the subject, should be founded upon a decision made

after due inquiry and consideration of the facts presented to the police. But the reasonable belief need not be based on actual existence of a definite cause but upon reasonable belief held in good faith in the existence of facts as are perceived by and laid before the police officer. It is not therefore a requirement that the police officer or prosecution should test each and every possible relevant fact before taking action to prosecute.

In the case at hand, the evidence on record is that, the plaintiff had imported the machines from Hala Trading Company, its supplier in Dubai. Hala Trading Company had obtained them from Hermanos Kaybee, an authorized singer agent in China. According to the plaintiff, the machines were genuine as per the SGS report which showed that before the goods were shipped, a clean report of findings was done by the supplier on description and quality of the goods. This report was produced in evidence as exhibit 13. PW1 denied that the machines were counterfeit.

The plaintiff submitted that the 2<sup>nd</sup> defendant's actions were not carried out on the basis of evidence before it but rather on mere word of the 1<sup>st</sup> defendant and in so doing, they acted without reasonable or probable cause. The Plaintiff further contended that the first defendant lodged its complaint before carrying out its due diligence to ensure that the plaintiff's sewing machines were indeed counterfeit. It relied on the case of **Samuel Kiprono Chepkonga Vs. Kenya Anti Corruption Commission & Another (2014) eKLR** where the court held;

***“Circumstances may exist in which it is right before charging a man with misconduct to ask for an explanation but no general rule can be laid down”***

On their part, the 2<sup>nd</sup> defendant submitted that the information the officers from the department of weights and measures had been given by the 1<sup>st</sup> defendant was credible enough to satisfy a prudent and cautious man that the plaintiff was guilty of the offence and hence the reason he was charged. The case of *Kagane Vs. A.G.* was relied on.

In this case, can the 2<sup>nd</sup> defendant be said to have met the test of a prudent and cautious man in having been satisfied that there was a proper case to put before the court against the plaintiff? After the 1<sup>st</sup> defendant made a report to the police, the 2<sup>nd</sup> defendant investigated the case and made decision to charge the plaintiff with a criminal offence. The 2<sup>nd</sup> defendant has argued that the government of Kenya through its relevant agencies are required to protect consumer rights under Article 46 of the Constitution to ensure that goods and services are of reasonable quality and that they are also under duty to protect their health, safety and economic interest.

The court has seen a letter dated the 22<sup>nd</sup> April, 2002 which was produced as Defence Exhibit 3. The letter was written by the director of weights and measures to the Managing Director of the first defendant and in it, the Director of weights and measures, who wrote the letter, appreciated the importance of calling a technical expert as a witness who could assist in differentiating between a genuine “singer” sewing machine from a fake one. He also advised the first defendant to avail a witness who could give evidence that the first defendant is solely authorized to use the trade mark “singer”.

The evidence of PW1 in the criminal proceedings is very critical. He is the marketing manager for Singer Africa and Middle East. It was his evidence that there are various types of Singer machines. They have factories in China, India, Turkey, Pakistan, Philippines, Bangladesh, Sri-Lanka and Brazil which produce Singer machines marked with the name “Singer”. It was his evidence that the most important distinguishable mark is the serial number and any machine that does not have the serial number engraved on it is automatically fake. He stated that their regional office is based in Oman, Jordan and it's the only office legally allowed to sell Singer Sewing machines in the whole of Africa and Middle East – otherwise no other Singer Company is allowed to sell into Africa except them and that any product sold into Kenya has to come through the local distributors, Amedo, the first defendant herein.

He stated that the only sure feature of a genuine Singer machine is that the serial number is engraved while a fake one has a sticker on the serial number, also that the design is flowery whereas the fake is not, their singer has a straight knob while the counterfeit has a circular knob, theirs has a flowery design that goes round the machine while the counterfeit does not have that feature, the genuine one has a letter “S” while the fake one does not have. It was his further testimony that the machines made in Pakistan and Sri Lanka are not sold in Kenya. He averred that though the fake machines were said to have been imported from China through Dubai, it must have been imported from a factory that is not a singer. He also confirmed that no other factory manufactures for them except their factories and that their factory in China has to abide by the regulations of “Singer” which are set by their parent company based in New York.

Going by that piece of evidence, the only logical conclusion that can be made is that the officers of the 2<sup>nd</sup> defendant had a reasonable and probable cause to prefer criminal charges against the plaintiff. Bearing in mind the evidence of PW1 aforesaid, the report by the plaintiff namely SGS report is highly suspicious just like the source of the sewing machines that were found in possession of the plaintiff.

As to whether there was malice on the part of the defendants, the plaintiff submitted that the report by the first defendant was intended to cause damage to the plaintiff's business and give the first defendant a competitive advantage in the same industry as the plaintiff was a competitor of the first defendant and by instituting criminal proceedings against its competitors by making frivolous, malicious and unfounded complaints against them because it stands to gain financially from doing so. It was averred that this shows that the first defendant acted maliciously and with an improper and wrongful motive in instituting the criminal proceedings against the plaintiff.

It was also submitted that failure by the officers of weights and measures to take into consideration documents which the plaintiff attempted to produce as proof that the machines were genuine, shows that it did not act in good faith but was actuated by malice. The case of **Christine Otieno Caleb Vs. A.G. (2014)** in which the court relied on the case of **James Karuga Kiiru Vs. Joseph Mwamburi & 3 others, Nrb. C.A. No. 171/2000** was relied on in which the court held:

***“where the police deliberately decide not to take into account the version of the suspect and acts on a story that eventually turn out to be improbable, and which no ordinary prudent and cautious man would have relied upon that failure may constitute lack of reasonable cause”***

Though the plaintiff was prosecuted and acquitted under Section 210 of Criminal Procedure Code, it is trite that to prosecute a person is not *prima facie* tortuous, but to do so dishonestly is. The burden of proving that the prosecutor did not act honestly lies on the person prosecuted. The court further held that it may well be that the Appellant was innocent at the time of the arrest but there is no reason in the absence of necessary evidence for making a police officer liable when he had only done his duty in investigating an offence. Whether a person arrested is so arrested in accordance with the law or whether it is unlawful to arrest him depends on the circumstances of his arrest. Usually where there is a genuine complaint made to the arresting officer, it will be said that the arrest was lawful” – See the case of **James Karuga Vs. Joseph Mwambiri & 3 others (supra)**

Also in the case of **Chrispine Otieno Caleb Vs. A.G. (2014) eKLR** where **Odunga J.** stated;

**.....the law is clear that the mere fact that a person is charged does not necessarily connote malice on the part of the prosecutor.**

The evidence by PW1 in the criminal case strongly shows that there was no malice on the part of the 1<sup>st</sup> defendants in making a report to the police. No evidence has been tabled before the court to suggest malice on the part of the 2<sup>nd</sup> defendant. The court therefore find that the prosecution of the plaintiff was not actuated by malice.

As to whether the criminal proceedings were terminated in favour of the plaintiff, the court does not have to dwell on that since it is obvious that it did, but like I have already pointed out, an acquittal does not necessarily connote malice on the part of the prosecutor and/or the complainant.

In view of the foregoing, the court finds that the plaintiff did not succeed in proving its case on a balance of probability and the same is dismissed with costs.

**Dated, Signed and Delivered at Nairobi this 13<sup>th</sup> day of December 2018**

.....

**L. NJUGUNA**

**JUDGE**

In the presence of:-

..... **For the Appellant**

..... **For the Respondents**