



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO.119 OF 2012

CHRISTOPHER ATURUAPPELLANT

VERSUS

AMEDO CENTRE LIMITED.....1ST RESPONDENT

THE ATTORNEY GENERAL2ND RESPONDENT

J U D G M E N T

1. The appellant sued the defendants jointly and severally for general damages arising out of Kisumu Criminal Case No.429 of 2008 in which the appellant had been charged with the offence of Forgery and uttering false documents contrary to Section 357(6) and 253 of the Penal Code. In the said case the appellant was acquitted in all counts. He then filed a civil claim which was dismissed hence this appeal.

2. In the lower court the appellant testified that he was an employee of the 1st defendant for a period of 4 years. He had been employed as a salesman. The 1st defendant's goods were found at a bus stage which raised suspicion as its goods were not ordinarily hawked. The 1st defendant's manager DW1 then took the steps of notifying the police which led into the arrest of the appellant and his co-accused. The trial court in the criminal proceedings however acquitted him under the provisions of Section 210 of the Criminal Procedure Code.

3. The appellant being dissatisfied with the decision of the trial court has filed this appeal citing 5 grounds namely:

1. **The learned trial magistrate grossly misdirected himself in dismissing the plaintiffs case despite the fact that the plaintiff having proved his case on a balance of probabilities.**
2. **The learned trial magistrate grossly misdirected himself in considering irrelevant issues while arriving at his decision;**
3. **The ruling was against the weight of evidence;**
4. **The learned trial magistrate erred in both law and fact in failing to consider the appellant's submissions while arriving at the decision;**
5. **The learned trial magistrate erred in law and fact by failing to assess damages that the plaintiff would have been awarded had the suit succeeded.**

4. Its now trite law that for a case of malicious prosecution to be established the following factors have to be considered:

1. That the prosecution was instituted by the defendants or by someone to whose acts he is responsible.
2. That the prosecution terminated in the plaintiff's favour.
3. That the prosecution was instituted without reasonable and probable cause.
4. That the prosecution was actuated by malice (see *Mbowa vrs East Mengo District Administration (1972) E.A. 352*

5. Its true that the criminal trial was terminated in favour of the appellant and that the same was instituted by the respondents. Can it therefore be said that the same was malicious" From the proceedings in the lower court it appears that DW1 Samuel Ndungu received information that the 1st respondent's goods were being hawked contrary to its normal operations. He went to the police and later had the appellant arrested together with his accomplice. Can the action be termed malicious" I do not think so. The said witness had a reasonable suspicion of whet was going on in respect to the items which are normally sold by the 1st respondent. In fact they managed to recover them which included LG TV and Sony HIFI. Those products were to be taken to one Noel Agesa who was a customer. The whole transaction was to be undertaken by the appellant who was its salesman.

6. I find that there was a reasonable suspicion on the part of the 1st respondent that its goods were being handled contrary to the laid down rules which I believe were well known by the appellant. The only recourse was to involve the police which he actually did. I respectfully do not find the trial court having erred in that respect on its findings.

7. Neither can it be said that the police acted maliciously. Although the appellant was later acquitted, the acquittal does not perse entitle him to damages. Malice or spite or ill will on the part of the respondents jointly and severally ought to be proved.

8. On the last issue of the trial court failing to award damages in any event, I find that whereas that would be true I do not find any basis or material for the court or this court to award him any damages. The appellant did not prove in my finding how he suffered in the process. He was lawfully arrested and brought to court within a reasonable time and granted bail. He raised the same within a week and did his case while on bond till the time of his acquittal. Neither did he prove his income or such status in society so as to attract any claims from damages. He did not place any material before court to show that he has attempted any form of employment or at all.

9. In summary therefore I do not think that the appellant's appeal is meritorious. The same is dismissed with costs to the respondents.

Dated, signed and delivered this day 10th of March 2016

H. K. CHEMITEI

J U D G E



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