REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Appeal 129 of 2002

M'MBWIRIA M'ARACHI …….....…….. APPELLANT

VERSUS

M'MUKIRI M'ARIMI …….…….. 1ST RESPONDENT

P.C. JOHNSON MOKAYA …….. 2ND RESPONDENT

THE COMMISSIONER OF POLICE ……. 3RD RESPONDENT

THE ATTORNEY GENERAL ……. 4TH RESPONDENT

(An appeal from the judgment of the learned Honourable Njeru Ithiga (S.P.M.)

in Meru CMCC No. 775 of 1999 delivered on 11th October 20020)

JUDGMENT

The appellant filed a plaint in the lower court seeking for damages for malicious prosecution, unlawful arrest, and falsee imprisonment. He sued the complainant in the criminal case against him and also sued a police constable and the Commissioner of Police. By the time the case came up for hearing, the second respondent, the police constable, had died. The 3rd and 4th defendants would are the 3rd and 4th respondents in this appeal did not offer evidence in the lower court. After hearing the evidence, the learned magistrate dismissed the case of the appellant and in his considered judgment, the learned magistrate made the following finding:-

"I am therefore unable to find that malice has been established against the defendants. I am also unable to find how the arrest was false and how locking up of the plaintiff was false and how the subsequent prosecution was malicious even when no malice is imputed on the police. All in all, I find the plaintiff has not proved his case against the defendants on a balance of probability. The same is ordered dismissed with costs."

The appellant was aggrieved by that judgment and has filed this appeal. He has brought before court the following grounds of appeal:-

1. That the learned Senior Resident Magistrate erred in law and in fact in failing to find that the 1st respondent had made a malicious report at the Meru Police Station despite glaring of carrying evidence

thereto.

2. That the learned Senior Principal Magistrate erred in law and in fact in failing to find that the 2nd and 3rd respondent had not instituted any proper investigations despite having found that the whole process of prosecution instituted by the respondents was not in dispute.

3. That the learned Senior Principal Magistrate erred in law and in fact in failing to find that the criminal proceedings were instituted without reasonable and probable cause.

4. That the learned Senior Principal Magistrate erred in law and in fact in failing to find that the whole criminal proceedings against the appellant were actuated by malice.

5. That the learned Senior Principal Magistrate erred in law and in fact in applying a standard of beyond reasonable doubt on the appellants case and thus dismissing the same for failure of proof.

6. That the judgment of the Learned Senior Principal Magistrate is against the weight of evidence.

In my view, all the above grounds of appeal bring out three distinct issues for my consideration. First issue is whether the report by the first respondent to the police was actuated by malice. The second issue is whether it was material whether or not the second and 3rd respondent instituted proper investigation. The 3rd issue is whether the learned magistrate applied the wrong standard of proof in the appellant's case. Malicious prosecution is defined by Wikipedia Encyclopedia as follows:-

"A common law intentional tort, while like the tort of abuse of process, its elements include (1) intentionally (and maliciously) instituting and pursuing (or causing to be instituted or pursued) a legal action (Civil or Criminal) that is, (2) brought without probable cause and (3) dismissed in favour of the victim of the malicious prosecution."

The lower court's evidence was as follows:-

The appellant stated that on 15th July 1998 was arrested by police following a report made at Meru police station by the first respondent. He was subsequently charged in criminal case No. 1517 of 1998. He was later acquitted of the charge. He was acquitted under section 210 Criminal Procedure Code. He produced in evidence the proceedings and the ruling of the criminal case. He denied that he had attempted to assault the first respondent which could have warranted his arrest and trial. That the respondent had wanted to grab his land prior to his arrest. That accordingly at the time of his arrest they did not have a good relationship with the first respondent. Although he said that he had paid an advocate Kshs. 50,000/= to represent him at the criminal trial, he did not produce a receipt to prove the same. He also was unable to produce a receipt to prove that he had used Kshs. 10,000/= to facilitate his attending the criminal trial. Further, in evidence he said as follows:-

"As a result of the criminal case, I suffered as I was remanded at police station for 11 days. I pray for general damages for malicious prosecution, unlawful arrest, false imprisonment, special damages and cost of the suit and interest."

