IN THE COURT OF APPEAL

AT MALINDI

(CORAM: WAKI, VISRAM & KARANJA, JJ.A)

CIVIL APPEAL NO. 49 OF 2017

BETWEEN

ROBIN ANGUS PAUL ..... APPELLANT

AND

1. MOHAMED HEMED KALE

2. AHMED KALE HEMED ..... RESPONDENTS

(An appeal against the Judgment of the High Court of Kenya at Malindi (Chitembwe, J) dated 5th December, 2016

in

Civil Appeal No. 13 of 2016)

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JUDGMENT OF THE COURT

The appellant herein challenges the decision of the High Court **(Chitembwe, J.)** on a first appeal in which the court dismissed his appeal against a finding made by the trial court that he was liable for the arrest and malicious prosecution of the two respondents before us. The court went further to award general as well as exemplary damages to the respondents. The issues of liability and quantum of damages are raised for our determination.

The short background to the appeal is this:

The two respondents are brothers from Ngomeni village while the appellant is a Kenyan of British origin. In the year 2005, the appellant purchased two parcels of land from the respondents' father (since deceased) and had them registered in his name. He took possession and fenced the land. On 18th March, 2011, the appellant was informed by his security guard that the two respondents had destroyed part of the wooden perimeter fence and trespassed on the land claiming ownership. The appellant reported the matter to Malindi Police for investigations, and the two respondents were arrested on 31st March, 2011. They were charged before Malindi Chief magistrate's court with the offence of malicious damage to property contrary to ***section 339 (1)*** of the Penal Code. They pleaded not guilty and were bonded to appear for their trial.

The trial commenced on 20th April, 2011 and by close of the prosecution case on 22nd May, 2012, the appellant together with eight other witnesses, including the scenes of crime officer, the arresting officer and the investigating officer had testified. Before the trial court could deliver a ruling on whether the respondents had a case to answer, the Director of Public Prosecutions **(DPP)** entered a *nolle prosequi* and the proceedings were terminated under ***Article 157 (6) (c)*** of the Constitution. They were discharged on 13th July, 2012 but their freedom was short lived as they were immediately re-arrested and re-arraigned in court on the same charge and an additional count of trespass with intent to annoy contrary to ***section 5 (1)*** of the Trespass Act. Another *nolle prosequi* was, however, entered by the DPP on 15th November, 2012 after objection to the charge was made on a point of law. They were discharged.

Ten months later, in September 2013, the respondents filed a civil suit against the appellant and the Attorney General on behalf of the Kenya Police and the DPP. They claimed that their arrest by the police was wrongful and the prosecution by the **(DPP)** was malicious. They claimed to have been humiliated, inconvenienced, defamed, and to have suffered loss and damage in hiring lawyers to defend the case. They prayed for special, general and exemplary damages.

Defences were filed by the appellant and the Attorney General denying any falsity in the arrest or malice in the prosecution. The appellant in particular averred that he had no hand in the termination of the charges and recommencement of the prosecution as it was handled by the DPP who is independent. He was therefore not responsible for any alleged loss suffered by the respondents. The Attorney General also asserted that the prosecution was lawful and justified. He contended that the entry of *nolle prosequi* did not operate as a bar to the prosecution of the respondents on the same facts.

Upon hearing the civil claim, the Chief Magistrate **(Mbogo, C. M.)** found that the appellant was liable because he reported the matter to the police; that the prosecution was wrongful because it was undertaken without thorough investigations; that the prosecution was malicious because the second arrest was prohibited by law; that the incarceration of the respondents caused them psychological trauma and anguish; and that they were entitled to damages. It awarded to each of the respondents Sh.200,000 in general damages and sh.100,000 in exemplary damages -- total Sh.600,000 -- to be paid by the appellant and the Attorney General, jointly and severally.

The appellant appealed against that decision to the High Court but the Attorney General did not appeal. The Attorney General was not enjoined in that appeal either and it proceeded without him. The judgment and orders made against the Attorney general were thus unaffected by the appeal and he does not feature in the appeal before us.

Upon hearing the appeal, the High Court disagreed with the trial magistrate that the initial arrest and prosecution of the respondents was false and malicious. The court found that indeed the respondents had admitted in their evidence that they had uprooted the appellant's fence in enforcement of their right to the land, which was the reason for their arrest. The court reasoned as follows:

> ***"The undisputed facts are that the respondents were charged twice in two different criminal cases. It is also not disputed that both cases were terminated in the respondents' favour. It is also not disputed that the appellant had reported that his fence had been vandalized. I do find that the first report was made on a probable and reasonable cause. There was a proper claim as the appellant believed that damage had been done to his fence. The report may not have been actuated by malice. It is evident that there has been a land dispute between the parties herein. The evidence before the trial court established that indeed the fence was damaged. This was the evidence of Mohamed Kale who testified that he was not happy when he found out that the land had been fenced."***

On that reasoning the court found that the first prosecution was made out of a good and probable cause.

However, the court found that the second arrest and prosecution was unlawful, malicious and unconstitutional. It also found that the appellant was as liable as the DPP. General damages in the sum of Sh.100,000 was awarded and the award of exemplary damages in the sum of Sh.100,000 was upheld. Total damages Sh.400,000.

Those are the findings and orders which aggrieved the appellant. As stated earlier, he basically challenges the finding on liability against him, as well as the quantum of damages awarded to the respondents. He listed four grounds of appeal in his memorandum and the appeal was urged through written submissions which counsel fully relied on without oral highlighting. The appellant was represented before us by **Mr. Omangwa Angima**, instructed by M/s Omangwa Angima & Company Advocates; while the respondents were represented by **Mr. Gekanana**, instructed by M/s Gekanana & Company Advocates.

In their submissions, both counsel agree, and properly so, that the main issue of law which is germane for the determination of this appeal is liability. For if, the appellant was not liable for the tort, it would follow that he is not liable to pay any damages.

In urging that issue, counsel for the appellant submitted that there was no proof, in line with the authorities, of the four elements that constitute the tort of 'malicious prosecution'; that is to say:

> ***(i) the appellant lodged the complaint with the police thus setting the prosecution in motion;***
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> ***(ii) the prosecution terminated in favour of the respondents;***
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> ***(iii) there was no reasonable or probable cause for initiating the prosecution;***
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> ***(iv) the prosecution was actuated by malice, that is, motives other than the interests of justice.***

According to counsel, it was established on the evidence, and the High Court so found, that the report on the crime was factual as brazenly admitted by the respondents themselves on oath; that there was no evidence of the involvement of the appellant, or complicity with the DPP, in the withdrawal of the initial charges or the re-arresting of the respondents; that in any event, the re-arrest was based on the same original report which the court had found justified, and not a fresh complaint; that the sole responsibility for the re-arrest lay with the DPP who cannot be directed by anyone; and that the appellant cannot be punished for doing what was right and required of him as a law abiding citizen. The High Court authorities of ***Stephen Gachau Githaiga & Another vs Attorney General [2015] eKLR*** and ***Kenya Flour vs William Mutace [2015] eKLR*** were relied on.

For his part, counsel for the respondents, while accepting that the tort of 'malicious prosecution' has four elements to it, nevertheless supported the finding by the High Court that both the appellant and the DPP acted in concert without reasonable or probable cause to have the respondents re-arrested after their acquittal. In his view, the appellant, from the very beginning, had an improper and indirect motive in pursuing false charges against the respondents who had a land case with him, in order to intimidate them into submission. He contended that the respondents never made any admission of demolition of any fence without justifiable cause. In his submission, resorting to the criminal process was improper and therefore malice can be inferred from the facts. Malice, in counsel's submission, flowed from the initial reporting which resulted in the re-arrest of the respondents and the two arrests and prosecutions cannot be divorced from each other. The cases of ***Mbowa vs East Mengo District Administration [1972] EA 352; Gitau vs Attorney General [1990] KLR 13;*** **and** ***Chrispine Otieno Caleb vs***

***Attorney General* [2014] eKLR** were relied on.

We have considered the matter fully. The principles governing the tort of malicious prosecution are well settled. They were properly decanted by counsel from the long line of authorities cited above and we need not rehash them. For completeness, however, we shall restate what this Court laid out in the ***Mbowa* case (supra):**

> ***"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 originated in the medieval writ of conspiracy which was aimed against combinations to abuse legal procedure, that is, it was aimed at the prevention or restraint of improper legal proceedings...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. It's 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 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 other than its legally appointed and appropriate purpose; 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".***

So that, it is not enough for the respondents to show that they were acquitted of alleged offences. All the other elements must be proved.

There is no cross appeal from the finding by the High Court that the report made by the appellant, or his agent, to the police which led to the arrest and prosecution of the respondents was factual, reasonable, and without ill motive. It does not therefore lie in the mouth of the respondents' counsel to challenge that finding as he attempted to do. What baffles us, as it did the appellant, is the conclusion that in terminating the first prosecution and re-arresting the respondents, the appellant played an active role in cahoots with the DPP. We have examined the reasoning of the learned Judge but we think, with respect, that the finding was, to say the least, baseless and unduly contrived.

The reasoning of the learned Judge was as follows:

> ***"Unfortunately, despite their acquittal, the respondents were re-arrested and charged with the offence of malicious damage to property and trespass. The subsequent Criminal Case Number 496 of 2012 was based on the same facts and same complaint. The appellant testified that he was called upon to testify in the subsequent suit. Although the appellant would like to distance himself with the second prosecution, the submissions of the Attorney General in Civil Case Number CMCC 259 of 2013 points otherwise. At page three of the submissions, it is stated as follows:-***
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> *"...., the plaintiffs, have failed to demonstrate that the subject proceedings founding the present suit were instituted by the 2nd defendant. To establish this, the plaintiffs are required as of necessity, to clearly show a direct co-relation and nexus between the actions of the 2nd defendant and their subsequent arrest and prosecution. In this regard, it is clear that it is not the 2nd defendant, the police who set in motion the legal process. It is the 1st defendant's farmhand who saw the offence being committed and made a report to the police station. Accordingly, the process of law was set in motion against the plaintiffs by a person whom the plaintiffs actually didn't sue!"*
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> ***The Attorney General was in essence blaming the appellant and his worker who was not enjoined in the suit. The second prosecution was therefore set in motion by the appellant. I had the advantage of seeing the respondents during the appeal. It cannot be possible that they instigated the decision by the DPP to enter the nolle proseque. They were acquitted but subsequently charged again. The second case was unlawful as section 218 of the criminal Procedure Act bars a subsequent Criminal case based on the same facts on acquittal. It was equally unconstitutional as Article 157 (7) of the Constitution states that upon termination of the case, the accused shall be acquitted. The Attorney General made reference to the first report by the appellant's employee. However, it can be deduced that the appellant was not satisfied with the first acquittal. None of the parties attached the charge sheet for both cases but it is clear that it was the appellant who was the complaint." ..... "In view of the fact that the entering of the nolle proseque meant that the respondents were acquitted, I do find that the second prosecution, that is criminal case number 496 of 2012, was unlawful, unconstitutional and instituted with malicious intention. The appellant was still the complainant and he cannot entangle (sic) himself from the prosecution chain. He testified that he was called to be a witness in the second case. The only logical assumption would be that the respondents were to be left free and thereafter the appellant make a fresh complaint. However, the record shows that the appellants were hurriedly arrested immediately after their acquittal. The entering of the nolle proseque was not an abrupt incident. The prosecution notified the trial court on 6th July, 2012 about the nolle proseque. The matter was adjourned to 13th July, 2012. It can be concluded that both the appellant and the DPP were working together and had decided to terminate the first case and have the accused re-arrested and tried again. One can simply conclude that the intention was to punish the respondents by undergoing a second trial and this was malicious."*** [Emphasis added]

First of all, the submissions of the Attorney General which were relied on by the learned Judge were not evidence and were not put to the appellant for comment or rebuttal. The appellant appears to have been condemned without a hearing. Secondly, reliance on assumptions and deductions, as the learned Judge did, does not amount to proof.

The office of the DPP is an independent office. ***Article 157 (10)*** of the Constitution spells out that independence, thus:

> ***"The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority."***

Those provisions are replicated in ***section 6*** of the **Office of the Director of Public Prosecutions Act.**

There is no denial that the DPP was in charge of the prosecution of the respondents. He invoked ***Article 157 (6) (c)*** of the Constitution to terminate the prosecution. It states:

> ***157 (6) The Director of Public prosecutions shall exercise State powers of prosecution and may-***
>
> ***(c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).***

Clause 7 provides for acquittal where the termination of proceedings comes after the close of the prosecution case, as happened in this case. There is no evidence that the appellant gave authority to the DPP to commence the proceedings, terminate the proceedings or re-commence the proceedings against the respondents. Indeed, there is nothing to suggest, even remotely, that the DPP acted in violation of ***Article 157 (10)*** of the Constitution and ***section 6*** of the Office of the Director of Public Prosecutions Act. It follows that the decision to terminate the first prosecution and to recommence another was the DPP's alone. The decisions made may have been wrong, but they were the DPP's. Perhaps that would explain why no appeal was filed on behalf of the DPP to challenge the judgment.

All in all, we are not satisfied that the decision of the High Court on liability was correct. We allow the appeal and set it aside. It follows that no damages are payable by the appellant. The respondents' remedy lies elsewhere. The costs of the appeal shall be borne by the respondents.

Dated and delivered at Malindi this 3rd day of October, 2018.

P. N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR