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| Case Number:   | Civil Appeal 17 of 2014  |
| Date Delivered:  | 18 Dec 2014  |
| Case Class:  | Civil  |
| Court:   | High Court at Homabay  |
| Case Action:   | Judgment   |
| Judge:   | David Shikomera Majanja  |
| Citation:  | Music Copyright Society Of Kenya v Tom Odhiambo Ogowl [2014] eKLR  |
| Advocates:   | Mr Rombo instructed by Rombo & Company Advocates for the appellant. Mr Nyauke instructed by Nyauke & Company Advocates for the respondent. |
| Case Summary:  | -  |
| Court Division:  | Civil  |
| History Magistrates:   | S. O. Ongeru   |
| County:  | Homa Bay   |
| Docket Number:   | -  |
| History Docket Number:   | Civil Case No. 117 of 2011   |
| Case Outcome:  | Dismissed with costs   |
| History County:  | Homa Bay   |
| Representation By Advocates:   | Both Parties Represented   |
| Advocates For:   | -  |
| Advocates Against:   | -  |
| Sum Awarded:   | -  |
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REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CIVIL APPEAL NO. 17 OF 2014

BETWEEN

MUSIC COPYRIGHT SOCIETY OF KENYA ..... APPELLANT

AND

TOM ODHIAMBO OGOWL ..... RESPONDENT

*(Appeal from the original judgment and decree in Civil Case No. 117 of 2011 at the Chief Magistrates Court at Homa Bay, Hon. S. O. Onger, PM, dated 20<sup>th</sup> June 2013)*

JUDGMENT

1. This is an appeal by the appellant (“MCSK”) on the following grounds set out in the memorandum of appeal dated 12<sup>th</sup> July 2013;

1. That the learned magistrate erred in law and in fact by making a finding on liability for malicious prosecution when none was proved.

2. That the learned magistrate misdirected himself in awarding the respondent Kshs. 200,000.00 as general damages when it was not proved.

2. The respondent’s case against the appellant was that on 17<sup>th</sup> January 2011, MCSK moved to the respondent’s premises at Sofia Estate, Homa Bay Town and impounded his electronic equipment on the ground that he was operating a business without a licence. On the next day, he was arraigned and charged at the Homa Bay Senior Residents Magistrates Court in **Homa Bay SRM Criminal Case No. 40 of 2011**. He was charged with the infringement of copyrighted musical works contrary to **section 38(2)** as read with **section 38(7)** and **38(8)** of the **Copyright Act, Act No. 12 of 2001**.

3. After the hearing of the prosecution case, the learned magistrate found that the prosecution had not established a prima facie case and that the respondent had no case to answer consequently the respondent was acquitted under **section 210** of the **Criminal Procedure Code (Chapter 75 of the**

**Laws of Kenya).**

4. The respondent therefore filed the claim for malicious prosecution. In his plaint dated 8<sup>th</sup> November 2011 stated that the charges were brought maliciously. He set out the following particulars of malice in the plaint.

1. *The 1<sup>st</sup> defendant knew or ought to have known that it had no claim against the plaintiff yet it proceeded to lay such a claim.*
2. *The 1<sup>st</sup> defendant had the sole objective of subjecting the plaintiff to a trial in court without any basis at all.*
3. *The 1<sup>st</sup> defendant completely ignored the statutory provisions that relates to the claim it was laying against the plaintiff.*
4. *The 1<sup>st</sup> defendant used the court trial to intimidate the plaintiff to pay fees to the 1<sup>st</sup> defendant without any justification at all.*
5. *The 2<sup>nd</sup> defendant acted recklessly and maliciously in charging the plaintiff in court.*

5. MCSK admitted that on 17<sup>th</sup> January 2011, its officers accompanied by police officers, went to the respondent's premises in order to enforce compliance with the **Copyright Act**. That the respondent was found operating a hall where local and international videos were being shown and played to the paying public. The appellant alleged that the respondent did not display or produce a Copyright Music Licence issued by MCSK permitting him to relay copyrighted works in his premises. That the respondent vanished from the premises whereupon the officers impounded his electronic gadgets and subsequently caused him to be charged. MCSK denied that it had caused the criminal proceedings to be instituted maliciously.

6. In the judgment the learned magistrate addressed himself to the ingredients to be proved in a case for malicious prosecution. He found as a fact the respondent was acquitted. As to whether the criminal case was instituted without a reasonable and probable cause, the learned magistrate held that the appellant did not demonstrate that the music that was being played in the shop was for the author whose artistic works had been registered and protected by the appellant. He concluded that, *"I find that [the]*

*defendant and the agents [of] the 2<sup>nd</sup> defendant by insisting to charge the accused yet no artistic author was identified fell short of the statutory obligation. By doing this they had no probable and reasonable cause for arresting and charging the accused. I further find that malice was proved.”*

7. Both parties filed written submissions which they highlighted. Mr Rombo, learned counsel for MCSK, attacked the judgment on the ground that the respondent failed to prove that there was no reasonable and probable cause in instituting the criminal proceedings. He submitted that the reason for the respondent's arrest and charge was that he did not have or display a licence, a fact which the respondent did not dispute. The appellant submitted that it was duly licenced collecting society under **section 46** of the **Copyright Act** and under the provisions of **section 35** of the **Act**, all public performances of music required a licence which licence the respondent did not have. He contended that there was no proof of malice and that mere acquittal of the respondent was insufficient to prove malice.

8. Mr Nyauke, counsel for the respondent, submitted that the appellant had no reason to report or seek police assistance in order to enforce the rights of its members. He submitted that the appellant failed to prove that the respondent was playing music publicly and as such it could not tell whether the author of the work was protected as such the complaint against him was baseless and malicious.

9. As this is a first appeal, I am called upon to examine and evaluate the evidence and reach an independent conclusion as to whether the judgment in the court below should be upheld bearing in mind that I did not hear or see the witnesses testify. Both parties agree on the ingredients to be proved in a case of malicious prosecution. These elements have been stated in several cases among them; **Kagane and Others v Attorney General and Another** [1969] EALR 643, **Katerregga v Attorney-General** [1973] EALR 287, **Mbowa v East Mingo District Administration** [1972] EA 352, **Murunga v Attorney General** [1979] KLR 138 as follows;

- a) The plaintiff must show that 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

10. In ***Mbowa v East Mengo District Administration (Supra)***, the East Africa Court of Appeal stated that;

*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.*

11. Whether there was reasonable and probable cause is to be determined from the nature of the charge preferred by the police. The respondent was charged with the infringement of copyrighted musical works contrary to **section 38(2)** of the **Copyright Act** which provides;

*Any person who causes a literary or musical work, an audio-visual work or a sound recording to be performed in public at a time when copyright subsists in such work or sound recording and where such performance is an infringement of that copyright shall be guilty of an offence unless he is able to prove that he had acted in good faith and had no reasonable grounds for supposing that copyright would or might be infringed.*

12. In essence, the provision makes it an offence to cause the performance of a literary, musical or audio visual work protected by copyright in public where such a performance constitutes an infringement. While displaying a licence is one way of showing that owner of the premises has permission to cause the copyrighted work to be performed publicly, it is by no means necessary as the accused is entitled to show he acted in good faith and had no reasonable ground for supposing that copyright would or might be infringed.

13. With profound respect to the learned magistrates who dealt with the criminal and civil case, the offence had nothing to do with membership of a copyright society. The offence was prosecuted by the police and it applies in respect of all and any works where copyright subsists. A Collection Society, such as MCSK, is charged with collection of royalties on behalf of its members and safeguarding its members' interests by ensuring that persons who play music publicly are duly licenced and if they are not, they are prosecuted and that is why lays a complaint with the police. It is entitled to lodge complaints with the police where reasonable grounds exist.

14. On the issue whether there was reasonable ground for belief that the respondent had violated **section 38(2)** of the **Copyright Act**, the respondent admitted that he was operating a business showing football matches to the public. He admitted that he was aware that he had to have a licence and to

display it. The showing of football matches to the public is an “*audio visual work*” under the provisions of **section 38(2)** of the **Act**. A perusal of the proceedings in the criminal case show that the respondents shop was showing movies and playing music in the background. In view of the clear admissions by the respondent and the evidence, I find that there was reasonable and probable cause that that an offence had been committed under **section 38(2)** of the **Act** and the MCSK officers were entitled to lay a complaint against the respondent.

15. The law is clear that the mere fact that a person has been acquitted of the criminal charge does not necessarily connote malice on the part of the prosecutor. In ***Nzoia Sugar Company Ltd v Fungututi*** [1988] KLR 399, the Court of Appeal held;

*Acquittal per se on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecutor. The mental element of ill will or improper motive cannot be found in an artificial person like the appellant but there must be evidence of spite in one of its servants that can be attributed to the company.*

16. The learned magistrate therefore erred in finding malice as a result of finding that there was no reasonable and probable cause. The two ingredients are distinct and where the plaintiff fails to prove that there was not reasonable and probable cause, the question of malice does not arise for consideration.

17. After evaluating all the evidence before the subordinate court, I find that the respondent failed to prove his claim. I therefore make the following orders;

- a. The appeal is allowed with costs to the appellant.
- b. The judgment and decree in the subordinate court is set aside and the suit is dismissed with costs to the defendant.

**DATED and DELIVERED at HOMA BAY this 18<sup>th</sup> day of December 2014.**

**D.S. MAJANJA**

## **JUDGE**

Mr Rombo instructed by Rombo & Company Advocates for the appellant.

Mr Nyauke instructed by Nyauke & Company Advocates for the respondent.



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