



REPUBLIC OF KENYA

High Court at Kakamega

Civil Appeal 4 of 2011

RISHI HAULIERS LIMITED APPELLANT

V E R S U S

JUSTINE SIFUNA MANG'OLI RESPONDENT

J U D G M E N T

The respondent herein used to work for the appellant as a mechanic. On the 3.8.2004 he was charged before the Mumias Resident Magistrate Court with the offence of stealing by servant contrary to **Section 281** of the **Penal Code**. His co-accused was one **IBRAHIM WESONGA**. On the 7.9.2004 the complainant **IDDRIS BASHIR** withdrew the case against the respondent and his co-accused. The respondent subsequently filed Kakamega Chief Magistrate Civil Case No. 347 of 2005 seeking general damages for malicious prosecution. The respondent was awarded **KShs.100,000/=** as damages by the trial court.

The appellant being dissatisfied with the award filed the current appeal on the grounds that the trial court arrived at the wrong conclusion given the evidence on record, that the trial court did not sufficiently consider the demand contributory negligence based on the evidence adduced, the trial court ignored the applicable principles of law and that the trial court proceeded on the wrong principles when assessing damages to be awarded to the respondent. Further that the damages awarded are inordinately high in the circumstances. Parties filed written submissions. Counsel for the appellant submitted that the evidence of DW1 showed that a theft had occurred at the appellant's premises. Police investigated the matter and charged the appellant. There was no malice on the part of the appellant. Counsel relied on the case of **MURUNGA VS ATTORNEY GENERAL [1979] KLR 138** and that of **HICKS VS FAULKNER [1878] 8 QBD 167**. On his part counsel for the respondent submitted that the trial court properly evaluated the evidence on record and arrived at the correct conclusion. The respondent was charged in court and was held for more than four days in custody yet the Constitution only allowed for **24** hours. This was malicious and even when the case was being withdrawn the complainant indicated that he was withdrawing a case of stealing money.

The record of the trial court shows that one witness testified for each party. The respondent testified that he was employed by the appellant in 1999 as a mechanic. On the 27.7.2004 he was on duty and had gone to the field when he was called over the radio call and informed about a lost spare tyre. He recorded his statement at Mumias police station and he was put in custody for some time as the police were waiting for the employer to go and give directions. He was later charged with the offence of stealing by servant and was released on bond. He hired an advocate and paid **KShs.4,000/=** as legal fees. Later the site manager of the appellant company withdrew the complaint on 17.9.2004. It was his evidence that he stayed in custody for **7** days and after the incident he did not continue to work for the appellant. The police did not investigate the matter and arrested the respondent.

On its part the appellant sent **SAMUEL MUSIDIA MUKONJELO** as its witness. His evidence is that he had worked for the appellant since 1995 and a spare wheel for tractor registration number KXG 726 got lost. The matter was reported to the police who investigated the same and arrested the respondent and his co-accused. Later the company withdrew the suit. The respondent was not dismissed from employment. He was the one who made the report to the police. The lost spare wheel was on a vehicle that had been used by the respondent.

The appellant's grounds of appeal as per the memorandum of appeal boils down to only one issue, that there was no malice in the prosecution of the respondent. Most of the grounds are framed in a manner that appears to me to have been meant for a road accident case. Issues of contributory negligence have no place in a matter involving malicious prosecution. If the respondent contributed to his prosecution then the case ought to have been left to proceed. Counsel for the appellant also contends that the trial court did not properly evaluate the evidence on record. The evidence before the trial court was that the respondent was arraigned before the Mumias Resident Magistrate Court and charged with an offence of stealing by servant. The court record shows that on the 7.9.2004 the criminal case was withdrawn and part of the record reads as follows:-

Complainant duly sworn in Kiswahili:-

Iddris Basiri holder of I/D card No.13600729. I wish to withdraw the case and agrees that the accused persons have been my employee for a very long time. I wish to forgive the accused persons of the money they stole.

During the hearing of the civil case the respondent produced the criminal case file. Counsel for the respondent submits that no evidence was adduced when the civil case was being heard to show that indeed there was a spare tyre that had been lost. The appellant ought to have produced witness statement to show that a tyre was lost.

I have gone through the judgment of the trial court, I do find that the trial magistrate extensively evaluated the evidence on record before making his finding. The trial court referred to two case namely that of **MURUNGA VS ATTORNEY GENERAL [1979] KLR 138**. The trial magistrate extracted the requirement of a claim for malicious prosecution and itemized them. He also evaluated the case of **KAGAME & OTHERS VS AG & ANOTHER [1969] EA 643** whereby the main yardstick for cases of malicious prosecution is *whether the prosecution was instituted without reasonable and probable cause and whether the material known to the prosecution would have satisfied a prudent and cautious man that the plaintiff was probably guilty of the offence.*

The trial magistrate after evaluating the evidence concluded that the arrest, detention and prosecution of the respondent was without reasonable and probable cause. The proceedings before the criminal court show that the case did not go on trial and was withdrawn within a period of one month. The person who withdrew the case are cited hereinabove indicate that he was forgiving the respondent for the money they stole. When the civil case for the claim for malicious prosecution was being heard other than the testimony of DW1 that a spare tyre had been lost there was no evidence in form of witness statement or a report to the police showing how the tyre was lost. There were no records produced to show that indeed the appellant had that tyre or when it was bought and who was the driver of the vehicle or tractor that had that tyre. It appears that no investigations were done and the same day the respondent was called while on duty in the field is the same day he was arrested and put in custody for about 7 days only for the company to withdraw the case after one month. I do find that the trial magistrate after evaluating the evidence on record correctly concluded that the arrest, detention and prosecution of the respondent was without a reasonable or probable cause. All what is there is the evidence of DW1 that a tyre had been lost and no more. Prosecuting somebody requires serious thought and sound evidence. The respondent was charged in court and no evidence was produced in court which could have helped the court to conclude that indeed the complaint by the appellant was based on proper facts. I do find that a prudent and cautious man will conclude that the prosecution was not based on sound evidence and was merely intended to intimidate and embarrass the respondent.

Malicious prosecution is defined by the Black's Law Dictionary (5th Edition) as one began in malice without probable cause to believe the charges can be sustained. I do find that there was no justification in the prosecution of the respondent. There was no evidence that the respondent had been assigned the car that had the spare wheel and that he was the one who was accountable for that spare wheel. Even the person who withdrew the case did not know what the case was all about. According to him it was a case of stealing money as opposed to theft of a tyre.

In the end I do hold that the appeal lacks merit and the same is dismissed with costs to the respondent.

Delivered, dated and signed at Kakamega this 9th day of May 2013

SAID J. CHITEMBWE
J U D G E