On being cross examined, he stated that all the prosecution witnesses who testified to corroborate the evidence of the first respondent were all members of a self-help group which had attempted to take away his land and therefore there was a grudge between them. He did not call any other witness to support his case and proceeded to close his case. The first respondent in evidence stated that he knew the appellant. He said that on 14th July 1998 the appellant had attacked him. The appellant was armed with a sword and it was as a result of the intervention of the people around him that he did not hurt him. First respondent reported the matter to Meru police station who after investigation charged the appellant. The appellant was subsequently acquitted by the court. First respondent stated that his report to the police was not malicious and that the appellant was charged in court after the police had carried out their investigation. On being cross examined on behalf of the appellant, first respondent said that he had told the police that

the appellant had chased him with a knife. DWII stated that he was at Mugego Market in the company of the first respondent. The appellant came to them and called the first respondent aside. He did not hear what they talked about but later he saw the appellant produce a sword and threatened to cut the first respondent's neck off claiming that he had made the appellant to be beaten by the chief. This witness restrained the appellant and separated them. That was the evidence that was adduced before court. From that evidence, did the appellant prove on a balance of probability that the first respondent intentionally and maliciously caused to be instituted criminal prosecution against him? The appellant produced before the lower court the proceedings and ruling of the criminal trial. I have gone through those proceedings and it is clear that the first respondent who was the complainant in that case gave clear evidence of how the appellant if he had not been restrained by members of the public would have cut him with a sword. That evidence was supported by three other eye witnesses whose evidence corroborated the first respondent's evidence. I would state that that the evidence in the criminal trial proved that there was probable cause to institute criminal charge against the appellant. I find the appellant did not prove malice. Malice is defined in the Black's Law Dictionary as:-

"*Malice means in law wrongful intention. It includes any intent which the law deems wrongful and which therefore serves as a ground of liability.*"

The appellant did not prove that the first respondent had wrongful intention when he reported the matter to the police. That finding therefore answers the first issue. In respect of the second issue, I also find that the appellant failed to prove that the first respondent made his report without probable cause. One of the definitions of probable cause in Wikipedia Encyclopedia is:-

"*A reasonable amount of suspicion supported by circumstances sufficiently strong to justify a prudent and cautious person's belief that certain facts are probably true.*"

The only evidence offered by the appellant which I believe he intended to show probable cause was the evidence of prior land dispute between him and the first respondent and his witnesses in the criminal trial. That on its own was not sufficient to show probable cause. The appellant did not either produce documentary evidence of that prior dispute or did not call witnesses of that dispute to prove that it existed. Further in the civil case at the lower court the appellant failed to give evidence of his version of what occurred between him and the first respondent. All he simply did was to deny the allegation of the first respondent that he had tried to cut him with a sword. He did not deny that he was present at the market when the incident was said to have occurred. I should state here that the fact that he was acquitted by the lower court simply show that witnesses are not always infallible. The fact they are not infallible is not necessarily evidence of malice. In the ruling of the learned magistrate after the prosecution closed its case, in the criminal trial, the learned magistrate stated as follows:-

"*No prosecution witness testified that the accused (appellant) chased the complainant (first respondent) as stated in the charge sheet. That means that the ingredient of the accused chasing the complainant has not been proved……. Prosecution has a duty to prove each and every ingredient of the charge for it to be said to have proved that case. I find that there is no sufficient evidence for me to place the accused (appellant) on his defence and I acquit him of this offence.*"

It is clear that the learned magistrate in the criminal trial acquitted the appellant because the witnesses had not stated that the appellant had chased the first respondent in accordance with the particulars of the charge. Other than that, the learned magistrate did not find that the prosecution had not made out a *prima facie* case in respect of the attempt to cut the first respondent. The appellant therefore has failed to prove probable cause on the part of the first respondent. First respondent having reported his complaint to the police the police acted as they are mandated by section 14(1) of the Police Act Cap 84. That section provides:-

"*The Force shall be employed in Kenya for the maintenance of law and order, the preservation of peace, the protection of life and property, the prevention and detection of crime, the apprehension of offenders, and the enforcement of all laws and regulation with which it is charged.*"

With that mandate, the second and 3rd respondent armed with the first respondent complaint and his witness's evidence rightly acted in apprehending the appellant and taking him before a court of law. I reject the submissions that the 2nd and 3rd respondent failed to investigate the matter. They indeed seem to have investigated the matter and the fruits of that investigation was the witnesses that gave evidence at the criminal trial. The police therefore in the light of the foregoing cannot be said to have maliciously prosecuted the appellant. The appellant's acquittal of the criminal charge on its own is not an indicator of the failure by the police to investigate the case nor does it prove malice on their account. This is so because, when one considers the learned magistrate at the criminal trial acquitted the appellant because of the failure of witnesses to support the same particulars of the charge. The learned magistrate as stated before did not find that there was no sufficient evidence of the appellant attempting to cut the first respondent with a sword. At this stage, I would wish to state that the appellant did not prove before the civil lower court that he was arrested on 15th July 1998. Such proof could have been through the production of the charge sheet on which the police indicate whether a person was arrested with or without bond. The appellant indeed failed to prove his case on a balance of probability. I have read the lower court's judgment and I have not found that the trial magistrate applied the wrong standard of proof. I find that the appellant case also failed the test of the case of Murunga V. The Attorney General (Kenya Law Report) where Cotran J. laid down the following test:

"*In proceedings for malicious prosecution, the plaintiff must show (1) that a prosecution was instituted by the defendant or by someone for whose acts he is responsible, (2) that the prosecution terminated in the plaintiff's favour, (3) that the prosecution was instituted without reasonable and probable cause, and (4) that it was actuated by malice. The test whether the prosecution was instituted without reasonable and probable cause is whether the material known to the prosecutor would have satisfied a prudent and cautious man that the plaintiff was probably guilty of the offence.*"

The appellant's case did not pass that test. The lower court's judgment can also not be faulted because of the learned magistrate's failure to assess the damages that the appellant would have been awarded if he had succeeded in his case. In the case of Selle and Another V. Associated Motor Boat Company Ltd and Others (1968) EA. The obiter of Per De Lestang, V-P was as follows:-

"*It is always advisable for a judge of first instance to decide all the issues raised in the case before him so that further expense to the parties and further delay caused by sending the case back, as in this case, for an assessment of damages.*"

The purpose of assessing damages by the court of first instance is to ensure that parties are not subjected to further expenses. So failure to so assess does not go to the root of the case. On the whole, I find that the learned magistrate failure to assess the damages was not fatal to the case. For myself if I had found that the appellant case had succeeded, I would have awarded him Kshs. 20,000/= in general damages. This is because the appellant did not even produce evidence to prove false imprisonment or unlawful arrest. The appellant also did not prove any special damages before the trial court. It is trite law that special damages must be specifically pleaded and proved. To quote but one authority on this is the case of Savannah Development Co. Ltd Co-operative Society Ltd NAI. Court of Appeal No. 160 of 1991 where the court of appeal stated:-

"*The law on special damages in Kenya has been admirably summarized in the recent decision of this court in the case of Charles Sande Vs. Kenya Co- operative Creameries Ltd CA Vol. 154 of 1992 (unreported) where in the course of its judgment the court said:-*

"*As we pointed out at the beginning of this judgment, Mr. Lakha readily agreed that these sums constituting the total amount were in the nature of special damages. They were not pleaded. It is now trite law that special damages must not only be pleaded but must also be specifically proved. We do not think we need to cite any authority for this simple and hackneyed proposition of law.*"

The appellant in the lower court did not prove special damages and he therefore could not be awarded the same. In the end, the appellant's appeal fails and the same is hereby dismissed with costs to the respondents.

Dated and delivered in Meru this 1st day of October 2009.

MARY KASANGO

JUDGE