

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
HIGH COURT CIVIL APPEAL NO. 86 OF 2023
KAKAMEGA CMCC 209 OF 2018

WEST KENYA SUGAR COMPANY LIMITED.....

APPELLANT

VERSUS

MOHAMED L. ALOICE.....1ST

RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....2ND

RESPONDENT

(Being an appeal against the judgment and decree of the Hon. R.N Akee (R.M) dated and delivered at the Chief Magistrate's Court, at Kakamega on 14th June 2022 in Kakamega Civil Case No 209 of 2018)

JUDGMENT

Background

1. This appeal arises from the judgment delivered on 14th June 2022 by the Learned Resident Magistrate in Kakamega CMCC No. 209 of 2018, in which the 1st Respondent was awarded Kshs. 500,000 in general damages, Kshs. 15,000 in special damages, and costs of the suit for malicious prosecution against the Appellant and the 2nd Respondent.
2. The genesis of this matter is Butali Criminal Case No. 718 of 2016, in which the 1st Respondent, an employee of West Kenya Sugar Company Limited, was charged with stealing a trailer registration number ZD 1507 valued at Kshs. 460,000, the property of West Kenya Sugar Company, or alternatively, handling stolen property contrary to Section 322(1)(2) of the Penal Code.

3. After a full trial, the learned trial magistrate found that the accused was not found in possession of the trailer and that the prosecution failed to prove the case beyond reasonable doubt. The accused was accordingly acquitted under Section 215 of the Criminal Procedure Code.
4. Following that acquittal, the Respondent instituted a civil claim alleging malicious prosecution, claiming the prosecution was actuated by malice, without reasonable cause, and that it resulted in reputational and emotional harm.
5. The Appellant challenges the lower court judgment on multiple grounds, summarized as follows:
 - a. The judgment was delivered in the absence of parties and without notice.
 - b. The trial court failed to specify which of the defendants (West Kenya Company Sugar Limited or Attorney General) was liable to pay the awarded sums.
 - c. The trial magistrate failed to give reasons or legal basis for the quantum of damages
 - d. The court erred in finding that the prosecution was malicious, without sufficient justification.
 - e. The award of damages was excessive and unsupported by evidence.
6. The Appellant therefore prays that this appeal be allowed, the lower court judgment set aside, and costs awarded to them.

Issues for Determination

7. From the pleadings, submissions, and record, the following issues arise for determination:
- a. Whether the prosecution of the 1st Respondent in Butali CMCR No. 718 of 2016 was malicious.
 - b. Whether the learned trial magistrate properly evaluated the evidence and gave sufficient reasons for the decision.
 - c. Whether the quantum of damages awarded was justifiable.
 - d. Whether this Court should interfere with the findings of the trial court.
8. This being an appeal, the duty of the court is to analyze a fresh evidence adduced at trial, re-evaluate and reconsider it so as to reach an independent determination bearing in mind the fact of not having seen or heard witnesses who testified. In the case of **Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123**, as the court stated that;

“This being a first appeal, it is trite law, that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate itself and draw its own conclusions though it should always

bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”

9. The tort of malicious prosecution entails instituting a criminal case of an improper purpose, and without grounds or probable cause. To succeed, the appellant must establish all four elements as set out in the case of **Mbowa v East Mengo District Administration [1972] EA 352**

a. The plaintiff must show that the prosecution was instituted by the defendant

b. The plaintiff must show that the prosecution terminated in his favour

c. The plaintiff must demonstrate that the prosecution was instituted without reasonable and probable cause

d. He must show that the prosecution was actuated by malice

10. Failure to prove any one of these elements is fatal to the claim.

a. The plaintiff must show that the prosecution was instituted by the defendant

11. The record from the criminal proceedings shows that the Appellant’s management reported the alleged theft to the police, resulting in the 1st Respondent’s arrest and subsequent prosecution. While it is true that the Appellant initiated the complaint, the decision to prosecute rested with the police and the Director of Public Prosecutions.

12. In the case of **Samson John Nderitu v The Attorney General [2010] KEHC 3039 (KLR)**, it was held that;
- “It is trite and this court, has judicial notice of the fact that before an accused person is taken to court, and arraigned in court for criminal prosecution, the prosecuting authority namely the police or whatever unit, whose functions fall under the office of the defendant, usually carry out investigations, record statements from potential witnesses, analyze the facts to determine if the facts disclose an offence before arraigning such a person in a court of law.*”**
13. In the case of **Gitau v Attorney General [1990] KLR**, the court stated as follows:-
- “To succeed in a claim for malicious prosecution the plaintiff must first establish that the defendant or his agent set the law in motion against him on a criminal charge.”***
- b. The plaintiff must show that the prosecution terminated in his favour.**
14. The first respondent was tried and acquitted under section 215 for the Offence of Stealing Contrary to Section 275 of the Penal Code and an alternative charge of handling stolen property contrary to section 322(1)(2) Penal code.
15. Therefore, the proceedings terminated in the favour of the 1st Respondent.

c. The plaintiff must demonstrate that the prosecution was instituted without reasonable and probable cause.

16. For the court to determine whether the Appellant had reasonable or probable cause to institute the criminal proceedings against the 1st Respondent, I have to look at the proceedings in the criminal trial of case No. CMCC 718 OF 2016.
17. I have examined the evidence of the witnesses, PW4 Peter Mwanje Chiluyi who was a guard on 21st June, 2016 told the trial court that he saw the 1st respondent (1ST Accused in criminal trial) approach the gate driving a tractor with a trailer. The 2nd Accused attended to him and the 1st Accused drove the tractor with the trailer out of the compound later the 1st Accused came with the tractor minus the trailer after entering the compound a security officer told him to stop the Accused from driving the tractor further. The 1st Accused (respondent) was arrested , later he was told that the 1st Accused drove the trailer out of the compound with intention of selling it. He knew the 1st Accused (1st Respondent) by his names.
18. PW5 Esau Makokha testified how he was detailed by his boss to go out and relay a trailer which was destined to be stolen by one of the drivers. He went to the location he was told to go , he saw tractor No. KTCB 867Q , he saw the driver whom he knew 1st Accused (1st Respondent) disengage the trailer, then he drove off leaving the trailer

at that place. He was with another person he dint know. He then called his boss and informed him the developments.

19. PW8 testified on how preliminary investigations were done and a report handed over to the management of the Appellant.

20. It is on the basis of this report that the Appellant management made a complaint to the police. To me the complaint was justified on face value given the evidence of PW4 and PW5 and also the prior incidents of trailers being stolen. So the Appellant had a plausible reason and probable cause to make the complaint against the suspects who included the 1st Respondent. Had the magistrate whose decision is subject to this Appeal, critically analysed the evidence adduced in the criminal trial and read the report produced by the prosecution in regard to the investigations done by the Appellants security Department she would have found that the Appellant had a reason to make the complaint.

c. He must show that the prosecution was actuated by malice.

21. Black law dictionary defines malice to mean, ***the intentional doing of a wrongful act without just cause or excuse.***

22. The 1st Respondent did not produce any evidence in the Lower Court to show that the Appellant was against him in anyway, the security department of the Appellant was doing its job following repeatedly cases of trailers being stolen and by bad or good luck the 1st Respondent fell to the trap. The investigations never targeted the 1st Respondent alone. Therefore to me the complaint was not actuated by malice on the part of the Appellant.

23. An acquittal in criminal trial does not automatic ally mean that a criminal trial was instituted without reasonable or probable cause. In a criminal trial there are so many factors which come at play. In the case of **Dixon Chebuye Ambeyi V National Police Service & Another** , the court stated *“.....Even with theses, there was a duty to prove that there was malice in making the report that lead to the arrest and prosecution. Acquittal alone cannot amount to proof of malice. There must be something more that just acquittal”*.

24. In **Robert Okeri Ombaka Vs. Central Bank of Kenya (2015)** **Eklr.** In this appeal there is no evidence that the respondent made a “false” report or that the it was actuated by “malice” or that his prosecution was brought” without reasonable probable cause” that a suspect was acquitted of a malicious prosecution or false imprisonment . **Evidence of spite, ill will, lack of reasonable and probable cause must be established.**

25. A party who suspects that there has been a violation of the law, has an obligation to report the matter to the police who carry out investigations and decide whether or not to charge and prosecute the person depending on the strength of the evidence.
26. The fact that an accused person, though charged and prosecuted, was acquitted is not proof of malice. There must be proof of existence of malice in making the report. In other words, the 1st Respondent must prove that there was no reasonable basis for making the report.
27. Having found so the other thing to look at is whether the Magistrate erred in awarding Ksh 500,000/= as general damages.
28. It is trite that an Appellate court is always reluctant to interfere with the discretion of a trial court unless the award by the lower court is inordinately low that it must show that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that figure, the court proceeded on a wrong principle or misapprehended the evidence in some material respect. Further, the awards should mirror recent comparable awards.
29. Having looked at other comparable awards, I would have awarded Ksh. 200,000/= to the 1st Respondent if he was successful.
30. On the issue of delivering the Judgment on a date not communicated to the parties, though it's a wrong practice and cannot invalidate a judgment.

31. On the issue of whether the judgment was delivered against the Defendants jointly or severally, the magistrate cannot be faulted; it is clear it his judgment that the judgment was entered against the defendants. Meaning all of them were required to satisfy the Judgment.
32. A decree is extracted from the reading of the Judgment, so if a decree is extracted contrary to the judgment then the decree is irregular and of no legal import.
33. In a nutshell, the Appeal succeeds, the lower court Judgment is set aside, plus the subsequent decree, and replaced with an order dismissing the Plaintiffs' case in the lower court. The 1st Respondent to pay costs to the Appellant incurred in the lower court and on this Appeal. There is no indication that the 2nd Respondent participated in the proceedings of the lower court and also in this Appeal.
34. Right of Appeal 30 days explained.
35. The file is closed.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 3RD DAY OF NOVEMBER,2025.

S.N MBUNGI

JUDGE

In the presence of:-

CA: Angong'a

Mr. Tawar for the Appellant present online.

Subeda for the Respondent present online.