



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & OUKO, J.J.A.)

CIVIL APPEAL NO. 29 OF 2013

BETWEEN

THE COMMISSIONER OF CUSTOMS & EXCISE.....APPELLANT

AND

HASMUKH SHAMJI HALAI.....1ST RESPONDENT

BERNARD MASAKA SHINALI.....2ND RESPONDENT

THE COMMISSIONER OF POLICE.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya

at Nairobi (Ruth N. Sitati, J) dated 7th May, 2012

in

H. C. C. No. 1585 of 2002 and 1586 of 2002)

JUDGMENT OF THE COURT

1. On 7th May 2012, the High Court (**Sitati, J.**) made findings that the Commissioner of Customs & Excise (**Commissioner**), who is the appellant before us, as well as the Commissioner of Police (**3rd respondent**), represented by the Attorney General (**4th respondent**) were jointly and severally liable for the unlawful arrest and malicious prosecution of the 1st respondent (**Halai**) and the 2nd respondent (**Shinali**). As a consequence, Halai was awarded damages in the sum of Sh. 400,000 for Advocates costs and Sh. 3 million in general damages for pain, suffering and mental anguish. The same damages were awarded to Shinali. The appeal before us is only by the Commissioner challenging the findings on liability and the damages awarded.

2. The background to the appeal is this:

Halai was employed by both M/s **Kenwood Trading Ltd (Kenwood)** and its sister company **Jaribu Credit Traders Ltd (Jaribu)**, as the Group Stores Manager. Kenwood was an importer/wholesaler of assorted merchandise while Jaribu provided Hire Purchase facilities. Shinali was also employed by the same companies as the Inputs Manager incharge of documentation for clearance of imported goods.

3. In April 1996 a complaint was made to the police and the commissioner by another company known as **Rayshian Apparels Ltd (Rayshian)**, claiming that some fake goods were being imported into the country by Kenwood and Jaribu using Rayshian's name without its knowledge or authority, with a view to avoiding payment of customs duty. Investigations followed and it was found that in March 1996, some three containers of goods had been imported from Singapore and cleared through the Inland Container Depot (**ICD**), Nairobi in the name of Rayshian and were described as '100% cotton fabrics.' The police officers and customs officers confirmed that the goods had been cleared from the ICD by Shinali and on following up the containers, they found that they had been offloaded into the stores of Kenwood and Jaribu where Halai was the Stores Manager. It was further discovered that the goods were not cotton fabrics as described, but electronic

goods (radio cassettes, televisions and air conditioners). As there was no evidence of payment of requisite taxes on the goods, the customs officers impounded them *in situ* pending further investigations.

4. On 15th April, 1996, Halai and Shinali were arrested for further questioning. So was an employee of Kenya Ports Authority at the ICD depot, two employees of Mackenzie Maritime, the shipping agents, and an employee of Rayshian. All the six suspects were arraigned before the Chief Magistrate's Court in Nairobi on three separate counts. Halai and Shinali faced one joint count of "*Making a document without authority contrary to Section 357 (a) of the Penal Code*" in that they jointly made a false "*Manufacture under bond import entry*" purporting it to be a genuine document made and issued by Customs & Excise department for release of imported cargo. The criminal trial took surprisingly long as it was not finalized until five years later. Along the way, several prosecution witnesses disappeared including Rayshian which wound up in Kenya and the proprietors migrated to the United States of America. Three drivers who had transported the uncustomed goods to the warehouse of Kenwood and Jaribu and later led the police to the warehouse, left the country for Uganda, Ethiopia and Sudan respectively. Some documents intended for the prosecution also disappeared.

5. The judgment was delivered on 16th October, 2001, acquitting all five accused persons (one had died after giving his defence and pending judgment). According to the trial Magistrate (**P. N. Mugo**), critical witnesses like the actual workers who released the cargo, the drivers who transported the goods to the warehouse, the owners of Jaribu and Rayshian, were not produced and therefore the case was not proved beyond reasonable doubt. The court lamented thus:

"..all people who could have helped this court with tangible evidence were not availed to court. The real culprits in the matter were all at large".

6. Buoyed by their acquittal, Halai and Shinali went to the High Court on 15th October, 2002 and launched the tortious claim referred to above. Ostensibly the claim was laid outside the limitation period and an objection was raised by the Attorney General but rejected, correctly in our view, on the ground that the cause of action arose after their acquittal and was not time barred. See the case of ***Mbowa vs East Mengo District Administration [1972] EA 352***. They pleaded malice and want of probable or reasonable cause in their prosecution, and sought special as well as general damages.

7. The commissioner denied such claims and averred that the complaints against the claimants were made by a third party and were duly investigated. So did the Commissioner of police and the Attorney general who asserted that there was a legitimate complaint filed upon which an independent, proper and adequate investigation was carried out by the police leading to the arrest and prosecution. Sitati, J. heard the testimony of Halai and Shinali, a Customs Officer (DW1), and the police investigating officer (DW2). In the end, the court was persuaded that the arrest was malicious; that the criminal proceedings were instituted without reasonable and probable cause; that the prosecution was actuated by malice; and that the criminal trial ended in the acquittal of Halai and Shinali, hence the award of damages.

8. Those are the findings that provoked the appeal before us which is premised on 21 grounds. The Commissioner of Police and the Attorney General did not take part in the appeal despite service of the record and hearing notices. Learned counsel for the Commissioner, **Ms. Janet Lavuna**, instructed by the Firm of Beatrice Akinyi Odundo & Janet K. Lavuna, Advocates, filed written submissions which were orally highlighted. The basic challenge is based on three grounds that the trial court made erroneous findings on: the issue of liability of the Commissioner for the prosecution; the element of malice in the prosecution; and whether there was reasonable and probable cause for the prosecution.

9. As this is a first appeal, we shall examine those issues *seriatim* by way of a retrial, reconsidering the evidence on record and re-evaluating it, in order to reach our own conclusions in the matter. We are cautious, however, that we should not lightly differ from the findings of fact of the trial court which had the benefit of seeing and hearing all the witnesses and shall give due allowance for that. However, where the findings are based on no evidence, or on perverted appreciation of the evidence or wrong application of principles of law, we shall have no hesitation in interfering with the findings. See ***Ephantus Mwangi vs Duncan Mwangi Wambugu (1982-88) 1 KAR 278***.

10. On the first issue, the trial court found that the commissioner was the prime mover, together with the police and the Attorney General, in the arrest and prosecution of Halai and Shinali. It stated:

"I have reached the conclusion that the complainant in this case was the 1st defendant and that as a result of the investigations carried out by the said 1st defendant, the 2nd and 3rd defendants caused the arrest, detention and trial of the plaintiffs. The prosecution was therefore initiated by the defendants jointly and severally."

11. That conclusion was reached on the basis that the documents which formed the basis of the prosecution did not belong to Halai or Shinali but to Jaribu and Kenwood where the two worked as junior employees. According to the trial court, those companies and others which were adversely mentioned in connection with the criminal offence were being shielded from the criminal proceedings.

12. Ms. Lavuna, challenged those findings as factually incorrect and not borne out by the evidence on record. She referred to the evidence of the Commissioner and the Investigating Officer in the criminal trial, who confirmed that the initiator of the complaint was the Managing Director of Rayshian Apparels Ltd. She observed that the report was made simultaneously to the commissioner and to the police, and submitted that since it involved the collection and administration of revenue, the commissioner had a duty, like all law abiding citizens, to record statements with the police in the course of their investigations, and to testify in court. Counsel further pointed out that the investigations confirmed the importation of uncustomed goods using false documents and the same evidence was repeated in more detail during the hearing of the suit before the trial court. The role of investigation, arrest and prosecution of criminal allegations, concluded counsel, lay squarely with the police while the prosecution, at the time, lay with the Attorney General. It was erroneous therefore, urged counsel, to make a finding that the commissioner was the complainant before the criminal court or at all.

13. Counsel cited the case of ***Gitau vs Attorney General [1990] KLR 13***, where **Trainor, J.** stated:

“To succeed on 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. “Setting the law in motion” in this context has not the meaning frequently attributed to it of having a police officer take action, such as effecting arrest. It means being actively instrumental in causing a person with some judicial authority to take action that involves the plaintiff in a criminal charge against another before a magistrate. Secondly he who sets the law in motion must have done so without reasonable and probable cause... The responsibility for setting the law in motion rests entirely on the Officer-in-Charge of the police station.” [Emphasis added].

14. The cases of ***Douglas Odhiambo Apel & Another vs Telkom Kenya Limited [2014] eKLR*** and ***G. B. M. Kariuki vs Attorney General [2016] eKLR*** were also cited for the proposition that *“in a claim for damages for unlawful arrest, false imprisonment and malicious prosecution, the proper defendant is always the Attorney General”*.

15. In response to those submissions, learned counsel for Halai and Shinali, **Mr. Wilson Mwihuri** instructed by M/s Hamilton Harrison & Mathews, submitted that it was the commissioner who was *“crucially involved in setting the law in motion leading to the arrest and prosecution”* and therefore the trial court was right in its finding on liability. In his view, the investigations were carried out jointly and severally by the commissioner, the police and the Attorney General as borne out by the record of the criminal trial and the civil suit. In the circumstances, this Court cannot interfere with the finding as it was based on evidence on record. Reliance was made on the ***Gitau case (supra)*** and ***Katerrega vs Attorney General [1973] EA 287*** both on the principle of *‘setting the law in motion’*.

16. We have considered the submissions on the first issue and have come to the conclusion that the finding that the commissioner was the prime mover in the arrests made by the police and the prosecution carried out by the Attorney General was erroneous. There was evidence before the criminal court, as well as the trial court, that the initiator of the investigations that led to the arrest and arraignment of six persons including Halai and Shinali was the Managing Director of Rayshian. The criminal court indeed regarded Rayshian as the complainant and the failure by its Managing Director to testify was one of the reasons for the acquittal of the accused persons. The criminal court stated in part:-

“In April 1996 customs office in Nairobi received a complaint from the managing director of RAYSHIAN APPARELS Ltd, Manufacturers of Garments for export to the offence that an importer of electronics was using his company’s name to import goods without paying the necessary taxes or duty. The complainant at the same time reported that matter to the Criminal Investigation Department and the department sent its officers to investigate these allegations.”

17. At the hearing before the trial court, the same evidence was repeated and indeed, the letter of complaint written by Rayshian was exhibited and part of it was reproduced by the trial court in its judgment. But no inferences were drawn from the letter. Furthermore Halai’s evidence before the trial court appears to have been exculpatory of the commissioner when he testified in parts of his cross examination thus:

“I see this notice of seizure. Agree I acknowledged that notice. The allegation for the seizure was that no duty had been paid. I was arrested by police officers. They told me they were arresting me on account of uncustomed goods. I was told the complainant was Rayshan Apparels Ltd. It is true investigations were carried out by the police..... It is true it is the police and not the 1st defendant(Commissioner) who carried out the investigations..... I agree none of the police officers involved in the criminal case were known to me. I was informed Rayshian Apparels were the complainants who caused my arrest....According to the charge sheet, the complainant was the Government of Kenya.”

18. Without the complaint lodged by Rayshian, the commissioner and the police may well have remained in the dark as no investigations would have commenced. In terms of the authority relied on by both sides, the ***Gitau case (supra)***, Rayshian, and not the commissioner, was the one *“actively instrumental in causing a person with some judicial authority to take action that involves the plaintiff in a criminal charge”*. The investigation was by the police and the prosecution was by the Attorney General as by law ordained. We so find. Whether or not there was probable cause for commencing the investigations, is the next logical issue to consider.

19. The trial court found on that issue as follows:

“There is evidence from DW1 to the effect that the documents complained of were not the plaintiff’s documents. The documents belonged to a company known as Jaribu Credit Traders Limited. The plaintiffs denied that they were either Directors or Senior Officers of the said company. The defendants did not controvert the plaintiffs’ testimony. As rightly submitted on behalf of the plaintiffs there was no nexus between the plaintiffs and the maker of the documents which formed the basis of the criminal case against the plaintiffs. Although the plaintiffs may have been arrested while in possession of the goods, yet in terms of the Customs and Excise Act those goods did not belong to the plaintiffs. The goods belonged to persons who are admittedly still at large. From the definition of what amounts to “reasonable and probable cause” (above) I am not persuaded that there was any honest belief on the part of the defendants in the guilt of the plaintiffs founded upon reasonable grounds which would reasonably lead any ordinarily prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed. It is clear from the evidence of DW1 that right from the beginning the circumstances were such that third parties were responsible for the mischief of which the plaintiffs were charged. There was Jaribu Credit Traders Limited. There was Rayshian Apparel Limited. These two companies were not called as witnesses during the hearing of the criminal case. The only inference I can draw is that the evidence of the two witnesses was detrimental to the defendants’ case. I conclude that no reasonable prosecutor would have deemed the case against the plaintiffs who were junior officers of their employers had any prospects of success. In the circumstances, I reject the arguments of the defendants that the prosecution was instituted upon reasonable and probable cause.”

20. Ms. Lavuna attacked those findings on the basis that the trial court did not fully and fairly consider the evidence on record before coming to the conclusion that there was no probable or reasonable cause. In counsel’s view, the court simply concluded, without the benefit of evidence and relevant law, that the two respondents were not the owners of the goods in issue but mere junior employees who had nothing to do with the goods or the paperwork relating to them, and that the true owners of the goods were being protected. She submitted that Halai and Shinali were in fact senior employees who had the goods in their possession and played an integral role in clearing them from the ICD

and storing them in their employer's warehouse.

21. Counsel cited an explanation of "reasonable and probable cause" found in **Halsbury's Laws of England, 4th Edition at paras 314 and 472** stating:-

“Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances which assuming them to be true, would lead to an ordinary, prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed.”

22. She also cited the case of ***James Karuga Kiiru vs Joseph Mwamburi & 2 Others*** [2001] eKLR where the court, referring to malicious prosecution, stated:

“To prosecute a person is not prima facie tortious, but to do so dishonestly or unreasonably is. 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.” [Emphasis added].

23. Finally on this issue, counsel cited the case of ***Stephen Gachau Githaiga & Another vs Attorney General*** [2015] eKLR where the court stated, *inter alia*, thus:

“Malicious prosecution is an intentional tort designed to provide redress for losses flowing from an unjustified prosecution..... The third element which must be proven by a plaintiff — absence of reasonable and probable cause to commence or continue the prosecution — further delineates the scope of potential plaintiffs. As a matter of policy, if reasonable and probable cause existed at the time the prosecutor commenced or continued the criminal proceeding in question, the proceeding must be taken to have been properly instituted, regardless of the fact that it ultimately terminated in favour of the accused.” [Emphasis added].

24. In line with those principles and the factual circumstances obtaining in this matter, counsel submitted that the commissioner had every reason to believe, and did in fact believe, that Halai and Shinali were involved in the making of a false customs document and hence the offences alluded to by Rayshian, the complainant. Other than lawfully impounding the goods in issue and recording a statement for further investigations by the police, the commissioner did nothing else in furtherance of the prosecution process, she concluded.

25. In response, Mr. Mwihuri submitted that the trial court properly relied on the evidence tendered before the criminal court and before it which showed that there was no evidence to implicate the two respondents in any offence, hence their acquittal. He urged us not to disturb, but respect, the factual findings and dismiss the appeal.

26. We have anxiously considered this issue and find, with respect, that the trial court took a shallow view of the evidence on record. In the first place, there was no factual basis for the finding that Halai and Shinali were junior employees of Jaribu and Kenwood, and therefore insignificant nonentities in the saga surrounding the companies. From their own evidence, Halai was the Group Stores Manager in charge of the companies' warehouse where the goods in issue were found. He was entrusted with managerial responsibilities and represented the companies. At some point, the companies applauded him for such representation in Dubai, stating in a letter to him, thus:

“...we are especially pleased with the successful trip you made to Dubai. It has greatly benefited the company through the contacts you made and we are now ripping (sic) those benefits”.

Shinali was equally high up in management being the Group Inputs Manager, in charge of clearance of all goods imported by the companies. He was the person who cleared the goods in issue in this matter from the Nairobi ICD.

27. The suspect documents that lent credence to the complaint lodged by Rayshian were completed in Shinali's office. He testified as follows when his evidence was tested in cross examination:-

“My duties were to receive documents for clearing goods, prepare C15 import entries then present the same to customs. Yes, I was preparing C 15. I had two clerks under me, so I was the one in charge.”

He also confirmed that there was no evidence of payment of customs duty at the time, as contended by the customs officer who questioned him. He testified:

“On 16/4/1996, I was arrested and some goods were seized. The seized goods were electronics in the warehouse of both companies. The goods had been imported much earlier. We had paid for these goods and had paid duties and customs, but I do not have the receipts. That evidence is in the proceedings so by implication I have produced receipts.”

28. There is no dispute that the commissioner has the powers in law to seize dutiable goods where duty had not been paid, and did so in this matter. After receiving a formal complaint from Rayshian, the commissioner carried out due diligence and found that KPA officers had released 'electrical goods' on the basis of a false declaration in customs forms that they were 'cotton fabrics'. With the assistance of the drivers who transported the goods, the police and customs officers found the goods in the warehouse of the two companies, and both Halai and Shinali were present. **Section 2 of the Customs and Excise Act, Cap 470, Laws of Kenya**, defines **“Owner in respect of Goods”** to include any person:-

“...being or holding himself or herself out to be the owner, importer, exporter, consignee, agent or the person in possession of or

beneficially interested in, or having control of or power of dispensation over the goods.

29. In our view, the actual owners of the goods, as well as Halai and Shinali, fall under that definition. There was no basis in law, therefore, to exonerate the two respondents on the basis that the companies involved were being shielded since they were neither prosecuted nor called to testify. There was no evidence of such shielding, and in any event, criminal liability is individual and has no limitation period. The absence of Rayshian and the three drivers was explained before the criminal court. There were also documents, meant to prove the charge, which went missing. Evidently, the prosecution had been driven into a helpless corner. It would be a sad day, and a dangerous precedent in our criminal justice system, if we celebrated the acquittal of an accused due to the absence of witnesses and documents, regardless of the reasons for their absence, and equating the acquittal to proof of innocence. Acquittal in a criminal trial, for whatever reasons, is one of the necessary elements for proof in a suit for malicious prosecution. It signifies a legal end to the criminal proceedings, and that is the only significance of the acquittal pleaded in this case.

30. In our assessment of the circumstances of this case, we have no hesitation in finding that there were probable and reasonable grounds upon which any person placed in the position of the commissioner, would believe that Halai and Shinali were party to the allegations made by Rayshian. As stated in the *Kiiru case (supra)*, the onus was on Halai and Shinali to prove that the commissioner did not act honestly or reasonably, but in our view they did not discharge that onus. On the contrary, it is our finding that the commissioner did not proceed recklessly or indifferently in establishing the facts on which his belief lay. Investigations carried out by the police thereafter, leading to the arrest and arraignment of the two respondents together with their accomplices, confirmed that belief.

31. The final element for proof was malice. For it would not matter that there was an acquittal of the two respondents; that the commissioner was the instigator of the prosecution; and that there was no probable or reasonable cause for it, if it is established that there was no malice. All the elements must dovetail in order to establish a cause of action. As this Court stated in *Nzoia Sugar Company Ltd vs Fungututi [1988] KLR 399*:

“Acquittal per se on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecutor.”

32. In the *Githaiga case (supra)* the court explained as follows:-

“The malice requirement is the key to striking the balance that the tort was designed to maintain: between society’s interest in the effective administration of criminal justice and the need to compensate individuals who have been wrongly prosecuted for a primary purpose other than that of carrying the law into effect.”

Referring to the element of malice, the former East African Court of Appeal in the *Mbowa case (supra)* stated:-

“the defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, with an intent to use the legal process in question for some purpose other than its legally appointed and appropriate purpose.”

Was the commissioner actuated by malice?

33. The trial court found that he was and reasoned as follows:-

“...I am persuaded that the defendants herein were actuated by malice. A look at the testimonies of both DW1 and DW2 confirms this fact. When the defendants decided to prosecute the plaintiffs, they were well aware that the real culprits were at large. They decided to prosecute because Shinali was the one who cleared the goods and Halai was found in possession of the disputed goods. The defendants had no evidence whatsoever that either of the plaintiffs made the documents they were alleged to have made...At the time of charging the plaintiffs, the defendants were aware that neither plaintiff was the owner or Director of Jaribu Credit Traders Ltd. In my considered view therefore, both DW1 and DW2 were actuated by malice in instituting the prosecution against the plaintiffs”.

34. Mr. Mwhuri supports that finding while Ms. Lavuna submits that there was no evidential basis for it. For starters, she observed, it was admitted by Halai and Shinali that there was no previous contact, dealings, familiarity, relationship or history of bad blood between them and the officers of the commissioner. But that evidence was not considered by the trial court. A finding of spite or ill-will would thus be a contrived one.

35. For our part, in view of the findings made earlier on other elements of the tort, we find the trial court's findings unsupportable. There is no evidence that the commissioner had improper and wrongful motive or that he intended to use the legal process for a purpose other than the legal one of ascertaining the truth about the importation of the goods found in possession of the two respondents. The fact that they were not directors of Jaribu or that Jaribu was also involved in the offence did not lessen the possibility that the two were culpable. Malice was not proved.

36. In the result, we hold that this appeal is meritorious and we allow it. The judgment of Sitati J. made on 7th May, 2012 in respect of the appellant herein shall be and is hereby set aside and substituted with an order that the suit against the Commissioner of Customs & Excise be and is hereby dismissed. The appellant shall have the costs of this appeal and of the High Court.

Orders accordingly.

Dated and delivered at Nairobi this 20th day of April, 2018.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR