



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**[CORAM: OUKO (P), GATEMBU & SICHALE JJA]**

**CIVIL APPEAL NO. 251 OF 2017**

**BETWEEN**

**NATIONAL OIL CORPORATION.....APPELLANT**

**AND**

**JOHN MWANGI KAGUENYU.....1<sup>ST</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**PETER KOMBUTHI.....3<sup>RD</sup> RESPONDENT**

*(Being an appeal against the Judgment and Decree of the High Court at Nairobi (Mboghli, J) dated 1<sup>st</sup> February, 2017 In*

**NAIROBI HCCC NO. 217 OF 2011**

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**JUDGMENT OF THE COURT**

On 1<sup>st</sup> September 2015 *John Mwangi Kaguenyu*, the 1<sup>st</sup> respondent herein filed an amended plaint dated 22<sup>nd</sup> July 2015. In the amended plaint, *National Oil Corporation*, the appellant herein was named as the 1<sup>st</sup> defendant whilst the *Attorney General* and *Peter Kombuthi*, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents herein were named as the 2<sup>nd</sup> and 3<sup>rd</sup> defendants respectively. The 1<sup>st</sup> respondent's cause of action was based on the tort of malicious prosecution over his arrest on 17<sup>th</sup> March 2005 which according to him was instigated by the appellant's servants, employee or its agent. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents were faulted as they "..... *proceeded to prosecute*...".

The appellant filed a statement of defence dated 2<sup>nd</sup> May 2012 and denied that it had maliciously and in absence of reasonable and probable cause reported the 1<sup>st</sup> respondent to the police. The 1<sup>st</sup> respondent filed a reply dated 17<sup>th</sup> November 2015 to the appellant's defence and joined issue with the appellant. It would appear that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not file statements of defence.

The dispute between the parties was heard by *Mboghli, J.* who in a judgment delivered on 1<sup>st</sup> February 2017 found in favour of the 1<sup>st</sup> respondent. The learned Judge made the following awards:

- **“Kshs 5 million damages for malicious prosecution**
- **Kshs 250,000/= special damages plus transport costs**
- **Kshs 32,256,000/= loss of user**

**Total Kshs 37,506,000/=**

The appellant was dissatisfied with the said outcome and in a Memorandum of Appeal dated 17<sup>th</sup> July 2017 listed seven (7) grounds of appeal. The learned Judge was faulted for failing to appreciate the settled principles of the tort of malicious prosecution as set out in the case of *Murunga vs. AG [1982-88] KLR 138*; for failing to find that the appellant was wrongfully enjoined in the suit; that the appellant was not

culpable for malicious prosecution; in awarding special damages which were not particularized nor proven; for failing to make a proper assessment of the losses allegedly incurred by the 1<sup>st</sup> respondent and finally for ignoring the law on malicious prosecution as well as the evidence tendered. In the appellant's written submissions filed on 15<sup>th</sup> December 2017, grounds 1 and 2 were urged together, ground 3 alone, grounds 4 and 5 together and grounds 6 and 7 together. In faulting the learned Judge for failing to appreciate the principle of the tort of malicious prosecution, several authorities were cited for proposition that for one to be successful in a tort of malicious prosecution, one must demonstrate malice. These included **MURUNGA VS. ATTORNEY GENERAL [1979] KLR 138**, **ITAU VS ATTORNEY GENERAL [1990] KLR** and **ROBERT OKERI OMBEKA VS. CENTRAL BANK OF KENYA [2015] eKLR**.

In ground 3 the learned Judge was faulted in finding the appellant is liable to pay damages in the absence of culpability for malicious prosecution.

In ground 4 and 5 the learned Judge was faulted for awarding special damages in the absence of proof and lack of pleadings. The decision of **WAWERU THUMBI VS. SAMWUEL NJOROGE CIVIL APPEAL NO. 445 OF 2003** was cited for the proposition that special damages must be specifically pleaded and proved.

Finally, in grounds 6 & 7, it was contended that the learned Judge failed to consider the appellant's arguments and authorities cited in support of its case.

The 1<sup>st</sup> respondent opposed the appeal and in written submissions filed on 8<sup>th</sup> January 2018 contended that the appellant through its agents/employee was "**actively instrumental**" in having the 1<sup>st</sup> respondent arrested; that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents failed to establish reasonable and probable cause in arresting the 1<sup>st</sup> respondent; that there was imputation of malice as the 1<sup>st</sup> respondent had done business with the appellant for 5 years and was all of a sudden blacklisted even without seeking the 1<sup>st</sup> respondent's explanation of the alleged loss; that the 1<sup>st</sup> respondent was acquitted of the criminal charge preferred against him; that the suit took more than 5 years; and finally, that the 1<sup>st</sup> respondent in supporting the award of damages was of the view that these were proved as required.

In supporting the appeal, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed their submissions on 5<sup>th</sup> November 2018. In their brief submissions, they reiterated the appellant's submissions.

On 12<sup>th</sup> November 2018, the appeal came before us for hearing. Learned counsel **Mr. Odhiambo** and **Mr. Kubai** appeared for the appellant. **Mr. Njuguna** appeared for the 1<sup>st</sup> respondent and **Mr. Ngumbi** appeared for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

In urging the appeal, **Mr. Odhiambo** submitted that the award of both special and general damages was not warranted and that no malice was established. Counsel reiterated that in the circumstances of the case the essentials of the tort of malicious prosecution were missing. **Mr. Ngumbi** for the 2<sup>nd</sup> and 3<sup>rd</sup> respondent wholly supported the 1<sup>st</sup> respondent's written submissions and made no oral submissions.

