



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU

CIVIL APPEAL NO. 30 OF 2014

BETWEEN

VICTOR OTIENO OUGO APPELLANT

AND

CHAIRMAN BOARD OF GOVERNORS

AMBIRA HIGH SCHOOL1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

(Appeal from the original Judgment and Decree of Hon. A. A. Odawo, RM dated 4th March 2014 at the Chief Magistrates Court at Kisumu in Civil Case No. 567 of 2012)

JUDGMENT

1. The appellant appeals against the judgment and decree dismissing his claim for malicious prosecution against the respondents. According to the plaint filed in the subordinate court, the appellant was arrested by police officers from Ugunja Police Station after the Principal of Ambira High School reported that he had allegedly been involved in setting fire to two classroom building valued at Kshs. 4 million. The appellant was arraigned at the Ukwala Law Court on 28th October 2008 and charged with the offence of arson contrary to **section 332(a)** of the *Penal Code (Chapter 63 of the Laws of Kenya)* in **Criminal Case No. 319 of 2008**. After trial, the appellant was acquitted under **section 215** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*.

2. The appellant contended that he suffered considerable humiliation and anguish and that the proceedings in the criminal court were actuated by malice. He alleged that the charges against him were malicious on the grounds that the Principal reported that he willfully and unlawfully set fire the school building knowing quite well that the allegations were untrue. That the Police officers attached to Ugunja Police Station failed to carry out thorough and proper investigations with a view to establishing the truth of the allegations made by the Principal and that the Principal and the Police officers deliberately ignored the appellant's explanation. The appellant claimed damages for the arrest, detention and malicious prosecution instigated by the respondents.

3. The respondents filed their respective defences denying the allegations made by the appellant and putting him to strict proof.

4. As this is a first appeal, I am called upon to examine and evaluate the evidence and reach an independent conclusion bearing in mind that I did not hear or see the witnesses testify (see *Selle and*

Another v Associated Motor Boat Company Ltd [1968]EA 123). The substance of the respondents' case was the claim for malicious prosecution and the parties did not dispute the elements of the tort of malicious prosecution in their submission in the court below.

5. The ingredients for the tort of malicious prosecution have been settled in this jurisdiction in several cases among them; ***Kagane and Others v Attorney General and Another [1969] EALR 643***, ***Mbowa v East Mengo District Administration [1972] EA 352***, ***Murunga v Attorney General [1979] KLR 138*** and they are as follows;

- a) The plaintiff must show that prosecution was instituted by the defendant, or by someone for whose acts he is responsible;
- b) That the prosecution terminated in the plaintiff's favour
- c) That the prosecution was instituted without reasonable and probable cause;
- d) That the prosecution was actuated by malice

6. These elements were summarized by the East Africa Court of Appeal in ***Mbowa v East Mengo District Administration (Supra)*** as follows;

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. In other words, the four requirements must "unite" in order to create or establish a cause of action. If the plaintiff does not prove them he would fail in his action.

7. As to the first element, there was no dispute that the appellant was charged and acquitted. Although he was acquitted, he was called upon to make his defence hence his acquittal under **section 215** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***. The appellant submitted that the learned magistrate erred in failing to find that the appellant had established that there was no reasonable and probable cause for prosecuting the respondents.

8. The appellant (PW 1) told the court that at the time the fire occurred on 20th August 2008, he was not at school as he had been sent home due to lack of school fees. He was told by his friend that the school had burnt down. He only returned to school in October and was taken before the Board of Governors where he told them that he was not at school at the time. Thereafter he was sent away from school to await the decision. He later recorded a statement at Ugunja Police Station and was charged with arson. He produced the proceedings and judgment in the trial court which confirm that he was acquitted on the ground that the prosecution witnesses were not reliable and that he had an alibi which the court accepted.

9. Barnabas Omondi Wanya (DW 1) testified on behalf of the 1st respondent. He told the court that he was the Principal and that he heard that the school had burnt down while he was away at a seminar. He recalled that after the incident, he interviewed students and narrowed down 5 boys whose names he gave to the police after which the appellant was charged.

10. Was there reasonable and probable cause? Mr Ayuko, counsel for the appellant, argued that trial court relied on the evidence of DW 1 and ignored the testimony of PW 1 which showed that on the material day, the appellant was not at the school and he could not have committed the offence. Mr Ayuko submitted that alibi defence was raised at the criminal trial and accepted hence the appellant was acquitted. In this respect therefore there was no reasonable and probable cause to prosecute the appellant particularly since the appellant had protested his innocence all along.

11. According to ***Halsbury's Laws of England, 4th Edition - Reissue, Vol. 45 (2)***.

[R]easonable 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 reasonable 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 ...

12. The fact that the appellant was put on his defence to answer the charges means that there was reasonable evidence upon which the prosecution could prosecute the appellant. That the appellant was finally acquitted does not negate the finding of reasonable cause as to hold otherwise would mean that an acquittal per se means that the element of reasonable and probable cause is established. In the case of **Murunga v Attorney General (Supra)** the Court of Appeal held that;

[T]he fact that the appellant was put on his defence was proof enough that there was reasonable and probable cause for prosecuting the appellant and that the prosecution was commenced after reasonable suspicion.

I therefore hold that there was reasonable and probable cause established to charge and prosecute the appellant.

13. With respect to malice, the law is clear that the mere fact that a person has been acquitted of the criminal charge does not necessarily connote malice on the part of the prosecutor. In **Nzoia Sugar Company Ltd v Fungututi [1988] KLR 399**, the Court of Appeal held;

Acquittal per se on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecutor. The mental element of ill will or improper motive cannot be found in an artificial person like the appellant but there must be evidence of spite in one of its servants that can be attributed to the company.

14. Malice may be implied from the lack of a reasonable and probable cause. As I understand, the law is that the appellant had to show that the respondents or their agents were actuated by ill-will or spite against him or that there was an improper motive. The appellant did not say anything about his relationship with DW 1 that would constitute malice or that by DW 1 taking the names of the suspects to the police was actuated by malice ill-will or spite.

15. From what I have stated, I find and hold that the appellant failed to prove the essential elements of the tort of malicious prosecution.

16. This appeal is dismissed with costs.

DATED and **DELIVERED** at **KISUMU** this 6th day of **October** 2016.

D.S. MAJANJA

JUDGE

Mr Oyuko instructed by Amos O. Oyuko and Company Advocates for the appellant.