IN THE COURT OF APPEAL OF KENYA
AT NYERI
Civil Appeal 270 of 2003
DAVID KIRIMI JULIUS …….…… APPELLANT

AND

FREDRICK MWENDA .....……. RESPONDENT

(An Appeal from a decree of the High Court of Kenya

at Meru (Kasanga Mulwa, J) dated 24th July, 2003

in

H. C. C. A. NO. 131 OF 1999

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JUDGMENT OF THE COURT

This is a second appeal. On 17th March, 1994 the appellant, David Kirimi Julius ("Kirimi") and the respondent, Fredrick Mwenda ("Mwenda") were involved in a fight. Mwenda was hurt in the fight, and reported the matter to the Meru Police Station. Following that report, Kirimi was arrested and charged with the offence of assault contrary to *Section 251* of the Penal Code in Meru Criminal Case No. 1287 of 1994. Half way through the trial, the prosecution withdrew the charge and Kirimi was discharged under *Section 87 (a)* of the Criminal Procedure Code. Two years thereafter Kirimi was re-arrested and charged with the offence of assault causing actual bodily harm contrary to *Section 251* of the Penal Code in Meru Criminal Case No. 314 of 1996. After a full trial, the learned magistrate found that the prosecution had not proven the case beyond reasonable doubt, and acquitted him under *Section 215* of the Criminal Procedure Code. The Magistrate observed, though, that the facts proved before him simply confirmed that the offence of affray had been committed.

Based on his acquittal, Kirimi filed a civil suit (Meru RMCC 319 of 1997) against Mwenda for general and special damages for unlawful confinement and malicious prosecution. He succeeded, and was awarded Kshs.75,000/= for general damages and Kshs.30,510/= for special damages.

Aggrieved by that decision, Mwenda appealed to the superior court. In a Judgment handed down 24th July, 2003 at Meru, Mulwa, J allowed the appeal and reversed the decision of the lower court. Being dissatisfied with that decision, Kirimi appealed to this court, citing seven grounds of appeal, as follows:

"*1. His lordship the Judge erred in law by allowing the appellant's appeal with costs in the superior court and subordinate court without making a ruling or judgment on the appellant's counter-claim.*

2. The judgment dated 24th July, 2003 by his lordship honourable Mr Justice Kasanga Mulwa is not a judgment in law.

3. His lordship the judge erred in law by allowing the appellant's appeal entirely with costs in superior and subordinate court when the appellant had not proved his counter-claim in the subordinate court on a balance of probabilities and more so when he had adduced exert (sic) evidence of a doctor to testify on his injuries.

4. His lordship the judge erred in law by not dismissing the appellant's appeal on counter-claim with costs both in the superior and subordinate court.

5. His lordship the judge erred in law by holding that the respondent was not entitled to the general and special damages awarded by the subordinate court.

6. His lordship the judge erred in law by allowing the appellant (sic) appeal or misdirection and misapplication of equity principle that the respondent was not in clean hands when awarded damages when the respondent report (sic), charge of the respondent of assault and discharge thereof under section 87 A in Meru Criminal Case No. 1287 of 1994 and his subsequent re-arrest charge and prosecution of an offence of assault and his acquittal thereof in Meru Criminal Case No. 314 of 1996 was abinitio malicious prosecution.

7. His lordship the judge erred in law to allow the appellant's appeal and erred in law to hold that the respondent had not established and/or proved the ingredients of malicious prosecution when the report at the police was on an offence of affray and therefore to charge the respondent only with assault vide Criminal Case No. 1287 of 1994 and discharging him under Section 87A of the penal code and his subsequent re-arrest charge of assault and prosecution vide Meru Criminal Case No. 314 of 1996 and his acquittal thereof was primacie (sic) malicious prosecution and false imprisonment."

Mr F K Kirubua, learned counsel for the appellant urged us to find that the appellant's prosecution for the offence of assault in the lower court was actuated by malice, and that the trial court was correct in awarding him damages in respect of the same. He argued that the learned judge of the superior court erred in rejecting the trial court's findings, and further that the superior court's judgment was "invalid" in law because it had failed to make a finding on the respondent's counter-claim.

Mr M Kariuki, for the respondent, submitted that there was no cross-appeal in respect of the counter-claim before the superior court, and accordingly the learned judge did not, and could not comment on the same. He urged us to hold that the arrest, prosecution and imprisonment of the appellant were committed by the police and was not actuated by any malice.

There was no dispute that Mwenda made a report to the police that he had been assaulted by Kirimi, as a result of which the latter was arrested, detained and charged. Kirimi, too, had made a similar report to the police, complaining that he had been assaulted by Mwenda. In their wisdom, and following an investigation the police decided to prefer charges against Kirimi. That was their prerogative, and had nothing to do with Mwenda. It is also not in dispute that after a full trial Kirimi was found innocent, and acquitted under *Section 215* of the Criminal Procedure Code. However, can it be said that the fact that Kirimi was acquitted, rendered his prosecution malicious? In *Jediel Nyaga vs Silas Mucheke (Civil Appeal No. 59 of 1987 (Nyeri) (UR)* this court said:

"*It is trite law that false arrest and false imprisonment may very well be found where prosecution is dismissed and the accused acquitted. Malicious prosecution may also be found where determination of prosecution was in favour of the accused i.e. in cases where the prosecution was withdrawn and the accused is not re-charged or where prosecution has been terminated with the acquittal of the accused. False arrest may also be constituted where the matter of the false report was actuated by malice. In the instant case, there was no evidence adduced to show that the report by the appellant about the damage to his crop and trees by the respondent was false. He admitted as having made the report. There was evidence that the respondent had erected a stone building on the appellant's land although the dispute was not on the ownership of the land. The police investigated the complaint and arrested the respondent. The arrest by the police could not be attributed to the appellant. The position would have been different if the appellant had arrested the respondent himself or that the report was false.*

Police action cannot be attributable to the appellant who had no authority over them. There was no evidence to suggest that the arrest and prosecution of the respondent was brought without reasonable or probable cause."

In this case, too, there is no evidence that Mwenda made a "false" report, or that he was actuated by "malice", or that his prosecution was brought "without reasonable or probable cause". The fact is that there was a fight, that following the fight, both Mwenda and Kirimi made similar but separate reports to the police; that the police investigated and chose to charge Kirimi. All that Mwenda did was to report the fight, and the fact that he had been assaulted, to the police. That's all. That is the duty of every citizen. The rest was up to the police. He had no control over the police; he did not influence or direct the police; he did absolutely nothing after making that critical report. He cannot be said to have been "malicious". And if making an honest report to the police can be said to be "malicious", then Kirimi is clearly as guilty as Mwenda.

In the case of *Egbema vs West Nile District Administration (1972) E. A.* Law, Ag. V. P. as he then was, said:

"*Is the respondent also liable in damages in respect of the abortive prosecution? I do not think so. The decision whether or not to prosecute was made by the Uganda Police, who are not servant or agents of the respondents after investigation. I can see no evidence of malice on the part of the respondent. The appellant was an obvious suspect as he was responsible for the security of the office from which the cash box disappeared. It cannot be said that there was no reasonable and probable cause for the respondent instigating a prosecution against the appellant. The actual decision to do so was taken by the Uganda Police. As the judge has made no finding as to whether the instigation of the prosecution was due to malice on the part of the respondent, this Court must make its own finding. In my view the circumstances of this case reasonably pointed to the appellant as a suspect and there was not sufficient evidence that in handing the appellant over to the Uganda Police for his case to be investigated and, if necessary, prosecuted, the respondent was actuated by malice."*

That appears to be the position in the case before us. Mwenda having reported to the police about the assault, the police took over the matter, and what followed was entirely in the control of the police. He had absolutely nothing to do with the events that led to Kirimi's incarceration, and he cannot possibly be faulted for what happened. Accordingly, we find that there is no merit to this appeal, and the same is dismissed with costs to the respondent.

Dated and delivered at Nyeri this 12th day of June, 2009.

E. O. O'KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

…….

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR