

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

Civil Appeal 83 of 2006

MICHAEL NGIGI MWAI.....APPELLANT

VERSUS

NGUMA NDEGA.....1ST RESPONDENT

WACHIRA MUTHONI.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

The appellant filed the amended plaint before the subordinate court on 5/5/2004 claiming general damages for unlawful and wrongful imprisonment and for malicious prosecution. He also asked to be awarded the costs of the suit. 1st Defendant is said to have made a report at Kerugoya police station causing the plaintiff/ appellant to be arrested and charged in *Miscellaneous Criminal Case No. 31 of 2001* where he was asked to show cause why he should not execute a bond to keep peace. Apparently the case was not heard but he was acquitted under Section 210 C.P.C. after the police failed to avail the police file to court. He contends that the said report was malicious and spiteful. It is not clear why the 2nd defendant was charged as even in his testimony in court, the plaintiff/appellant said he was arrested by one P.C Shitemi. He claimed that the said Shitemi was accompanied by the 1st and 2nd defendants to arrest the plaintiff. The O.B entry exhibited in court shows that the plaintiff/appellant was arrested by P.C Shitemi and P.C Njeru. It is not clear therefore what role the 2nd defendant played and why he was dragged into this case. I am ready to find like the learned trial magistrate who heard the case that the cause of action against the 2nd defendant was not established at all. The defendants did not turn up in court to testify although they had filed their defence. The record shows however that they were represented during the trial by one Bita who cross- examined the witnesses. During the cross-examination of the plaintiff by Mr. Bita, he admitted that “*The 2nd defendant was not a police officer.....*”

This goes contrary to paragraph 3 of his defence where he describes him as a police officer. If then the 2nd defendant was not a police officer, then it would mean that the police officer who arrested and detained the plaintiff/appellant were not sued. This in itself would create a serious misjoinder or non-joinder of parties which would have rendered the plaintiff’s case before the trial court a non-starter.

All in all however, having heard the plaintiff’s case, the learned trial magistrate made a finding that the plaintiff had failed to prove his case on a balance of probability and dismissed the same. Being aggrieved by the said dismissal, the plaintiff filed this appeal citing the 4 grounds listed in his memorandum of appeal as hereunder:-_

1. *That the learned trial magistrate erred in law and in fact in holding that the appellant had failed to prove his case on a balance of probabilities whereas he had in fact done so.*
2. *That the learned trial magistrate erred in law and in fact in failing to make a finding that the appellant was unlawfully and wrongfully imprisoned for 5 days which was in contravention of the law.*

3. *That the learned trial magistrate erred in law and in fact in failing to hold that the 1st Respondent's report to the police was actuated by malice.*

4. *That the learned trial magistrate erred in law and in fact in delivery a judgment against the weight of evidence on record.*

He is asking this court to allow the appeal and set aside the orders dismissing the appeal and that Judgment be entered in his favour.

Both counsel briefly addressed the court on the merits or otherwise of the appeal. I have considered the said submissions along with the evidence adduced before the trial court as outlined above. I have also considered carefully the grounds of appeal enumerated in the memorandum of appeal. As stated earlier, there was no case established whatsoever against the 2nd defendant. Secondly, if as conceded by the plaintiff on cross-examination the 2nd defendant was not a police officer, then the 3rd defendant should not have been co-joined as a party. The case was from the word 'go' bad for misjoinder of the parties and on that ground alone, it should have been dismissed. Since the same was nonetheless decided on merit, I will proceed to consider the said merits or otherwise of the same. To start with, what the criminal case before the magistrate established was that the plaintiff was arrested taken to court and acquitted on a technicality. The 1st defendant did not testify. He was not therefore cross-examined to establish if he was driven by malice or spite as claimed by the appellant. Malice is not established by the mere report of a complaint against a person to the police. Nor is it proved by the fact that a suspect is acquitted by the court. Indeed in this case, no evidence was ever tendered. There was therefore no material or evidence from which the learned trial magistrate could draw an inference of malice. The learned trial magistrate did not err in his finding that malice had not been established. I also find like the learned trial Magistrate that all the 1st defendant did was to make a report to the police station. He had a right to do so if he felt that he had been wronged. It was incumbent upon the police to then take up the report and carry out investigations before charging the plaintiff. If they charged him without sufficient evidence, then the plaintiff could not be blamed for it. If the case was thrown out because the police failed to avail their file to court, that had nothing to do with the plaintiff either. This boils down to one conclusion, that the plaintiff did not prove malice on the part of the 1st defendant and hence failed to overall prove his case on a balance of probability.

My finding is that the plaintiff's suit was properly dismissed and I have no reason to upset the learned trial magistrate's findings and Judgment. Accordingly, I find this appeal devoid of merit and dismiss the same with costs to the 1st respondent. The other respondents did not appear for the appeal.

W. KARANJA

JUDGE

Delivered, signed and dated at Embu this 3rd day of June 2009

in presence of Mr. Nganga for Chomba for Appellant and Mr. Okwaro for Respondent.

W. KARANJA

JUDGE