REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

CIVIL APPEAL NO. **E167** OF 2024

SAMUEL NGARUIYA KURIA……...……..……APPELLANT

-VERSUS-

PETER NGANGA KIARIE…….....1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL……...…2ND RESPONDENT

(Being an appeal from judgment and decree in the Chief Magistrate's Court at Thika (Hon V. Kachuodho SRM) civil case number 493 of 2008 dated 10th December 2018)

JUDGMENT

The genesis of this matter was a complaint made by the 1st respondent on 11-10-2004 to Kirwarwa police station that the appellant had assaulted him. The police received and investigated the complaint and charged and prosecuted the appellant in Thika Chief Magistrate criminal case number 8999 of 2004 (hereinafter referred to as 'the criminal case'). The appellant was convicted of the charge and sentenced to serve 5 years in jail. The appellant filed civil suit number 493 of 2008 in the lower court after he was allegedly acquitted on appeal in High Court of Kenya at Nairobi criminal appeal number 443 of 2005 (hereinafter referred to as 'the criminal appeal').

In the matter before the lower court, the appellant prayed for general and special damages as compensation for malicious prosecution on the basis that the 1st

respondent's complaint to the police was actuated by malice and founded on no reasonable or probable cause. After the trial, the Honourable trial court held that the appellant had not proved his case and proceeded to dismiss the suit vide judgment delivered on 10-12-2018 hence this appeal which raises the following three grounds;

1. ***THAT*** *the learned trial Magistrate erred in law and in fact when she failed to fathom that proof of illegal arrest and malicious prosecution did not require the appellant to demonstrate motive by defendants to warrant a case of malicious prosecution as the criminal proceedings are conclusive to insinuate malice.*

2. ***THAT*** *the learned trial Magistrate erred in law and in fact when she failed to accommodate findings of the Nairobi High Court criminal appeal No. 443 of 2005 and whose findings formed a basis of founding a cause of action.*

3. ***THAT*** *the learned trial Magistrate erred in law and in fact when she failed to find that once the respondent moved the court in motion the gist of malicious prosecution arose as the facts relating to the alleged crime were exclusively within the knowledge of the respondent.*

This is a first appeal and as it is trite, I have the obligation of conducting it as a re-hearing where I should re-evaluate, re-consider and re-analyse the evidence produced before the trial court and come to my own independent conclusion. I should however bear in mind that I did not have the advantage of taking the evidence of the witness or observing their demeanour and give due allowance for that. This is the established principle as it has been held in many judicial

authorities. In discharging this obligation, I will reproduce the relevant parts of the evidence adduced by the parties as follows.

The appellant's case

The appellant testified by adopting his undated written statement filed on 21-06-2016 as his evidence in chief. In the said statement, the appellant stated that on 11-10-2004, the 1st respondent made a malicious complaint against him which caused his arrest by the police and arraignment in court for a charge of assault causing actual bodily harm. He added that, he was subjected to a long litigious trial in the criminal case which lasted between 12th October 2004 and 25th June 2007. The appellant claimed that following the conviction, he lodged an appeal vide Nairobi High Court criminal appeal number 443 of 2005 after hearing of which, the judgment and conviction in the criminal case was set aside.

In addition to the written statement, the appellant gave short highlights and produced documents in a list he did not identity in the proceedings but which this court assumes are the ones appearing at pages 49 to 83 of the record of appeal. These documents are typed proceedings and the judgment in the criminal case. In one sentence cross-examination, the appellant stated that he did not assault or injure the 1st respondent and that the High Court did not find him guilty of any offence.

The 1st respondent's case

The 1st respondent's case was as short as the appellant's where he adopted his written statement filed in court on 10-11-2016. He told the court that he made a valid claim against the appellant arising from an assault meted upon him prior to

11-10-2004. He added that he was within his legal and constitutional rights to lodge the complaint with the police and the police were expected to conduct proper investigations and prosecution. He stated further that even if the criminal appeal was allowed, the same did not negate the fact that he was assaulted. He told the court that he was kicked in his private parts and that his head still ached from the appellant's blows. He also stated that he was unable to work and prayed for damages. The 1st respondent did not produce any documents.

