REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 22 OF 2014

(An appeal from the Judgment of the Ag. Principal Magistrate, Embu in CMCC No. 126 of 2006 dated 26/06/2014)

WAMAE NJENGA.....1ST APPELLANT

SIMON NJOGU MUTURI.....2ND APPELLANT

VERSUS

EMBU GATURI HOUSING CO-OP. SOCIETY LTD.....1ST RESPONDENT

ATTONEY GENERAL.....2ND RESPONDENT

J U D G M E N T

1. This is an appeal arising from the judgment of Embu Ag. Principal Magistrate in Embu CMCC No. 126 of 2006. The appellants sued the respondents claiming general damages pegged on three limbs: the tort of defamation; wrongful arrest and detention and malicious prosecution.

2. The case was dismissed with costs for lack of proof which gave rise to this appeal. The appeal was by consent of the parties canvassed by way of written submissions.

3. The appellants were represented by Magee Wa Magee & Co. Advocates, the 1st respondent by Muma & Kanjama Advocates while the 2nd respondent was represented by the Attorney General.

4. The grounds of appeal contained in the memorandum are that the judgment was against the weight of the evidence; that the evidence was not fully evaluated; that the magistrate reached the wrong finding; that the respondents did not put forth a reasonable defence to the claim and that the magistrate failed to assess the damages in the claim in the event that the appellants would be successful on appeal.

5. The case was partly heard by Hon. F. W. Macharia RM who heard all the witnesses. It was then taken over by S.K. Mutai Ag. Principal Magistrate who prepared and delivered the judgment on 24/06/2014.

6. The appellants testified that they were members of the 1st appellant between 1978 and 1999. The 1st appellant was elected as the 1st respondent's vice-chairman in 1999 while the 2nd appellant was elected the treasurer in the same election.

7. In the year 2001 it was alleged that the appellants had stolen money that had been withdrawn for payment of dividends to the society members. The Chairman wrote a letter to the District Criminal Investigations Officer (DCIO), Embu directing him to conduct investigations. The names of the

appellants were mentioned as suspects in the alleged theft.

8. The appellants were subsequently arrested and arraigned in court on charges of theft of the funds. They were remanded in prison remand for two days and subsequently the court took part of the evidence of one witness before the criminal case was withdrawn under Section 87(a) of the Criminal Procedure Code (CPC).

9. The appellants claimed that their arrest and detention was wrongful for there was no evidence of any stolen funds from the 1st respondent and that prosecution was activated by malice. Further that the letter to the DCIO was published resulting in damaging their reputation in society and causing them to suffer damage.

10. It was the appellants submissions that the respondents failed to show that the appellants had stolen any money and that they were not found in possession of the alleged stolen funds. It was contended that the removal of the appellants as officials of the 1st respondent disparaged them as dishonest people. The letter by DCIO was read by third parties for it was copied to the minister of Co-operative Development. The members of the 1st respondent were also informed of the contents of the letter. The appellants argued that publication was not denied by the respondents which fact favoured of the appellants case as was held in the case of ***KOAH VS MBURU [1982] eKLR 131***.

11. The trial magistrate was faulted for denying the appellants damages though he had found that they were detained for 2 days. It was argued that the appellants were charged and later discharged which was equal to an acquittal.

12. The appellants submit that the 2nd defendant failed to use his investigative machinery reasonably before charging them since the figures of the alleged stolen funds differed. The 2nd respondents gave three different figures as Shs.280,000/=, Shs.20,290/= and Shs. 139,700/=. It is therefore argued that the 2nd respondent was activated by malice in prosecuting the appellants.

13. As for damages the appellant faults the learned magistrate for failing to assess or give the figures he would have awarded. The appellants urged this court to find in their favour and consider awarding them Kshs.600,000/= for each of the appellants for defamation, Kshs.200,000/= for unlawful detention and Kshs.800,000/= for malicious prosecution.

14. The respondents called three witnesses. DW1 a committee member of the society said that Kshs.560,000/= was withdrawn from the society account for payment of dividends to members. Kshs.280,000/= was given to the appellants to keep and pay dividends. The money was not accounted for and about 55 members were not paid. He produced cards of members who were not paid.

15. DW2 and DW3 were members of the society. The witnesses testified that they went to collect their dividends on the first day of payments but were not reached for there were many people. It was their testimony that they have never been paid to date but did not know the reason why the society did not pay them.

16. The 1st and 2nd respondent filed separate submissions. The issues addressed therein are similar and it is appropriate to briefly state their arguments.

17. It was argued that the discharge under Section 87(a) of the CPC is not an acquittal and does not work in favour of the appellants since charges could be preferred afresh based on the same facts. As for the tort of malicious prosecution it was contended that there was no evidence of malice on part of the respondents. The detention, the prosecution of person is not on the face of it tortuous, but the appellants have a duty of proving that the prosecutor did not act honestly as well as adduce evidence of actual malice on the part of the prosecutor.

18. It was further argued that the appellants failed to call independent witnesses to prove defamation and

as such the magistrate was entitled to his finding of lack of proof.

19. According to the respondents, the letter to the DCIO was true and fair in the circumstances of the 1st respondent's report. It was never shared to 3rd parties and as such the issue of publication does not arise. The communication was privileged for it was meant for public good. The appellants failed to show how the said letter damaged their reputations.

20. The 1st respondents raised the issue of the appellants suit having been filed out of time. It was argued that the leave obtained before the magistrate was flawed since the reasons given for delay were always within the knowledge of the appellants. The case of ***FRANCIS NDEGWA KUNG'U & ANOTHER VS STEPHEN OMITTO [2014] eKLR*** was cited.

21. The duty of this court on appeal is to re-evaluate the evidence afresh, draw its conclusions bearing in mind that the court did not have the opportunity of hearing the witnesses.

22. It was held in the case of ***KENYA PORTS AUTHORITY VS KUSTON (KENYA) LIMITED [2009] 2EA 212*** by the Court of Appeal that:-

> *On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.*

23. The issues for determination in this appeal may be briefly stated:-

> *(i) Whether the suit before the learned magistrate was filed out of time;*
>
> *(ii) Whether the appellants were wrongfully arrested and detained;*
>
> *(iii) Whether the magistrate erred in finding that the letter by the 1st respondent was not published;*
>
> *(iv) Whether the case terminated in the favour of the appellants;*
>
> *(v) Whether the contents of the letter lowered the plaintiffs reputation;*
>
> *(vi) Whether the magistrate erred in finding that the prosecution of the appellants was not activated by malice;*
>
> *(vii) Whether the magistrate erred in finding that the appellants had failed to prove the case on the balance of probability;*
>
> *(viii) Whether the appellants are entitled to damages and the quantum thereof; and*
>
> *(ix) Whether the magistrate erred in failing to assess damages.*

24. In his submissions, the 1st respondent brought the issue of invalidity of the leave obtained by the appellants to institute the suit out of time. He urged the court to dismiss the appeal on this ground. The appellant responded to this issue by way of further submissions. The manner of introducing a cross-appeal at submission state was challenged as unprocedural and an abuse of the due process of the court.

25. The record of appeal contains the order for leave issued on 5/07/2006. This document was in the court file before the learned magistrate. The 1st respondent did not challenge it in its defence. It was during the hearing of the case that the issue was raised during cross- examination.

26. In its submissions, the 1st respondent argued that the leave granted by the court was invalid. He contended that the magistrate did not address it in his judgment which was an error and that no explanation was given.

27. The 1st respondent has sneaked in a cross-appeal at submission stage and urges the court to deal with the issue and grant his wish of dismissing the appeal. This is an abuse of the due process of the court. The counsel is an officer of the court and is conversant with the procedure. He knows very well at what stage the cross- appeal ought to have been filed.

28. It is my considered view that entertaining the cross- appeal at this stage would prejudice other parties including the 2nd respondent who had filed its submissions two months before the cross-appeal was brought on board and violates the rules of procedure. I find that the document is incompetent and an abuse of the court process and it is hereby struck out.

29. On appeal, this court is empowered to correct errors or omissions made by the first court. The learned magistrate ought to have addressed the issue of leave which had been raised before him.

30. I have perused the application dated 22/05/2006 which gave rise to the order for leave dated 5/07/2006 in SPMCC No. 77 of 2006 (OS). The supporting affidavit explains the journey of the appellants from the investigations to withdrawal of the case and up to the date of the letter by the DCIO of 13/10/2004 in which he gave up on the case.

31. The Limitations of Actions Act limits time of filing a defamation suit to three (3) years. From the date of the alleged offence to the time the DCIO wrote the letter, the time for filing the suit had expired.

32. Paragraph 16 of the supporting affidavit states:-

> *That because of the delay in finalizing the investigations, we were unable to commence proceedings against the intended defendants.*

33. The magistrate who gave the orders was convinced by the reasons given by the appellants and found the application merited. There is no material that was placed before the learned trial magistrate to make him determine the issue of leave. Likewise, I hold that the leave order issued on 5/07/2006 was valid. The suit was therefore properly before the court and the expiry of time was validated by the order issued on 5/07/2006.

34. Defamation is defined by the Black Law's Dictionary 8th Edition as:-

The act of harming the reputation of another by making a false statement to a third person.

35. The plaintiff must prove that the words were spoken or published; that the words refer to him; that the words were false and that they were defamatory or libelous and that he/she suffered injury of reputation as a result.

36. The contents of the letter were that the DCIO was being called upon to investigate theft of Shs. 158,800/= allegedly stolen by the appellants. The 1st respondent admits writing the letter and attempted to show that the money was given to the appellants who never accounted for it.

37. The evidence tendered by the 1st respondent did not demonstrate that any such monies existed. Money withdrawn from any bank goes with supporting documents for example, a withdrawal slip. A bank statement would also be obtained if need be. If the appellants received the cash as alleged, the society being an established institution should have some petty cash vouchers or other documents signed by the recipients acknowledging receipt of the cash and the purpose.

38. The respondents did not produce any document to prove the existence of the money and that the

appellants received it at all. The testimony of DW1 was not supported by the relevant documents as to the alleged lost cash.

39. While the letter indicated that Kshs.158,800/= was stolen, the charge sheet stated that Kshs.139,700/= was stolen. DW1 testified that only Kshs.48,610/= was missing. The same letter stated that there was a discrepancy of Kshs.20,190/= paid twice to the members and to which the appellants should pay. It was not explained who was to blame for the double payment if it occurred.

40. The appellants produced audited accounts for the year 2001 showing that the society had not lost any funds. DW1 admitted in his evidence that the audited accounts were in order. DW2 and DW3 said they were not paid dividends but did not know why they were not paid. These two witnesses were not of any use to the 1st respondent.

41. In cross-examination DW2 confirmed that on the list of members, he was member No. 1555 and that the list showed that he was paid against his identity card number. DW3's name on the identity card differed with the number on the list of members who were not paid. The list and cards of member not paid was not important to the 1st respondent's defence as would have been evidence on the existence of the money allegedly stolen and that of the appellants having received it as alleged.

42. The discrepancies of three different figures given by the 1st respondent as the stolen money was not explained in the evidence of its witness. It is regrettable that the learned magistrate failed to evaluate the evidence of the 1st respondent v*is a vis* that of the appellants. Had he done so, he would have probably arrived at a different finding on the truth of the contents of the letter. The letter alleging theft of the funds by the appellants cannot be said to be true with the glaring discrepancies which DW1 the key witness of the 1st respondent could not explain.

43. The letter alleged that the appellants had gone into hiding for 26 days. This allegation was denied by the appellants and was not supported by any evidence. In fact, DW1 said that he saw the appellants one day after the alleged incident.

44. The appellants were summoned by the DCIO through the area chief and honoured the summons. The residences of the appellants must have been known by most of the society officials and even by some of the members. There was no evidence that police visited their homes and did not find them. This puts into question the truth of the contents of the letter.

45. The letter was addressed to the DCIO and copied to the Minister for Co-operative Development. The appellants being officials of the society were under the ministry's watch through the local Co-operative boss. The contents of the letter became known to the minister and staff who may have been assigned the duty to deal with the letter bearing in mind that the minister's duties are restricted to policy making. The appellants testified that the letter was read to the members of the society which evidence was not controverted. This was sound evidence of publication by any standards.

46. The appellant cited the case of ***KEAH VS MBURU [1982] eKLR 131*** it was held:-

> *The court was satisfied that the letter had been published to the persons to whom it was copied and the words used in the letter were clearly defamatory.*

47. Similarly, in the case of ***MOHAMED NASORO DIMA VS MOHAMED OMAR SOBA [2013] eKLR*** the court held that a letter copied to some organizations was published. The letter was read to the society members resulting in their removal as officials. The appellants were also registered as members possibly through a general meeting of members. I reach a conclusion that the letter was published as was held in the foregoing decisions.

48. In this appeal, the allegations in the letter were false in that the 1st respondent never proved them even in the criminal case. The appellants were portrayed to their colleague officials and to the members of the

society and the other people who read the letter as dishonest and as thieves who did not care about the members welfare for they allegedly plundered the funds for payment of members dividends.

49. It is not in dispute that the letter refers to the appellants; that its contents were false and that it was published. The letter resulted in preferring of criminal charges for the offence of stealing by servant against the appellants and remove from leadership position.

50. The content of the letter in their natural and ordinary meaning lowered the reputation of right thinking members of society leading to the shunning of the appellants in their capacity as officials of the society. It also led to the rejection by the society members to the extent that they were removed from office and deregistered as members. The impact of the said letter also lowered the reputation of the appellants in their own families which evidence was uncontroverted.

51. The tort of defamation has specific defences available to the defendant namely justification, truth, privilege and fair comment. The burden of proof is on the defendant to satisfy the court as to any of the defences. In this case the 1st respondent in its evidence relied on the defence of truth which was not proved since the 1st respondent failed to prove that the allegations against the appellants were true.

52. The defence of justification was adopted by the 1st respondent that the correspondence was *"taken out in prudent and objective exercise of its duties of its officials."* For this defence, the 1st respondent was required to prove that the alleged defamatory matter was substantially true and therefore justified in the circumstances. As explained in the foregoing paragraphs, there was no proof of justification by the respondent.

53. It was also pleaded that the publication was *"for purposes of information to and in the general interest and welfare of the generality of its membership"*. The 1st respondent had a duty to the members to exercise due diligence in ensuring that the correct information was sent to the 2nd respondent for investigation. The 1st respondent failed to carry out this noble duty as portrayed by lack of evidence in the criminal case which led to the withdrawal under Section 87(a) of the Criminal Procedure Code. The contradictory figures of the allegedly stolen funds weakened the 1st respondent's case. The defences of qualified privilege and that of fair comment were not established.

54. Having found that the respondent did not give evidence to establish the truth of the contents of the letter and that the defences pleaded were not satisfied, I find that the letter was defamatory. The reputation of the appellants was indeed lowered in the society they lived in as viewed by the mirror of its right thinking members.

55. The appellants testified that they were arrested and charged in court and denied their liberty for two days before being released on bail. The case was later withdrawn allegedly for further investigations. The proceedings in Embu CM criminal case No. 2824 of 2003 were produced in evidence. The arrest, detention, prosecution and release of the appellants was not denied by the respondents.

56. The evidence of the appellants was that they were maliciously prosecuted in the criminal case which took about one year in court with only one witness who was stood down before he completed his testimony. The witness was never recalled and the case was subsequently withdrawn for further investigations. The DCIO later wrote to the 1st respondent advising him to refer the matter to the Ministry of Co-operative Development for inquiry. There was no evidence that such a referral was ever done and the matter ended there. The DCIO's action of withdrawal and advice to the 1st respondent was informed by lack of evidence to prosecute the appellants. The failure of the 1st respondent to act on the advice of the DCIO was informed by the same reason.

57. For a claim of malicious prosecution, the plaintiff is required to prove that the prosecution terminated in his favour; that the charges were instituted without reasonable and probable cause and that the prosecution was actuated by malice. The 1st respondent complained to the police which is admitted in

evidence. The respondent is an organization that must be seen to act in good faith and be responsible and accountable to its members. Due diligence ought to have been exercised before the complaint was made to the police. It turned out that the complaint was not only baseless but untrue.

58. The appellants alleged that the 2nd respondent instituted malicious prosecution against them. It was argued that the 2nd respondent merely investigated the complaint and charged the appellant. The defence was that the 2nd respondent only did its duty and acted reasonably.

59. Bearing in mind that the case was withdrawn for lack of evidence and that there were no further investigations conducted before the DCIO threw in the towel, justification of the charges is put question and malice on part of the 2nd respondent may be inferred.

59. It was held in the case of ***Nairobi HCCC No. 1729 of 2001 THOMAS MBOYA OLUOCH & ANOTHER VS LUCY MUTHONI STEPHEN & ANOTHER***:-

> *Unless and until the common law tort of malicious prosecution is abolished by parliament policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense. I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the states prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes."*

60. I agree with the dicta in the ***THOMAS MBOYA OLUOCH case*** and find that the 2nd respondent in this case had no probable and reasonable cause in prosecuting the appellants.

62. It was the appellants case that the prosecution was actuated by malice. The discharge of the appellants under Section 87(a) of the Criminal Procedure Code gave rise to the argument by the respondents that this was not an acquittal and that the appellants could be charged afresh on the same facts. In determining whether the discharge could be said to be a termination of the case in favour of the appellants, the court must take into consideration the facts of each case.