On behalf of the 1<sup>st</sup> respondent, **Mr. Njuguna** submitted that the 1<sup>st</sup> respondent established the loss suffered in the five (5) years; that receipts were produced that established the loss; that the Civil Procedure Rules allow the production of documents in support of a litigant's case even at a later date; that the appellant's agent issued Memos to all other depots black-listing the 1<sup>st</sup> respondent's trucks; that these actions implied malice and finally, that thorough investigations would have absolved the 1<sup>st</sup> respondent of criminal culpability.

We have considered the record, the rival oral and written submissions, the authorities cited and the law.

For a start it is not denied that the 1<sup>st</sup> respondent and the appellant had a business relationship. It is also not disputed that following a report made by the appellant's agent/employee, the 1<sup>st</sup> respondent was arrested on 17<sup>th</sup> March 2005 and charged in Nairobi Chief Magistrate's Court Criminal Case No. 553 of 2005. On 21<sup>st</sup> June 2010, the 1<sup>st</sup> respondent was acquitted under the provisions of Section 215 of the Criminal Procedure Code. However, the single most important issue for our determination is whether the allegation of malicious prosecution was established. The trial Judge summed up his findings as follows:

***"The arrest of the plaintiff was initiated by the 1<sup>st</sup> defendant, its agent and or servant. It is the 1<sup>st</sup> defendant who made a complaint to the Police Banking Fraud Unit whose investigation department took over the matter ending with the prosecution of the plaintiff. Had the complaint not been made, the plaintiff would not have gone through what he did.***

***The prosecution was terminated in favour of the plaintiff. Malice can be imputed or inferred depending on the circumstances of the case. At the same time, even after receipt of the complaint, the police must act reasonably and there must be probable cause for them to mount the prosecution".***

With respect to the judge, case law is replete on the issue of malicious prosecution. Of critical importance is that a litigant must establish malice. It is not sufficient to find one liable on the basis that he/she is the one who made the complaint. In the often cited case of **MURUNGA VS. ATTORNEY GENERAL [1979] KLR 138**, the principles of the tort of malicious prosecution were spelt out. These are:-

***" i) The defendant instituted the prosecution against the plaintiff.***

***ii) The prosecution ended in plaintiff's favour.***

***iii) The prosecution was instituted without reasonable and probable cause.***

**iv) The prosecution was actuated by malice.”**

The facts as can be discerned from the record are that the 1<sup>st</sup> respondent in his business dealings with the appellant used to pay for petroleum products by deposits of cash at Cooperative Bank. Upon such deposits, the 1<sup>st</sup> respondent would then collect the products. One such a deposit slip was missing and an audit by the appellant showed that one of the payments was missing. The appellant made a report to the Banking Fraud Unit and this culminated in the arrest and subsequent arraignment in court of the 1<sup>st</sup> respondent. The position of the law is that a plaintiff has to demonstrate that there was malice on the part of the complainant. This is because once a report is made, the matter is taken up for purposes of investigation. If the investigation reveal culpability, a complainant becomes a state witness and under an obligation to attend court to testify. Should however, the investigations show that the complainant made false accusation, then he/she is charged with the offence of giving false information to a public officer. In this Court’s decision of **JEDEL NYAGA VS. SILAS MUCHEKE CA NO. 59 OF 1987** the court stated:-

**“ The appellant had made a complaint to the police and nothing more and what followed had nothing to do with him. The decision to arrest the respondent was made by the police who must have found some merit in the report”.**

Consequently, the Court found that; **“the appellant who had made the report to the police was not responsible for the arrest of the respondent and the mere fact that he was a probable prosecution witness did not render him responsible for the arrest of the subsequent prosecution of the respondent by the police.”**

Similar findings were made in **KOECH VS. AFRICAN HIGHLANDS & PRODUCE COMPANY LIMITED & ANOTHER [2006]2 EALR 148** wherein the court stated:-

**“The police carried out their own investigation and were satisfied that there were sufficient grounds upon which a charge of theft by servant could be preferred against the plaintiff. The first defendant carried out its own investigation regarding the disappearance of its property, just like any prudent person or company would in the circumstances but those investigations had nothing to do with the investigations by the second defendant through the police and the resultant decision to charge the plaintiff with the said offence.”**

In **JAMES KARUGA KIIRU VS JOSEPH MWAMBURI & OTHERS [2001] eKLR** the court stated:-

**...however, the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect...On the other hand it would be obviously absurd to make a defendant liable because matters of which he was not aware put a different complexion upon facts, which in themselves appeared a good case for prosecution. But neglect to make a reasonable use of the sources of information available before instituting proceedings would be evidence of want of reasonable and probable cause and also malice. It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but whether there is a reasonable and probable case for a prosecution. Circumstances may exist in which it is right before charging a man with misconduct to ask for an explanation but no general rule can be laid down.”**

It is not disputed that the 1<sup>st</sup> respondent had collected petroleum products from the appellant. In spite of the 1<sup>st</sup> respondent producing the deposit slip as a pre-requisite for the collection of the products, the bank reconciliation did not reflect the deposit made by him. It is in view of this that we find the appellant’s report was not actuated by malice. The audit report carried out by the appellant established that the products collected by the 1<sup>st</sup> respondent had not been paid for. The appellant made a report to the Banking Fraud Unit who commenced their own investigations. As stated in the case of **Murunga vs. Ag.** (supra), it is not sufficient for a tort of malicious prosecution for one to establish that he was acquitted in the ensuing criminal trial. He/she must further establish that the report and the prosecution was actuated by malice. We see no malice herein.

It is for the above reasons that we find that this appeal has merit. It is hereby allowed and the judgment of 1<sup>st</sup> February 2017 is hereby set aside. Costs of this appeal and of the High Court to the appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> respondent.

**Dated and delivered at Nairobi this 8<sup>th</sup> of March, 2019**

**W. OUKO (P)**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**