Cheruiyot v Konoin Tea Growers Limited (Civil Appeal 35 of 2020)
[2024] KECA 1790 (KLR) (6 December 2024) (Judgment)

Neutral citation: [2024] KECA 1790 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 35 OF 2020

MA WARSAME, FA OCHIENG & JM MATIVO, JJA

DECEMBER 6, 2024

BETWEEN

JOEL CHERUIYOT ..... APPELLANT

AND

KONOIN TEA GROWERS LIMITED ..... RESPONDENT

(An appeal from the Judgment of the High Court at Bomet
(Dulu, J.) dated 29th April 2020 in Cause No. 19 of 2018)

JUDGMENT

1. The appellant Joel Cheruiyot, has brought this appeal against the judgment of the High Court dated 29th April, 2020 wherein the Court set aside the trial court's decision which found the respondent and the Attorney General liable for malicious prosecution and awarded the appellant damages of Kshs. 1,016,705.00

2. Being a second appeal, our duty is to determine matters of law only unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. (See: Stanley N. Muriithi & Another vs. Bernard Munene Ithiga (2016) eKLR).

3. The salient facts of this case are that on 17th January 2005, the appellant, who had worked for about three years as an accountant for the respondent, Koinon Tea Growers Limited was arrested and charged before Sotik Principle Magistrate Court with various counts of theft by servant, conspiracy to defraud and failure to prevent commission of a felony in criminal case Number Criminal Case Number 93 of 2005 and Criminal Case Number 3 of 2005 and later Criminal Case Number 2161 of 2013.He states he was unlawfully remanded in custody from 23rd October 2004 to 30th October 2004 and thereafter released on bond, and that the respondent and the state maliciously and without reasonable/probable cause continued to prosecute the cases against him.

4. The cases would continue for almost eight years. In Criminal Case No 93 of 2005, the court held that the prosecution had not proved its case beyond reasonable doubt and the appellant was acquitted of the charges.

5. Meanwhile, Criminal Case No. 2161 of 2013 was transferred to Bomet on 4th July 2007 and the accused persons were eventually discharged under Section 202 of the Criminal Procedure Code on 2nd February 2011.Upon review of the said ruling discharging the appellant and his co-accused, the High Court ordered the matter be heard denovo before another magistrate. The matter (now Criminal Case No. 808 of 2011) was again dismissed for lack of prosecution on 17th May 2012. As we can discern from the record, it appears that Criminal Case No 3 of 2005 also came to nothing or fizzled out.

6. In the end, the appellant who was aggrieved by the entire ordeal, filed suit against the respondent and the Attorney General seeking inter alia damages for unlawful and false arrest, malicious prosecution and defamation. The appellant's claim was based on the ground that the respondent laid false claims against him without any shred of evidence and that its actions were intended to relieve him of his employment and that the Kenya Police imprisoned him and preferred charges against him without carrying out proper investigation. As far as the appellant was concerned, the charges preferred against him were actuated by malice and resulted in depravation of his liberty, mental aguish, financial loss, injury to his character by being branded a thief and hindered his ability to seek alternative employment.

7. On its part, the respondent maintained that its complaints against the appellant were genuine and legally founded and that they had suffered financial loss due to the appellant's fraudulent activities which included falsifying accounts, illegally withdrawing money from the account, failing to account for money lost and actual loss of the savings of their members. As a result, they filed a counterclaim seeking a refund of the illegally obtained money and general damages.

8. In finding that the prosecution was instituted without reasonable cause and actuated by malice, the Hon. Trial magistrate in a judgment dated 22nd February 2018, awarded the appellant damages of Kshs.1,016,705.00 and held as follows:

> " In considering the evidence as adduced by the plaintiff and the defendant I find that there was a mishap in the management. The management could have gotten external auditors and or could have hired the services of auditors to find out whether money was embezzled and or misappropriated by the plaintiff before taking the drastic measures...
>
> In considering the evidence, I find it to be tricky in the sense that there was no audit report ever made and or conducted to establish whether money was lost. At the same time the frequency at which the cases were being initiated tells tales of malice. It follows that the defendants will be held 100% liable that is jointly and severally."

9. The respondent, being aggrieved by that determination, filed an appeal in the High Court while the appellant filed a cross-appeal against the dismal amount awarded by the trial court. Upon weighing the rival positions taken by the parties against the law, the learned Judge (Dulu, J.), who was seized of the matter, found merit in the appeal and set aside the judgment of the lower court. In doing so, the learned Judge held that the trial court erred in finding that the appellant had proved his case on a balance of probabilities

10. The appellant was not happy and he has lodged the instant appeal against the said decision on the following grounds:

a. That the Judge erred in finding that the four essential aspects in a claim for malicious prosecution were not proved on a balance of probabilities

b. That the learned judge failed to appreciate that there was no nexus between the alleged financial irregularities in the books of the respondent and the appellant, and consequently failed to find that the prosecution of the appellant was without probable cause

c. The learned judge failed to appreciate that the prosecutions of the appellant all terminated in his favour

11. The appeal was disposed of by written submissions as well as oral highlights by the parties' respective counsel. Mr. Japhet Koskei who appeared for the appellant submitted that the appellant had proved all four essential ingredients required to prove malicious prosecution as was cited in the case of Mbowa vs. East Mengo District Administration [1972] EA352; that the respondent instituted the proceedings; they were instituted without reasonable or probable cause; the prosecution was actuated with malice and lastly, the proceedings were terminated in his favour.

12. Expounding on the essential ingredients, he submitted that from the onset, it was clear that the three criminal cases against the appellant were instituted by the respondent since he was charged with conspiracy to defraud and stealing by servant. Secondly, it was obvious that there was no material or basis for prosecution given that the court in Sotik Criminal Case No. 93 of 2005 found that the prosecution had failed to prove beyond reasonable doubt that the appellant conspired to steal from the complainant given their failure to procure expert evidence to show that the appellant had somehow managed to withdraw money from the bank by cheques which were to be signed by several signatories.

13. In his view, the third ingredient of malice was evident by the delay of 7 years in prosecuting the cases which resulted in dismissal and discharge of the appellant and thereby resulting in the fourth ingredient- that the proceedings were brought to a legal end, in the appellant's favour.

14. Finally, the learned Judge was faulted for failing to consider the appellant's cross appeal which sought the enhancement of the manifestly low award of Kshs.1,000,000 to Kshs.3,000,000 which was appropriate, given that the cases had dragged on for seven painful years and in the end the prosecution failed to call witnesses leading to termination of the suits.

15. In opposition, Mr. Kefa Omari who appeared for the respondent submitted that the absence of any one element in a claim for malicious prosecution is fatal to a party's case. He emphasised that no evidence was led to prove any malice on the part of the respondent who simply reported the matter to the police, who on their own accord investigated the matter and charged the appellant accordingly.

16. Citing the Case of Susan Mutheu Muia vs. Joseph Makau Mutua (2018) he maintained that the role of the complainant and the prosecution were distinct and a complainant has no control or discretion over the matter as the decision to investigate and charge lies with the police.

17. In the respondent's view, the acquittal of an accused person does not automatically lead to an inference of malice;

furthermore, in Criminal Case 93 of 2005, the appellant was put on his defence which was a clear indication that there was reasonable and probable cause for his prosecution.

18. Relying on Nzoia Sugar Company Ltd vs. Fungututi (1988) eKLR the respondent maintained that the mental element of mental ill-will cannot be found in an artificial person like the respondent but there must be evidence of spite attributed to one of its servants that can be linked to the company. In conclusion, we were urged to find that the appeal was undoubtably for dismissal.

19. We have carefully perused all the arguments advanced by both counsel as well as the record of appeal and relevant provisions of the law. The sole question for our determination is whether the appellant established his claim of malicious prosecution.

20. The elements to be proved in an action for malicious prosecution are settled. In Mbowa vs. East Mengo District Administration [1972] EA 352, the East African Court of Appeal summarised the law as follows:

> " The action for damages for malicious prosecution is part of the common law of England... The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than for the public benefit.... It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion of the truth. Its essential ingredients are:
>
> 1. the criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority;
>
> 2. the defendant must have acted without reasonable or probable cause i.e. there must have been no facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified;
>
> 3. the defendant must have acted maliciously. In other words, the defendant must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, he must have had, "an intent to use legal process in question for some other than its legally appointed and appropriate purpose" Pike v. Waldrum [1952] 1 Lloyd's Rep. 431 at p. 452; and
>
> 4. the criminal proceedings must have been terminated in the plaintiff's favour, that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge...
>
> The plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must "unite" in order to create or establish a cause of action. If the plaintiff does not prove them he would fail in his action. "

21. There is ample documentary evidence to show that there was a variance in the respondent's finances as discovered by the respondent's management. For instance, on 14th February 2004, Kshs. 700, 000 was withdrawn via cheque 1008 from the Co-operative Bank yet the respondent's treasury book on the corresponding date indicated that only Kshs. 500,000 had been received by the respondent, on 25th March 2004 1,200,000 was withdrawn via cheque 1048 yet the treasury book indicated that only Ksh. 1,100,000 was received by the respondent and on 15th October 2004 Kshs. 420,000 was to be withdrawn on the respondent's behalf via cheque number 1108 and again the treasury book reflected that only Kshs. 400,000 was received.

22. By the appellant's own testimony he was the accountant during the period when the said amounts of money were alleged to be missing He testified that the cashier who worked under him would draw the cheques and he would withdraw the money from the bank and hand it back to the chief cashier who would maintain the treasury book to show what was in the respondent's treasury. He admitted that he maintained the cashbook which would show the overall movement of the money in the company, that his work was to reconcile the books and that the treasury section and book keeping sections in the accounts departments were all under him.

23. Given the admissions by the appellant of his role in the respondent company, it is hardly surprising that he was summoned by the management board to table the bank reconciliation statements, the cashflow statement and requisite trial balances in the wake of the irregularities in the finances in the SACCO. There is no evidence that he submitted any explanation or report to the board over the missing funds save for pointing an accusatory finger at the chief cashier during his testimony nor is there an explanation why for instance one of the cheques produced (number 1048 and dated 25th March 2005) for Kshs.1,200,000 which clearly bares the appellant's name shows that he withdrew the said funds yet it does not tally with the presentation book.

24. Just as a captain steers his crew and a maestro conducts his orchestra, the point of accountability included the appellant as the head of the accounts department. Consequently, there is no doubt that the respondent was justified in suspecting that the appellant was involved in the disappearance of the funds, and upon his failure to explain the variances, proceed to inform the District Cooperative officer who informed DCIO Bureti and who in turn launched investigations over the matter.

25. Again, we do not find any possibility that the respondent acted beyond the scope of its duty to its members or maliciously in calling for explanations, accountability and investigations regarding the loss of money in their treasury and subsequently lodging a complaint with the relevant authorities.

26. The Supreme Court of India in West Bengal State Electricity Board vs. Dilip Kumar Ray AIR 2007 SC 976, 2007 (14) SCC 568 while referring to Advance Law of Lexicon, 3rd Edition by P. Ramanatha considered various definitions of malicious prosecution, which we find imperative to reproduce below:

> Malicious Prosecution Malice. Malice means an improper or indirect motive other than a desire to vindicate public justice or a private right. It need not necessarily be a feeling of enmity, spite or ill-will. It may be due to a desire to obtain a collateral advantage. The principles to be borne in mind in the case of actions for malicious prosecutions are these: Malice is not merely the doing of a wrongful act intentionally but it must be established that the defendant was actuated by malus animus, that is to say, by spite or ill- will or any indirect or improper motive. But if the defendant had reasonable or probable cause of launching the criminal prosecution no amount of malice will make him liable for damages. Reasonable and probable cause must be such as would operate on the mind of a discreet and reasonable man; 'malice' and 'want of reasonable and probable cause.' have reference to the state of the defendant's mind at the date of the initiation of criminal proceedings and the onus rests on the plaintiff to prove them.
>
> "A judicial proceeding instituted by one person against another, from wrongful or improper motive and without probable cause to sustain it."
>
> "A prosecution instituted wilfully and purposely, to gain some advantage to the prosecutor or through mere wantonness or carelessness, if it be at the same time wrong and unlawful within the knowledge of the actor, and without probable cause."

"A prosecution on some charge of crime which is wilful, wanton, or reckless, or against the prosecutor's sense of duty and right, or for ends he knows or is bound to know are wrong and against the dictates of public policy."

"MALICIOUS PROSECUTION" means that the proceedings which are complained of were initiated from a malicious spirit, i.e, from an indirect and improper motive, and not in furtherance of justice. [10 CWN 253 (FB)] The performance of a duty imposed by law, such as the institution of a prosecution as a necessary condition precedent to a civil action, does not constitute "malice". (Abbott v. Refuge Assurance Co., (1962) 1 QB 432).

"Malicious prosecution" thus differs from wrongful arrest and detention, in that the onus of proving that the prosecutor did not act honestly or reasonably, lies on the person prosecuted." (per DIPLOCK U in Dailison v. Caffery, (1965) 1 QB 348)). (Stroud, 6th Edn., 2000).

The term 'malice,' as used in the expression "malicious prosecution" is not to be considered in the sense of spite or hatred against an individual, but of malus animus, and as denoting that the party is actuated by improper and indirect motives.

27. From our consideration of the above definitions, we cannot impute any malice in the actions of the respondent. Indeed, the respondent was entitled to report the suspected crime and subsequently left it to the Cooperative District Officer, the police and the prosecution to lay bare the intricacies of the case before the court. Whether the prosecution discharged its duty substantively, diligently, zealously and efficiently must be answered in the negative as is evident from the numerous adjournments, missing court files,delays, lack of witnesses and the eventual dismissal of the cases against the appellant court.

28. Nonetheless, it is important to make a distinction between lethargic prosecution and malicious prosecution. From our perusal of the record, we simply cannot impute an illegitimate motive on the prosecution. In Criminal Case No. 3 of 2005 the prosecution called 8 witnesses in support of their case and even sought the help of the document examiner from CID Nairobi on 12th April 2006 to ascertain whether the signatures on various cheques could be linked to the appellant. The document examiner did not materialise and the case failed.

29. In Criminal case Number 2161 of 2005, the record shows that the delay was not entirely caused by the prosecution, but that the court itself adjourned the matter due to lack of time occasioned by a long cause list, transfer of the trial magistrate, the original file being destroyed after a fire broke out. The appellant's counsel and the appellant himself were also absent on various occasions. In fact while transferring the case to Bomet, the court noted that the prosecution had always been ready to proceed, however the interests of justice impressed upon the court to transfer the case to Bomet to ensure that the accused persons get justice given that the court had substantially heard Criminal Case no 3 of 2005 which had similar facts and evidence. This is in contrast with the appellant's assertion that the transfer of their case was actuated by malice.

30. Once the matter was transferred, delays were again occasioned by the court going on leave, the appellant's advocate requesting for more documents and failing to attend court, the prosecution witness failing to attend court on account of having travelled and the appellant and his co-accused failing to attend court.

31. In Bomet Criminal Case 808 of 2012, the delay was largely due to the prosecution's failure to receive the police file, the 1st Accused's advocate being held up in Kisumu and Kericho and the failure of the prosecution to call witnesses to court.

32. We have painstakingly gone through the record to ascertain the reasons for delay and to show that the delay was not motivated by the prosecution's ill-will as proposed by the appellant but by circumstances arising from all parties involved.

33. As for the appellant's claim that the respondent prosecuted the cases against him, a distinction must be drawn between giving information and being the proximate cause/agitator of putting the law into motion or wielding some control over the police. In this case, the respondent was a mere witness and did not prosecute the appellant. Its role in the case is evidenced in their letter to the court dated December 2012 seeking information on the position of the Criminal Case 93 of 2005 because they were in the dark as to the progress of the case after receiving a demand letter from the appellant's co-accused. Consequently, this core ingredient must also fail.

34. Even though the prosecutions terminated in the appellant's favour, we are inclined to find (and not without sympathy to the long and arduous prosecution faced by the appellant) that the three remaining requirements of malicious prosecution, as set out above, have not been fulfilled and the appellant failed establish a cause of action. Consequently, the learned Judge was right in holding that the learned magistrate erred in finding that the appellant had proved his case for malicious prosecution on a balance of probabilities. Accordingly, the appeal is dismissed, and we hereby direct each party to bear its own costs.

DATED AND DELIVERED AT NAKURU THIS 6TH DAY OF DECEMBER, 2024.

M. WARSAME

.....

JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR