REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 22 OF 2016

KENYA POWER & LIGHTING CO. LTD….....APPELLANT

VERSUS

MAURICE OTIENO ODEYO…….…….....…….....1ST RESPONDENT

THE PERMANENT SECRETARY MINISTRY OF INTERNAL SECURITY...2ND RESPONDENT

THE HON. ATTORNEY GENERAL…….....…….…….3RD RESPONDENT

(Being an Appeal from the Judgment of Hon..C.N. Njalale (RM) in Maseno PMCC NO.228 OF 2012 delivered on 5th April, 2016)

JUDGMENT

Maurice Otieno Odeyo ***(hereinafter referred to as the 1st respondent)*** sued **Kenya Power & Lighting Co. Ltd** ***(hereinafter referred to as appellant),*** **The Permanent Secretary Ministry of Internal Security** and **The Hon. Attorney General** ***(hereinafter referred to as the 2nd and 3rd respondents)*** in the lower court claiming damages for false imprisonment, malicious prosecution and malicious prosecution.

The defendants filed statements of Defence and denied the claim and urged the court to dismiss it with costs.

In a judgment delivered on **5th April, 2016,** the learned trial Magistrate **found that the 1st respondent had proved his claim and** awarded him a sum of Kshs. 500,000/- general damages for false imprisonment, malicious prosecution and malicious prosecution.

The Appeal

The Appellant being dissatisfied with the lower court's decision preferred this appeal and filed the Memorandum of Appeal dated 12th April, 2016 which set out 6 grounds of appeal which can be summarized into 2 grounds to wit:-

1) The Learned trial Magistrate erred in law and in fact by finding that the appellant liable for the tort of malicious prosecution contrary to circumstances leading to the arrest and subsequent prosecution of the 1st respondent

2) The Learned trial Magistrate erred in law and in fact by awarding the 1st respondent a sum of Kshs. 500,000/- general damages for malicious prosecution a sum which award was

too excessive in the circumstances of the case

SUBMISSIONS BY THE PARTIES

When the appeal came up for hearing on 28.3.17; the parties' advocates agreed to dispose it off by way of written submission which they dutifully filed.

Appellant's submissions

In further exposition of the above grounds of appeal, learned Counsel for the appellant, invited this court to consider that there was evidence to support the finding that the institution of the criminal proceedings against the 1st respondent was justified. It was submitted further that the sum of Kshs. 500,000/- was excessive and that an award of Kshs. 300,000/- would have sufficed if the case had been proved.

1st Respondent's submissions

It was submitted for the 1st respondent that there was proof that the appellant and 2nd and 3rd respondents were malicious.

2nd and 3rd Respondents' submissions

The 2nd and 3rd respondents in supporting the appeal cited the case of ***John Ndeto Kyalo v Kenya Tea Development Authority & another [2005] eKLR.***

Analysis and Determination

This being a first appeal, this court is mandated to evaluate the evidence before the trial court while bearing in mind that it never saw or heard the witnesses and therefore make due allowance for that. The principles governing the consideration and evaluation and findings of an appeal court have well been established particularly in the case of ***Kiruga Vs Kiruga & Another [1988 KLR page 348*** where the Court of Appeal held

> ***"An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but his is a jurisdiction which should be exercised with caution."***

I have perused the entire record of appeal and considered the submissions for both parties. The principle issue for determination in this appeal is whether the prosecution against the respondent was malicious. The principles that govern a claim founded on malicious prosecution have been laid down in a number of case including the case of **Kagane -vs- Attorney General (1969) EA 643** where *Rudd, J* stated as follows:-

> ***a) The plaintiff must show that the prosecution was instituted by the defendant; or by someone for whose acts he is responsible;***
>
> ***b) That the prosecution terminated in the plaintiff's favour.***
>
> ***c) That the prosecution was instituted without reasonable and probable cause;***
>
> ***d) That the prosecution was actuated by malice;***

The foregoing principles were reiterated by Maraga J. (as he then was) in the case of ***John Ndeto Kyalo v Kenya Tea Development Authority & another [2005] eKLR*** where he held as follows:-

"In a claim for malicious prosecution it is incumbent upon the plaintiff to prove, of course on a balance of probabilities, four essential aspects. Not one, not two, not even three but all four essential aspects. These are that:-

1. The defendants instituted the prosecution against the plaintiff;

2. The prosecution ended in the plaintiff's favour;

3. The prosecution was instituted without reasonable and probable cause; and

4. The prosecution was actuated by malice"

Similar principles were expounded and reiterated by Odunga J. in the case ***Chrispine Otieno Caleb v Attorney General (2014) eKLR.***

According to the records especially the proceedings of the criminal trial, the appellant on 3.10.08 discovered that 83 electricity poles were missing from its Mambo Leo yard and that they had been transported to Nairobi by M/Vs KAU 372 C and KBJ097 E. The 1st respondent admitted that he had signed the delivery note that was used to remove the poles from the yard. There's evidence that the 1st respondent's signature on the delivery note was confirmed by the document examiner. The poles were recovered in Nairobi. There's no evidence that the appellant had authorized removal of the poles. The theft was reported to police and the 1st respondent and another were charged in ***Winam PM Criminal Case No. 2373 of 2009*** where after they were acquitted under section 201 of the Criminal Procedure Code on the grounds that there were disparities relating to-

- The number of poles stolen
- Date when the offence was committed
- The officer who took photographs of the recovered poles was not gazette

The appellant's report to the police that its poles had been stolen was factual and truthful. There is evidence that police conducted investigations and gathered evidence that showed that the 1st respondent had authorized removal of the poles without authority of the appellant. The 1st respondent was subsequently charged. From the foregoing; I therefore find that the police acted reasonably when they charged the 1st respondent on the basis of the complaint made by the appellant and evidence gathered in support thereof.

I am persuaded from the evidence before the trial court which was based on the material from the criminal case, that this prosecution was instituted with reasonable and probable cause. There is no material to support the allegation that the prosecution was actuated by malice. The fact that the 1st respondent was acquitted is not sufficient basis to ground a suit for malicious prosecution. (See ***Nzoia Sugar Company Ltd v Fungututi (supra)***.

In the current case the appellant and 2nd and 3rd respondent's defence in the lower court denied the 1st respondent's claim as pleaded in the plaint. It was therefore incumbent upon the 1st respondent to establish his case on a balance of probability. Justice J. V. Juma (as he then was) in the case of **Susan Mumbi Waititu v Kefala Greedhin NRB HCC 3321 of 1993** stated that:-

"The question of the court presuming adverse evidence does not arise in civil cases. The position in civil cases is that he who alleges has to prove. It's for the plaintiff to prove her case on the balance of probability and the fact that the defendant doesn't adduce any evidence is immaterial".

I have considered the cases of ***Joyce Adeko V The Attorney General HCCC No. 6056 of*** 1992 and ***Teresa Mwana Nyaga v G.K.Mutunga & 4 Others HCCC 1444 of 1997*** cited by the 1st respondent where the defendant was found liable for its failure to defend the suits and I am not persuaded that the appellant and 2nd and 3rd respondents should be held liable only for the fact that they did not tender any

evidence.

From the foregoing, I find that the learned trial magistrate's finding that the appellant and 2nd and 3rd respondents liable on the ground of the inconsistencies in the evidence of the prosecution witnesses did and that the appellant and 2nd and 3rd respondents not call any witnesses was based on a misapprehension of the law.

The upshot of the above analysis and evaluation is there is no material before the court which supports the case of false imprisonment, malicious prosecution and malicious prosecution. In the end; this appeal is allowed; the judgment of the trial court is set aside and substituted with an order dismissing the suit. The appellant shall have costs of the appeal and the proceedings in the lower court.

DATED AND DELIVERED THIS *29th* **DAY OF** *June* **2017**

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Appellant - Mr. Oduor h/b for Mr. Nyamwange

1st Respondent - N/A

2nd Respondent - N/A