THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 008 OF 2012

(Arising from Civil Suit No. 1965 of 2009)

DR. WINYI KABOYO ::APPELLANT

VERSUS

MUWAGULA GEORGE ::::::::::::::::::::::::::::::::RESPONDENT

BEFORE: HON. LADY JUSTICE ELIZABETH MUSOKE

JUDGMENT

The appellant herein, DR. WINYI KABOYO, being dissatisfied with the judgment and orders of Her Worship Juliet Nakitende Magistrate Grade 1, delivered on 13/01/2012 at Chief Magistrates Court of Mengo appealed to this court on grounds that;

1. The learned trial Magistrate erred in law and fact when she held that the appellant was liable for the false imprisonment and malicious imprisonment of the respondent.
2. The learned trial Magistrate erred in law and fact when she awarded punitive damages against the appellant.
3. That the trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record thereby coming to a wrong conclusion.

It is prayed that the appeal be allowed; the judgment of the learned trial Magistrate be set aside or varied, and that the appellant be awarded costs of the appeal and the court below.

From the pleadings and evidence on record, the respondent sued the appellant herein together with the Attorney General jointly and severally for special, general and punitive damages arising out of false imprisonment and malicious prosecution; interest and costs of the suit.

It was the respondent's case as stated in paragraph 5 of the plaint that on or about 7/01/2009, he was arrested by servants of the Attorney General and charged at City Hall court in Kampala with the offence of theft of shs. 2,000,000/= from the appellant's motor vehicle on 30/12/2008, at Mulago washing bay in Kampala. He was eventually acquitted of the said offence due to insufficient evidence adduced at the trial. It is on this basis that he instituted Civil Suit No.1965 of 2009 at the Chief magistrates Court of Mengo seeking a host of remedies as stated in the plaint arising from the alleged false imprisonment and malicious prosecution.

On the other hand, the Attorney General/then 1st defendant in the original suit filed its Written Statement of Defence wherein it denied the plaintiff's/respondent's claim. In the alternative it was averred for the Attorney General that if the respondent was arrested and prosecuted, it was done lawfully and on reasonable cause that he had committed a criminal offence. It was also averred that the plaint was devoid of a cause of action

as against the Attorney general and that the same ought to be dismissed with costs.

For the 2nd defendant, the appellant herein, it was averred that the respondent was lawfully prosecuted in the circumstances. It was his averment that shs. 2,000,000/=, which was the subject of the prosecution against the respondent went missing from the appellant's car when the same had been taken to Mulago Washing Bay; where the appellant had been at the time and had gone ahead to wash the vehicle, where the money had been kept. It was after washing the car that the appellant discovered that his money had gone missing. It was on this basis that he reasonably believed that the same had been stolen by the respondent. It was therefore on this background that the appellant reported the matter to the police thereby culminating into the respondent's arrest and eventual prosecution at City Hall.

In reply to the appellant's averment, the respondent averred that his arrest and subsequent prosecution were actuated by the appellant's actions/conduct based on fictitious and non-existent claims/complaints of theft of shs 2,000,000/= by the respondent to the 1st defendant's (Attorney General) agents/servants/ employees.

At the trial, three issues were raised for determination, that is;

1. Whether the plaintiff was falsely imprisoned and maliciously prosecuted by the defendants.

2. And if so, whether the defendants are liable to the plaintiff

3. Remedies available to the parties.

In her judgment, the Trial Magistrate found in favour of the plaintiff/respondent in so far as she found that his arrest was instigated by the 2nd defendant/appellant; the respondent was falsely imprisoned and that the prosecution against him was done maliciously. Accordingly the plaintiff/respondent was awarded shs 5,000,000 as general damages; shs 3,000,000 as punitive damages; interest at the rate of 18%p.a on both awards from the date of judgment till payment in full, and costs of the suit.

The 2nd defendant/appellant, being dissatisfied with the judgment and the orders made therein, filed this appeal. The Attorney General, apart from filing a defence, did not participate in the proceedings; this probably explains why it is only the 2nd defendant that has lodged an appeal in this court. Be that as it may, I will go ahead to determine the appeal between the parties as it appears.

This is a first appeal. It is the duty of the first appellate court to review the record of the evidence for itself in order to determine whether the conclusion reached upon the evidence by the trial court should stand. It is trite that if the conclusion of the trial court has been arrived at on conflicting testimony after seeing and hearing witnesses, the appellate court in arriving at a decision would bear in mind that it has not enjoyed this opportunity and the view of the trial court as to where credibility lies is entitled to great weight: ***Peters Vs Sunday Post [1958] EA 424***.

The appellant sought to discuss the grounds of appeal in the chronology they were raised. However for purposes of coherence, I will resolve/ determine ground three of the appeal first, then ground two will follow and finally ground one.

Ground 3: That the trial magistrate erred in law and fact when she failed to properly evaluate the evidence on record thereby coming to a wrong conclusion.

It was submitted for the appellant that the record of the trial court shows that the appellant withdrew shs 2,000,000= on the 30/12/08 as proved by the bank statement that was exhibited; and the testimony of a one Ayo Francis, a police officer, who investigated the complaint clearly showed that the appellant did not specifically mention any particular person as having stolen the money. It is on this basis that it is contended for the appellant that the Trial Magistrate ought to have found that the appellant was not liable for the arrest and prosecution of the respondent for the simple reason that the appellant merely reported a case of theft to the police without pointing any fingers on the respondent. It is therefore submitted for the appellant that the Trial Magistrate failed to evaluate the evidence on the record so as to determine the right person that was responsible for the arrest and eventual prosecution of the respondent.

Counsel for the respondent did not agree with the appellant's submission that the trial magistrate had indeed failed to properly evaluate the evidence before her. It is contended for

the respondent that the appellant has failed to show any error committed by the trial Magistrate while evaluating the evidence before her to justify the alleged wrong conclusion. It is further submitted for the respondent that it is instead counsel for the appellant that had concocted and introduced new and contradictory evidence (that of Detective Ayo Francis) in as far the said detective had admitted in cross examination that he recorded a statement from the appellant alleging that the respondent had actually stolen his money and not his driver, a matter he never independently thoroughly investigated.

I am of the considered view that there is no set format to which evaluation of evidence should conform and while the length of the analysis may be indicative of a comprehensive evaluation of evidence, the test of adequacy is a question of substance. Evaluation of evidence may depend on the circumstance of a given case and the style used by a given judicial officer.

I am mindful of the duty of this court as a 1st appellate court, it is duty bound to re- evaluate the evidence before it. I will do my best to discharge that duty.

The respondent stated on page 9 of the (handwritten) record of proceedings of the trial court that;

> ***"I was seated with my colleague where I work from when I saw policemen..(sic) I later saw Haji who told the policemen to arrest me...."***

At page 11 the respondent stated;

"I only saw the Doctor as a witness, I was in court... I had never seen him..."

At page 14 the respondent in cross examination testified that;

"I did not see the 2nd defendant when I was arrested.... I heard when the 2nd defendant say to police I stole his money when I was at police. ...the 1st time I saw the 2nd defendant was at court (sic)"

In re-examination the respondent testified that;

"***the CID who recorded my statement told me that the 2nd defendant had complained that I had stolen his money."***

On the other hand the appellant testified that he did not tell the police that the person that had washed the car had stolen the money (page19), but it was after investigations by the police that he was told that someone had been arrested in connection with the theft (page 20). Additionally the investigating officer (Ayo) stated in his testimony that no one told him to arrest the respondent (page 37) and that he only inquired about the person who had washed the vehicle that allegedly contained the money in issue and the appellant's driver identified the respondent.(page 33). He also testified that their investigation pointed to the respondent, having washed the vehicle that contained the money (page 40).