63. It is trite law that a discharge is not final for one could be charged afresh in the event that the prosecution obtain further evidence. The facts of this case went beyond the discharge. The DCIO wrote a letter dated 13/10/2004 to the 1st respondent advising them to institute an inquiry through the parent Ministry. It was clear in the letter that the advice was from the state counsel. It is noted that this advice was never acted on by the 1st respondent.

64. Had the DCIO found evidence to charge the appellants, he would have instituted fresh criminal proceedings at the conclusion of his second round of investigations. The State Counsel too would have advised that fresh charges be instituted. His action of withdrawal and the letter of advice demonstrated the closure of investigations with the silent outcome that there was no evidence to charge the appellants afresh.

65. It was held in the case of ***EGBOM VS WEST NILE ADMINISTRATION [1972] EA 60*** that:-

> *The fact that no fresh prosecution has been brought, although five years have elapsed since the appellant was discharged, must be considered equivalent to an acquittal, so as to entitle an appellant to bring a suit for malicious prosecution.*

66. In this case no prosecution had been preferred for over a period of ten (10) years. The charges were withdrawn on 23/02/2004 and this case filed in 2014. In the circumstances, the only reasonable conclusion is that the case terminated in favour of the appellants and I hereby so find.

67. The issue that arises is whether the 2nd respondent acted reasonably in prosecuting the appellants. The appellants were kept in court for about one year with no evidence at hand before the case was withdrawn. Not even PW1 concluded his evidence or produced a single document to show the existence of the alleged stolen funds or to support the allegations of theft.

68. It was held in the case of ***JAME KARUGA KIIRU VS JOSEPH MWAMBURI & 3 OTHERS, Nairobi C.A. No. 171 of 2000*** cited in the ***MUTSOTSO case*** that *to prosecute a person is not prima facie tortuous, but to do so dishonestly or unreasonably is the burden of proving that the prosecutor did not act honestly or reasonably being on the person prosecuted.*

69. I find that the 2nd respondent's conduct was dishonest and unreasonable in the circumstances of this case. I reach a conclusion that it has been established that the prosecution was actuated by malice.

70. In regard to wrongful detention, the appellants testified that they were remanded in custody for two days for they could not meet the bail terms. The appellants were detained as a result of a court order in respect of which damages may not be payable if the legal process was lawful. However, in the present case, the respondents set in motion an unlawful legal process where the constitutional rights of personal liberty of the appellants were violated. For this reason, the appellants are legible for compensation for loss of liberty.

71. It is my finding that the appellants have proved their case on the balance of probability. The learned magistrate erred in his finding to the contrary and in failing to fully evaluate the evidence.

72. I hereby set aside the judgment of the learned magistrate and substitute it with one in favour of the appellants.

73. On general damages, the magistrate is required to assess damages even where the case does not end in the plaintiff's favour. This serves the purpose of a successful appeal. It was wrong for the learned magistrate to fail to do his duty in this case.

74. For defamation, the appellants seeks Kshs.600,000/= for each one of them relying on the case of ***MOHAMED NASORO VS MOHAMED OMAR [2003] eKLR.*** The plaintiff in that case was a former member of parliament and was awarded Kshs.450,000/= for defamation in 2013. There was no input from the respondents on the quantum of damages herein.

75. In this case, the appellants were officials of the 1st respondent and the libel led their removal from office thus losing leadership and future expectations incidental to their positions. I award each of the appellant Kshs.400,000/= on this head.

76. For unlawful detention, the plaintiff relied on th case of ***SUSAN NYATHIRA VS COMMISSIONER OF POLICE [2015] eKLR*** where Kshs.200,000/= was awarded in 2015 for 19 days detention. The appellants herein were detained for only two days. I award each of them damages of Kshs.50,000/=.

77. The appellants cited the case of ***THOMAS MUTSOTSO (supra)*** for general damages, for malicious prosecution and prayed for Kshs.800,000/=. The plaintiff in this case was detained for a period of one month and lost his business items and profits. The appellant's trial lasted for about one year which caused them mental torture, stress and anxiety. I award the Kshs.600,000/= general damages.

78. The interests on the general damages are awarded at court rates from the date of judgment of the first court. The cost of this appeal and the court below are awarded to the appellants.

79. Judgment is hereby entered in favour of the appellants against the respondent jointly and severally in the foregoing terms.

80. The appeal is successful.

81. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 22ND DAY OF FEBRUARY, 2017.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Maina for Kanyama for respondents