IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Cockar, Omolo & Akiwumi JJ A)

CIVIL APPEAL NO. 131 OF 1991

BETWEEN

ABUBAKER SIMBA.....APPELLANT

AND

STEPHEN N.WAMBARI.....RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Mr Justice Mbaluto) dated 10th April, 1987)

JUDGMENT

This appeal arises from the dismissal by the superior court of a suit filed by the appellant against the respondent wherein he had claimed special damages and "substantial, heavy and even punitive damages" for malicious prosecution and false imprisonment in the alternative or complementary.

Briefly the facts as put forward by the appellant, a small scale gem-stone dealer, before the superior court are that in 1976 he had refused to co-operate with the respondent, a farmer and a businessman at Kitale, whereby the latter had unsuccessfully tried to obtain the former's assistance to sell some worthless stones of his to the former's Greek boss. Three years later on 10th August, 1979, the respondent met the appellant in Kimathi Street outside New Stanley Hotel and blamed him for having caused him loss through his non-co-operation in cheating his boss over the stones that the respondent had planned to sell him. On the respondent becoming physically more violent the appellant ran in the direction of Central Police Station but met a police patrol car on the way and he stopped it and explained the position to the police officers. They were both taken to Central Police Station. At the police station the respondent complained that the appellant had stolen from him by selling him bad stones at Kitale. The appellant told the police about what had happened at the house of his boss. The police took away Shs 40/= and some stones that he had with him and put him in cells. It was normal for him to carry precious stones on him. He was kept in cells for 10 days and was then transported in handcuffs in a lorry to Kitale with some policemen and other men. After spending 2 more days in a police cell he was taken to Kitale Court on 22nd August, 1979, and charged with the offence of obtaining money by false pretences contrary to section 313 (b) of the Penal Code in that during May, 1979, at Kitale with intent to defraud he had obtained Shs 600/= from the respondent by falsely pretending that some stones he presented to him were genuine diamonds which were later discovered not to be diamonds. The criminal trial followed and on

2nd November, 1979, he was convicted and sentenced to a fine of Shs 400/= and in default 2 months imprisonment. Unable to pay the fine he served the default prison sentence. His appeal to the superior court was summarily rejected. The Court of Appeal eventually on 10th June, 1981, allowed his appeal, quashed the conviction and set aside the sentence which of course he had already served much earlier. From the time of his arrest up to the time he was convicted the appellant had remained in confinement in police custody.

The respondent's account of the incident was quite different. He said he had never traded in stones. He met the appellant for the first time when the latter came to his shop and told him that he had diamonds to sell. The respondent had no interest in diamonds and so he sent him away. Later he again came, pleaded financial problems, and asked him to buy the stones. He showed him one stone telling him that it was worth Shs 2,000/= but he would sell it for Shs 300/=. The respondent, convinced of a profitable deal, paid him Shs 300/=. On the appellant's suggestion, it was agreed that he would bring the respondent the remaining 8 stones at his farm the following day. So the following day after they had dinner together at the farm the appellant gave him another stone for which he paid him another sum of shs 300/=. This happened in the presence of the respondent's wife who also gave evidence. The appellant told him that he was afraid to carry the rest of the stones with him. The respondent dropped the appellant at Rock Hotel where he was staying and the following morning he took the stones to a jeweler who, after examining the stones, told him that both the stones were worthless. At Rock Hotel the respondent was told that the appellant had left very early in the morning. At the police station, where he reported the incident, he was given a policeman and they fruitlessly went around the town looking for the appellant. The appellant never returned to the hotel. The respondent kept the two stones with him. Three years later, in June, 1979, he happened to come across the appellant in Nairobi at Warariki Night Club at Ngara. The appellant pleaded to him that he would bring his money back to him at Kitale. But he slipped away when

the respondent went out to look for a policeman. On 10th August, 1979, when he again met the appellant opposite New Stanley Hotel he held him, demanded his money, and this time did now allow the appellant, despite his attempt, to escape. A mob gathered and a police patrol car stopped. He pulled the appellant to the police vehicle. They were taken to Central Police Station. A statement was taken from the respondent. He told the police that the stones that were sold to him were similar to those found on the appellant. He was told to go and that he would later be summoned to Kitale where the appellant was going to be taken. During the criminal trial the two stones which he had given the police were produced in Court. A government expert had in his evidence told the magistrate that the 2 stones were useless. He had not received his Shs 600/= back.

The above two accounts of the incident are diametrically different from each other. There is no doubt that if the account given by the appellant was the truth then malice, being amply proved, the appellant would be entitled to damages as claimed in the plaint. However, the learned judge who saw and heard the witnesses and had the opportunity of observing their demeanour had disbelieved the appellant's evidence and rejected his version of the incident and had accepted the respondent's account as being the truth. We, on our own independent evaluation of the evidence, have no hesitation in coming to the same conclusion as did the learned judge. In fact Mr Gross, who conducted the appeal on behalf of the appellant, did not ever suggest that the account given by the appellant was the correct one. The trial judge found from the evidence that in his view the arrest of the appellant was justified. As regards the number of days the appellant had spent in police custody before the trial, the respondent was not responsible for that because the arrest was justified. With regard to the claim for malicious prosecution the learned judge found that malice had not been established. He, therefore, dismissed the suit.

The nine grounds of appeal, spread over three and a half typed sheets, and filed by the appellant's former advocate, were more in the nature of arguments and submissions than what a proper set of grounds of appeal ought to be. They were quite properly brushed aside by Mr Gross who conducted the appeal on behalf of the appellant. The thrust of his submissions was whether or not malice had been shown. After citing the relevant holdings and passages from *Kasana Produce Store v Kato* [1973] EA 190, *Egbemba v West Nile District Administration* [1972] EA 60, *Murunga v The Attorney General* [1979] KLR p 138 *Sekaddu v Ssebadduka* [1968] EA 213 *Clerk & Lindsell on Torts*, 16th Ed pp 972 & 1042, and *Halsbury Laws of England* Vol 38 p 764, Mr Gross accepted that the trial judge had correctly stated the essential

ingredients to establish

the tort of malicious prosecution as follows:

1. That the proceedings were instituted or continued by the defendant (respondent herein).

2. That the defendant (respondent herein) acted without any reasonable and probable cause.

3. That the defendant (respondent herein) acted maliciously.

4. That the proceedings were terminated in favour of the plaintiff (appellant herein).

With regard to the false imprisonment Mr Gross contention that the same was proved by the unchallenged evidence of 10 days confinement in police custody that preceded the appellant's being charged before the Kitale Magistrate's Court is unacceptable. The appellant never claimed in his evidence before the trial judge that he had asked at the police station for release on bond or that the police had thereafter declined to release him on bond to appear at Kitale Magistrate's Court. The appellant's evidence that he was transported to Kitale in a lorry with three policemen and some other men is an indication of the problems the police have to face in such cases for an economical transport. Finally even if the appellant was arrested on a report made by the respondent, he cannot by any stretch of imagination be accused of having persuaded the police to keep the appellant in their custody for that period. If the Attorney General had been made a party to the suit he would have been obliged to explain the reason for confinement in police custody for 10 days before the appellant was produced in Court. We reject the submission of Mr Gross.

Having disposed of that part of the appeal we now come to the malicious prosecution claimed by the appellant. As we stated earlier the criminal proceedings were terminated by the Court of Appeal in favour of the appellant after the judges of appeal felt that in all the circumstances the case against him fell short of establishing his guilt beyond all reasonable doubt. One of the four ingredients needed to prove malice is therefore established.

On the question of malice with regard to the rest of the ingredients Mr Gross submitted that the first issue was as to whether the respondent was convinced that he was buying diamonds or was he aware that he was buying zircons. If the respondent was buying zircons then paying a sum of Shs 600/= for 2 zircons would not amount to obtaining by false pretences.

The government expert was wrong in stating that the zircons were worthless and the trial magistrate was also wrong in accepting his opinion

and making a finding to that effect. The Court of Appeal had found that zircons were valuable and not worthless and, therefore, there was no obtaining of money by false pretences by the appellant. The respondent had not been induced by the appellant to buy the stones. The trial magistrate had found that the two had an acquaintance of a long standing.

Mr Gross stands to be corrected in his statement of facts as put above by him. The Court of Appeal did not make any finding that the zircons had any value. It had merely referred to Mr Morgan's submission, which in fact was his, Mr Morgan's own opinion, that the expert's deposition that zircons were of no value was absurd. We must point out that the evidence of the government expert in criminal proceedings was not challenged during cross-examination nor rebutted by any other evidence. In any case the appellant had claimed both during the criminal proceedings and in the superior court that he had not sold the two stones to the respondent for Shs 300/= each nor had he obtained any money from him. So there was no evidential basis for Mr Gross submission that the two zircons had any value. The only evidence that the zircons were worthless was that of the respondent. But the genuineness of his belief is borne out by his action after he learnt of the stones being valueless. He had immediately reported at Kitale Police Station and had obtained a policeman from there in order to look for the appellant all over the town. He must have done so because he had found that the stones were worthless and that he had been cheated. In any case the charge against the appellant and the evidence in support thereof had been that he was selling

to the respondent diamonds and not zircons. We reject Mr Gross submission on this issue.

Another argument advanced by Mr Gross was that it was unconscionable and malicious to try to get back at some one after a period of three years by instigating criminal proceedings for a sum of Shs 600/-. At this stage we must consider whether, on the facts disclosed by the evidence of the respondent, which was accepted by the superior court, and is also accepted by us, it can be said that:

1. The respondent acted without any reasonable or probable cause, and

2. The respondent acted maliciously?

The evidence which we detailed earlier clearly shows that the respondent parted with Shs 600/= on the appellant's representations to him that the two stones were worth Shs 2,000/= each. Earlier the appellant had told the respondent that he had diamonds to sell but the respondent had declined to accept the offer. The respondent also made it clear that he had expected to make money and he got angry when the jeweler told

him that the stones were worthless. Despite a search all over the town with the help of a policeman, the respondent had not been able to find the appellant. He must have felt justifiably outraged at the disappearance of the appellant. The learned judge, in our view, was quite correct in finding that the respondent had shown that he had acted with reasonable or probable cause and that his actions were not motivated by any malice. Justifiable anger or outrage is not malice. Finally, we are certain that Mr Gross did not seriously intended to convey a novel view that passage of time erodes away the element of criminality from an offender's misdeeds in a way that after a certain period the criminal act may no longer be deemed criminal. The respondent's acts in apprehending the appellant when he saw him for the first time after three years and handing him over to the police were very proper and cannot, by any means, be termed malicious. In the final analysis, we find that there is no merit in this appeal and we dismiss it with costs.

Dated and Delivered at Nairobi this 19th day of January 1994.

A.M.COCKAR

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JUDGE OF APPEAL

R.S.C.OMOLO

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JUDGE OF APPEAL

A.M.AKIWUMI

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JUDGE OF APPEAL

I certify that this is a true copy of

the original.

DEPUTY REGISTRAR