In cross-examination, the 1st respondent maintained that he was injured and incurred expences on treatment. He added that he had filed civil suit number 1735 of 2005 claiming damages against the appellant but he was not aware whether the suit had been dismissed.

The 1st respondent called a witness known as Josphat Njoroge who told the court that the 1st respondent was assaulted by the appellant and confirmed that the appellant was found guilty and imprisoned and that he had no idea if the appellant appealed successfully.

Analysis and determination

This appeal was argued by way of written submissions. The appellant in his submissions dated 7th October 2019 argues that the trial court fell into an error by failing to appreciate that proof of illegal arrest and malicious prosecution did not require that the appellant demonstrate motive in his arrest and prosecution. He also argues that he proved all the ingredients necessary for success of a case for malicious prosecution.

The appellant argues further that the trial court failed to consider his pleaded particulars of malice and that since the 2nd respondent did not call evidence to rebut his, the court should have found that the pleaded particulars of malice were uncontroverted and find in his favour.

The 1st respondent filed submissions dated 29th November 2021 which I find very interesting and assumptive. The submissions are in two sentences which go like this; *'My Lord the major issue in the appeal is whether the judgment was fair. The answer is in the affirmative as the same is reasoned and founded on facts, evidence and law'* then he attached an authority. These shortest submissions I have ever seen since I was admitted as an advocate of the High Court of Kenya some 27 years ago, may be to the point but it is not enough for a party to set an issue and his proposed answer to it and expect the court to take such submissions seriously.

The 2nd respondent did not participate in the appeal. I also note from the proceedings that it did not participate in the trial in the lower court.

I have given due consideration to the evidence of the parties and their submissions. As rightly submitted by the appellant, the elements of a case for malicious prosecution are well settled. They are; whether the proceedings complained of were instituted by the respondents, whether the same were malicious, whether there was a reasonable or probable cause to commence the prosecution and whether the proceedings terminated in the plaintiff's favour. This position was encapsulated in the holding of Honourable Justice PJO Otieno in ***Bedrock Holdings Ltd v Otieno & another (2023) KEHC 2894 (KLR)*** as follows;

> *'In a suit for malicious prosecution, the plaintiff must show; that the prosecution was instituted by the Defendant, or by someone for whose acts*

he is responsible; that the prosecution terminated in his favour; that the prosecution was instituted without reasonable and or probable cause; and was actuated by malice.'

It is not in dispute in this appeal neither was it disputed in the trial court that the 1st respondent made a claim of having been assaulted by the appellant. Although it was denied in the defence, the evidence of the parties shows that that following the complaint, the appellant was arrested, arraigned, tried, convicted and sentenced in the criminal case. In this regard, the first ingredient was sufficiently proved.

The second element of whether the prosecution was malicious is the gravamen in this appeal. The appellant pleaded the particulars of malice at paragraphs 6 and 7 of his plaint. When it came to production of evidence, all that the appellant did was to narrate that a complaint was made and prosecution carried out. The only exhibits produced in court were the proceedings and judgment in the criminal matter. I do not see any evidence that was led in prove of malice.

The appellant submitted that since he had pleaded particulars of malice and the 2nd respondent failed to testify, the trial court should have found in his favour. It is not enough for a plaintiff to plead malice. He must go further and adduce evidence that would show or impute malice on the part of the defendant. Pleadings are not evidence and a case must be proved by adduction of evidence. Pleadings do not prove a case or anything. Evidence of the parties do. The mere fact that the particulars of malice were pleaded cannot stand the test of proof without evidence in support thereof. In ***Charterhouse Bank Limited (Under Statutory Management) v Frank N. Kamau (2016) KECA 153 (KLR),*** the Court of Appeal held that;

'The suggestion, however, implicit in some of the decisions quoted above, that in all and sundry civil cases the failure by the defendant to adduce evidence in support of his defence means that the plaintiff's case is proved on a balance of probabilities cannot possibly be correct. It is also obvious to us that in some of those decisions the question whether the plaintiff has, in the absence of evidence from the defendant, proved his case on a balance of probabilities, was conflated and confused with the distinct issue of the effect of the defendant's failure to testify when he had filed a defence and a counterclaim. While the defendant's failure to testify has fatal consequences for the counterclaim because the onus is on him to prove it on a balance of probabilities, it does not necessarily have the same consequence for the defence where the onus is on the plaintiff to prove his claim on a balance of probabilities.'

Where malice is not easily provable but the plaintiff is able to show that there was no reasonable or probable cause for setting the prosecution in motion against him, malice can be imputed against the defendant. The onus of proving that there was no reasonable or probable cause is on the plaintiff. He who alleges must prove and the burden of proof of specific set of facts lies on the person who wants the court to believe in existence of those facts. That is the purport of Section 109 of the Evidence Act as held in ***Gichuru v Package Insurance Brokers Ltd (2021) KESC 12 (KLR),*** where the Supreme Court of Kenya stated that;

'Section 109 of the Act declared that, the burden of proof as to any particular fact lay on the person who wished the court to believe in its existence, unless it was provided by any law that the proof of that fact would lie on any particular person.'

I have looked at the proceedings in the criminal case produced by the appellant and in my view, there was a reasonable cause for the 1st respondent to make the complaint to the police and for instituting of the proceedings against the appellant. The 1st respondent called a witness during the trial who reiterated that the appellant assaulted the 1st respondent following which they reported to police. The same witness also testified in the criminal case as the second prosecution witness and his evidence obviously contributed to the court convicting the appellant. A reasonable or probable cause is that which discloses basis of likelihood of the truth of stated facts and it is not necessary that a case once initiated in reliance on the facts must succeed. Actually, not every acquittal of an accused person would amount to a cause of action for malicious prosecution. The Court of Appeal held in ***Robert Okeri Ombeka v Central Bank of Kenya (2015) KECA 464 (KLR,*** that;

> *'Comparative judicial experience in other jurisdictions also shows an emerging legal principle that an acquittal or discharge in a criminal prosecution should not necessarily lead to a cause of action in malicious prosecution law suits. A malicious prosecution plaintiff cannot establish lack of probable cause based on having obtained in an earlier action an acquittal based on insufficiency of the evidence. Successfully defending a prosecution or a law suit does not establish that the suit was brought without probable cause. It is the state of mind of the one commencing the arrest or imprisonment, and not the actual facts of the case or the guilt or innocence of the accused which is at issue. Probable cause is determined at the time of subscribing a criminal complaint and it is immaterial that the accused thereafter may be found not guilty.'*

The last element of malicious prosecution is that the proceedings in question must have been terminated in favour of the plaintiff. The appellant claimed that he

appealed the conviction in the criminal appeal following which the same were set aside by Honourable Justice Dulu on a date he did not mention but did not produce any evidence to that effect. The trial court observed as much in its judgment and I do hold that it was right in finding that there was no proof of the acquittal by the High Court.

The appellant submits that if the trial court was in doubt as to the outcome of the criminal appeal, it should have verified the same by conducting *voire dire* after hearing of the plaintiff's case. I have pained to understand this line of argument. I am not aware of a situation where *voire dire* is conducted after a hearing and on an adult. I also don't understand what purpose *voire dire* would have served in this matter. I doubt that the appellant understands that *voire dire* in our legal system is an examination conducted to ascertain whether a witness of tender years is able to understand the nature and purpose of taking an oath.

Whatever the appellant intended to say in reference to *voire dire* in his submissions, the onus of proving the case remained on him. A court has no business in cross checking the status of cases in other courts or evidence therein which has not been produced before it or making enquiries on the strength or otherwise of a case beyond the evidence availed by the litigants. The strength of a case must be seen in the evidence a party adduces before the court in context of the applicable law.

Having said the above, I do not see any reasons for disturbing the judgement of the trial court. This appeal lacks merits and the same is hereby dismissed with costs to the 1st respondent.

Dated, signed and delivered at Nairobi this **14th** day of **November** 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Mr. Kereu holding brief for Mr. Muturi Njoroge for the applicant and absence of the respondent.