From the excerpt above, it is clear that appellant did not ever mention that the respondent had indeed stolen his money; he did not even know him before the incident. It seems clear from the record that the appellant lodged a complaint with the police

of the alleged theft of his money in the undisputed sum of shs 2,000,000/=. It is the police that arrested the respondent as a suspect, having washed the car where the alleged money had been kept. The respondent's testimony actually shows that it is the appellant's driver (a one Hajji Ntege) that told the police to arrest the respondent and not the appellant. For this reason, I am of the considered opinion that the trial Magistrate failed to evaluate the evidence so as to determine the person that had indeed advised/ told the police to arrest the respondent. Without prejudice to the foregoing, it was stated by Ayo (police officer) that the respondent was arrested after the police had carried out investigations into the alleged theft. It is my finding that this ground of appeal must succeed.

Turning to the other ground of the appeal, that is, ***the learned trial Magistrate erred in law and fact when she held that the appellant was liable for the false imprisonment and malicious imprisonment of the respondent.***

It is submitted for the appellant that the evidence adduced in the trial court showed that on 30.12.08, the appellant withdrew shs 2,000,000 from Stanbic Bank and that the said money had disappeared from the vehicle. In this regard the appellant could not be said to have been driven by malice to make the claim of theft at the police station as indeed the money had been stolen. It is further contended that the appellant did not mention to the police that it was the respondent who had stolen the money; he merely made a general complaint of the alleged theft. It was through the police investigations that the

respondent was arrested, detained and eventually prosecuted. It was therefore Counsel's submission that the case of ***Sekaddu Vs Sebadduka [1968] EA 213*** relied on by the trial Magistrate was distinguishable from the instant case. I will comment about this later on.

It is further submitted for the appellant that the prosecution of the respondent cannot be blamed on the appellant since it was instituted by the DPP by virtue of Article 120 (3) (b) of the Constitution on the one hand; and that there was reasonable and probable cause for the prosecution of the respondent on the other hand. Referring to ***Kateregga Vs Attorney General EALR 287*****,** counsel submitted that in a case of malicious prosecution, the plaintiff ought to prove that the person instituting proceedings was actuated by spite, ill will or improper motive. It is counsel's submission that none of these was proved on the part of the appellant as such this ground of appeal must succeed.

For the respondent, it is contended that the appellant has failed to show that he did not commit the acts for which the trial court found him liable. It is counsel's submission that the authorities of ***Sekaddu Vs Sebadduka (supra); Alaudin Ramtulla Vs Uganda Bookshop Ltd HCCS No. 249 of 1971*** were rightly applied to the instant case by the trial Magistrate**.** Counsel further cited the authority of **Mahon *& Anor Vs Rahn & Another (No.2) (2004)4 All ER 41 at 242*** for the proposition that where an individual falsely and maliciously gives a police officer information indicating that

some person is guilty of a criminal offence and states that he is willing to give evidence in court of the matter in question; it is properly to be inferred that he desires and intends that the person he names should be prosecuted. Such an individual is deemed to be actively instrumental in setting the law in motion.

On the other hand, it was contended for the respondent that it was inconceivable as to why the appellant had insisted and maintained that the respondent was culpable for the theft yet he had not directly dealt with him in any way. It is also submitted for the respondent the case of ***Kateregga Vs Attorney General (supra)*** as cited by the appellant is distinguishable in the present case in as far as the appellant was not only spiteful but also malicious and coupled with improper/ill motive when he caused the arrest and detention and subsequent prosecution of the respondent for a crime he had not committed.

Furthermore, it is the respondent's submission that the imprisonment of the respondent for a period of one week was unjustifiable and as such the trial magistrate rightly awarded the sum of shs. 3,000,000/= as punitive damages against the Attorney General. Premised on the above submission counsel maintained that the trial Magistrate rightly found that the appellant was liable for the false imprisonment and subsequent prosecution of the respondent. Counsel invited court to uphold the trial magistrate's finding accordingly.

I have critically re- evaluated the evidence on the record in order to ascertain whether the respondent was maliciously prosecuted and whether the finding of the trial magistrate should be left to stand or be quashed.

It is trite law that for malicious prosecution to succeed the plaintiff must prove that the proceedings were instituted by the defendant without probable or reasonable cause; the defendant must have acted maliciously and the proceedings must have terminated in favour of the plaintiff. The authority of ***AG Vs Hajji Adam Farajala [1977] HCB 29*** is instructive.

Suffice it to note is that the malice necessary to be established is not even malice in law such as may be assumed from the intentional doing of a wrongful act, but malice in fact **-** *malus animus*- indicating that the party was actuated either by spite or ill will towards an individual or by indirect or improper motives, though these may be wholly unconnected with any uncharitable feeling towards anybody.

The plaintiff in an action of malicious prosecution must prove that the prosecution was instituted without reasonable and probable cause.

Reasonable and probable cause has been defined (Farajala's case supra) as; 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 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.

This matter requires very careful consideration, that is to say, the aspect as to whether the evidential material on which the prosecution was based was such that a reasonably prudent and cautious man could have honestly believed that it was sufficiently credible and cogent to justify the institution of a prosecution. It is sufficient to constitute primary reasonable and probable cause if the prosecutor proceeds on such information as a prudent and cautious man may reasonably accept in the ordinary affairs of life; ***Kagane Vs AG 1969 EA 643.***

In the matter now the subject of appeal, it is stated that the appellant's money went missing from the vehicle when it had been taken to the washing bay and eventually washed by the respondent. As to whether the ingredients of the offence of theft were present is not for this court, being a civil court to determine. Criminal offences such as theft are a preserve of the criminal court. What is material to this court is whether a reasonably prudent man believing that his money was lost/stolen in the circumstances as the ones before court would have caused the arrest of the respondent. It is not in dispute that the respondent washed the appellant's car both the exterior and the interior where the money was allegedly kept. It is no doubt that the respondent having washed the car would reasonably be believed to have knowledge of the contents of the car he washed; it is also probable that the driver of the car

could fail to see the bag that contained the said money hidden under the car seat, and yet it seems more probable that the person that washed the interior of the car would see such a bag, if any, in the course of cleaning.

As such although the prosecution terminated in favour of the respondent; I am not convinced that the appellant was either spiteful or malicious in having the respondent arrested, having in mind that he neither knew him nor had seen him before the incident. Besides the arrest, detention and eventual prosecution of the respondent was done at the instance of the police and not the appellant. For the reasons stated above; this ground of appeal succeeds.

Turning to ground 2 of the appeal, that is, ***the learned trial Magistrate erred in law and fact when she awarded punitive damages against the appellant.***

It is submitted for the appellant that the trial Magistrate misdirected herself in making an award for punitive damages against the appellant. It is submitted that exemplary or punitive damages are awardable where there has been oppressive, arbitrary or unconstitutional actions by the servants of government and not private individual, like the appellant. Counsel referred to ***Rooks Vs Bernard (1964) All ER 367***. He submitted that it was a serious error on the part of the trial Magistrate to condemn the appellant to punitive damages.

These should have been against the Attorney General/ 1st defendant therein.
Conclusively, counsel invited court to allow the appeal with costs here and in the trial court.

In reply, it is submitted for the respondent that the punitive damages awarded in the trial court were as against the Attorney General as a 1st defendant for the blatant acts of his servants/ agents/employees in falsely detaining the respondent beyond the mandatory constitution limit of 48 hours and not the appellant.

Conclusively counsel invited court to dismiss the appeal with costs here and below for being frivolous, vexatious and an abuse of process.

Having resolved the ground in relation to malicious prosecution in favour of the appellant; I am of the considered opinion that the grant of punitive damages is without any justification. The same is henceforth set aside.

In the final result, the appeal succeeds; the judgment of the learned trial Magistrate is hereby set aside. However the justice of this case requires that each party must bear its costs.

Orders accordingly.

Elizabeth Musoke

JUDGE
24/09/2014