



REPUBLIC OF KENYA

High Court at Kisumu

Civil Appeal 125 of 2009

MICHAEL OCHIENG' ODERA.....APPELLANT

VERSUS

ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

This is an appeal from the decision of the lower court, CM Oluoch, Senior Resident Magistrate, in which the plaintiff's (now appellant's) suit for wrongful arrest and detention as well as malicious prosecution was dismissed.

The court found that plaintiff had failed to establish element of lack of reasonable cause as well as malice on a balance of probability. Being aggrieved by that decision, the appellant filed this appeal and put forth the following 5 grounds:

- 1) THAT the learned trial magistrate erred in law and fact in finding that the Appellant failed to prove his case on a balance of probability.**
- 2) THAT the learned trial magistrate's judgement is against the weight of evidence adduced,**
- 3) THAT the learned trial magistrate erred in law and in fact in finding that there was reasonable and probable cause for the prosecution of the Appellant.**
- 4) THAT the learned trial magistrate erred in law and in fact in finding that the respondent did not act maliciously.**
- 5) THAT the learned trial Magistrate erred in law and fact in finding that the Appellant failed to discharge the burden of proving malice.**

Brief facts and background of the case.

The brief facts of the case are that:

The appellant was arrested on 1/12/2003 which was a Sunday and was taken to Kondele Police Station where he was beaten and where the lady complaining scratched him with a bottle top. Nothing was recovered from his house after a search by CID officers but the police took a panga they found in the house. The police stopped at the appellant's father's place of work where again nothing was found. The appellant was later taken to Central Police Station, where he was again beaten and his upper incisor tooth broken. His father was also arrested, made to record a statement but was later released. The appellant was

incarcerated in the police cells on allegations that he had committed the offence of robbery with violence. On or about **1.12.2003**, the appellant was arraigned in court and charged with the offence of robbery with violence in **Criminal Case No 892 of 2004** in which he was convicted and sentenced to 2 years imprisonment. During the trial he was remanded in Kodiaga for more than 1 year. He served part of the sentence (1 ½ months) but on appeal, this conviction and sentence was quashed in **KSM HCCRA NO.231 of 2004**. It is on the basis of the successful appeal that the appellant filed a case against the respondent in **CIVIL SUIT NO.159 OF 2006** which suit was dismissed with reasons already stated above.

The appellant submitted that simply put the trial court was of the view that the Appellant's case failed because:-

i. The appellant failed to prove that his prosecution was without reasonable and probable cause; and

ii. The appellant failed to prove that the Police acted with malice in charging him.

On its part the State respondent submitted that in a claim for malicious prosecution, the plaintiff must prove that the person instituting the proceedings was actuated by spite, ill will or improper motive. Thus the appellant's admission that the police officers did not have a grudge against him is sufficient to dismiss the claim for malicious prosecution and therefore the trial magistrate rightfully found so in her judgement. Further that there was reasonable and probable cause to warrant the plaintiff's prosecution for that reason the Police did not act maliciously and the burden of proof was on the plaintiff to prove that there was malice which burden the plaintiff did not discharged.

In order for an action to lie for malicious prosecution, certain conditions must be fulfilled. This criteria was set out by **Cotran J** in the High Court decision of **Murunga -v- The Attorney General (1979) KLR 138** as well as by **Rudd J** in **Kagane and Others -v- Attorney General and Another (1969) EALR 643 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;**

Since conditions (a) and (b) are not in dispute, I shall go straight to points (c) and (d) which were the basis of the trial court's decision in dismissing the suit.

No action lies for the institution of legal proceedings, however malicious, unless they have been instituted without reasonable and probable cause. This was held by **Tindal C.J** in **Williams v. Taylor (1829)6** full citation where it was stated that “ ***Malice alone is not sufficient, because a person actuated by the plainest malice may none the less have a justifiable reason for prosecution.***”

Salmond on The Law of Torts defines Reasonable and probable cause as (“***means a genuine belief, based on reasonable grounds, that the proceedings are justified***”). Further, **Rudd J** in the **Kagane -vs- Attorney General** case, adopted definition of **Hawkins J** in **Hicks v. Faulkner (1878) 8 Q.B.D 167** where Reasonable and Probable cause was defined as “ ***.....to be an honest belief in the guilt of the accused, based upon full conviction, founded on 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 the accused, to the conclusion that the person charged was probably guilty of the crime imputed.***” This definition was relied upon also in the case of **Thomas Mboya Oluoch & another -vs- Lucy Muthoni Stephen & another (2005) eKLR** (appellant's list of

authorities). The prosecutor must himself honestly believe in the case which he is making. The defendant (in this case the respondent) is not required to believe that the accused is guilty: it is enough if he believes there is reasonable and probable cause for a prosecution. He need only be satisfied that there is proper case to lay before the court. If the prosecution is based on information received, it was held in the **Kagane** case cited above that, **“.....the information must be reasonably credible, such that an ordinary reasonable prudent and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for the prosecution.”**

The burden of proving absence of reasonable and probable cause is on the plaintiff. The plaintiff must give some evidence from which the actual belief of the defendant can be inferred. For instance, when a person embarks on a prosecution without any evidence at all or with evidence on which no reasonable jury would convict, then there is strong evidence that he had no reasonable and probable cause. The respondent, having regard to the facts known to him, must show reasonably sound judgment and use reasonable care in determining whether there are sufficient grounds for the proceedings instituted, and any failure to exhibit such judgement or care will be imputed as a want of reasonable and probable cause.

Malice is the presence of some improper and wrongful motive or intent to use the legal process in question for some other reason than its legally appointed and appropriate purpose. In the case of **Joseph C. Mumo –v- Attorney General and Another (2008) eKLR**, Malice was defined as **“ means prosecution for a reason other than the vindication of justice “**. The burden of proving malice lies on the plaintiff. It can be proved by:- showing what the motive was and that it was wrong, or by showing that the circumstances were such that the prosecution can only be accounted for by imputing some wrong or indirect motive to the prosecutor.

Malice and absence of reasonable and probable cause together in order to produce liability. No action will lie for the institution of legal proceedings, however destitute of reasonable and probable cause, unless they are instituted maliciously, i.e. from some wrongful motive.

Did the appellant herein give evidence to prove absence of reasonable and probable cause as well as malice on the part of the respondent?

The appellant submitted that, certain acts undertaken by the respondent on the conduct of the criminal case were a clear indication of absence of reasonable and probable cause the same were:

- **a complaint that led to the arrest of the appellant came from one kamolo with whom the appellant had a grudge.**
- **no evidence adduced that the prosecution conducted investigations on the circumstances surrounding the information received from the said Kamolo before arresting the appellant. Further, failure by the Police to investigate the appellant’s insistence that he was never at the scene of the crime.**
- **failure by the prosecution to produce 2 crucial witnesses to testify in court is a clear indication that their testimonies would have otherwise been detrimental to their case.**
- **that the State conceding to the criminal Appeal after considering the totality of the evidence, the concession itself was prima facie proof of the weakness of the case they had presented against the appellant.**

Considering the evidence and submissions by the parties, the conduct of the police leading to the arrest as well as prosecution of the appellant was wanting. This is clear from the manner in which the prosecution embarked on prosecuting the case with evidence on which no reasonable jury would convict. Further, the prosecution failed to exercise reasonably sound judgment and use reasonable care in determining whether there were sufficient grounds for instituting the proceedings against the appellant, and this exhibited want of reasonable and probable cause.

The unexplained failure to call the two essential witnesses who would have provided crucial information upon which the prosecution did not assist the prosecution's case. **Justice Rudd** in the **Kagane –vs- Attorney General** (supra) stated that:

“ Consequently, the subjective test should only be applied where there is some evidence directly tending to show that the prosecutor did not believe the truth of his case. Such evidence could be afforded by words or letters or conduct on the part of the prosecutor which tended to show that he did not believe in his case, as for example a failure or reluctance to bring it to trial, a statement that he did not believe in it, and I think possibly, an unexplained failure to call an essential witness who provided a basic part of the information upon which the prosecution was based.”

On proof of malice, I would totally agree with the Appellant's counsel that once a finding of lack of reasonable or probable cause had been made then malice on the part of the prosecution could be imputed. This was also held in the **Kagane (supra)** that:

“.....want of reasonable and probable cause to be taken into consideration as being some evidence of malice”.

I also find that the actions of the police in handling the appellant after his arrest are a clear indication of spite or ill-will on their part although the appellant admitted that the Police officers did not hold or bear any previous grudges against him. The appellant however testified that he was beaten by the police during his arrest to the point of breaking his upper incisor teeth, allowing the appellant to be assaulted by a lady complainant to the case with a bottle top while he was under the custody of the police, placing of a gun in front of the appellant during interrogations at the police station and in the absence of any evidence in rebuttal by the a respondent, the conduct of the police point to spite and ill-motive.

All in all this appeal succeeds. I find that the appellant did prove his case on a balance of probability and I do find fault with the trial court's conclusion.

The trial court in assessing damages had awarded as follows:

- **Kshs.100,000/= for wrongful arrest and detention;**
- **Kshs.200,000/= for malicious prosecution.**

The appellant's counsel found the sums too low and unsupported. He proposed Kshs.1,000,000/=. In addition counsel sought for legal fees of Kshs.87,000/= in one case and Kshs.42,340/= in the other.

In **Thomas Mboya Oluoch and Amos Odhiambo Ooro vrs Lucy Muthoni Stephen & The Attorney-General Ojwang J.** (as he then was) the inter-alia made the following awards:-

- Kshs.500,000/= as general damages for false imprisonment and Kshs.300,000/= for malicious prosecution (A 2005 decision) Guided by the above authority and taking into account the inflationary trend I make the following award:-

- (1) damages for wrongful arrest and detention Kshs. 750,000/=;**
- (2) damages for malicious prosecution Kshs. 500,000/=;**
- (3) no special damages were proven. I therefore make no award;**
- (4) costs to the appellant.**

Dated and delivered this 6th day of November, 2012

**ALI-ARONI
JUDGE**

In the presence of:

.....counsel for appellant

.....counsel for respondent