



**Chogo v Attorney General & 2 others (Civil Appeal E859 of 2022)
[2024] KEHC 7693 (KLR) (Civ) (24 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7693 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E859 OF 2022

WM MUSYOKA, J

JUNE 24, 2024

BETWEEN

JOSEPH ONYONO CHOGO APPELLANT

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT

(An appeal arising from the judgment of Hon. SA Opande, Principal Magistrate, PM, delivered on 26th September 2022, in Nairobi CMCCC No. E12441 of 2021)

JUDGMENT

1. The suit, at the primary court, was initiated by the appellant, against the respondents, for compensation, for malicious prosecution, with respect to a criminal prosecution in Makadara CMCCRC No. 4616 of 2014, on a charge of theft by servant, which terminated with his acquittal. The case was that appellant did not steal from his employer as alleged, and that the prosecution was actuated by malice. The respondents filed a joint defence, in which they denied liability, arguing that the complaint had been thoroughly investigated, a probable and reasonable suspicion was drawn that the appellant had committed an offence, the police exercised their statutory duties in arresting him and arraigning him in court, and that his subsequent prosecution was without any malice.
2. A formal hearing was conducted, where only the appellant testified. The respondents did not participate at the trial. In the end, a judgment was delivered on 26th September 2022, where the suit was dismissed, on grounds that the case was not proved on a balance of probability.



3. The appellant was aggrieved, hence the instant appeal. The grounds, in the memorandum of appeal, dated 21st October 2022, revolve around the trial court erring for finding that the ingredients to satisfy a case for malicious prosecution had not been established; the appellant had discharged his legal and evidential burden, and that it was the respondents who had failed to adduce evidence to disprove his case; the respondent had failed to defend the suit, and, therefore, the case by the appellant was unrebutted; and the trial court had misapprehended the requirements for establishing a case of malicious prosecution.
4. Directions were given on 12th June 2023, for disposal of the appeal by way of written submissions. There has been compliance, for both sides have filed their respective written submissions.
5. The appellant has summarised his grounds into 2: whether the evidence presented satisfied the ingredients for a claim of malicious prosecution, and whether the appellant discharged his burden of proof. He has cited *Mbowa vs. East Menjo District Administration* [1972] EA 352 (), *Christpine Otieno Caleb vs. Attorney General* [2014] eKLR (Odunga, J), and *George Francis Simiyu vs. Attorney General & 4 others* [2021] eKLR (HA Omondi, J), on the ingredients of the tort of malicious prosecution. On burden and standard of proof, he cites section 108 of the *Evidence Act*, Cap 80, Laws of Kenya, and *Grace Nzula Mutunga vs. Joyce Wanza Musila* [2017] eKLR (DK Kemei, J).
6. On their part, the respondents have identified 2 issues for determination: whether the elements necessary to prove a claim for malicious prosecution had been established by the appellant, and whether the failure by the respondents to tender evidence meant that the case by the appellant was unrebutted. They have cited *Kagane vs. Attorney General* [1969] EA 643 (Rudd, J), *Murunga vs. Republic* [1976-80] 1 KLR 1251 (Cotran, J), *Abubakar Simba vs. Stephen Njoroge Wambari* [1987] KLR 601 (Mbaluto, J), *Nzoia Sugar Company Limited vs. Collins Fungututi* [1988] eKLR (Platt, Apaloo JJA, & Masime, Ag JA), *James Karuga Kiiru vs. Joseph Mwamburi & 3 Others* [2001] eKLR (Omolo, Lakha & Owuor, JJA), *Byrum Kenneth Olenja vs. Michael Opundo & another* [2011] eKLR (Okwengu, J), *Susan Mutheu Muia vs. Joseph Makau Mutua* [2018] eKLR (C. Kariuki, J), *Cooperative Bank of Kenya Limited vs. Patrick Mutuku* [2018] eKLR (Githua, J), *Attorney General & 2 others vs. Josephat Maina Karuoro* [2018] eKLR (Muchemi, J), *Kioko Mwakavi Makali vs. Attorney General & another* [2019] eKLR (Odunga, J), *James Kahindi Simba vs. Director of Public Prosecutions & 2 others* [2020] eKLR (Nyakundi, J), *Andrew Mulika Kithusi vs. Beatrice Nthambi Muya & 3 others* [2020] eKLR (DK Kemei, J) and *Lawrence Onyango Oduori vs. Attorney General & another* [2022] eKLR (Chitembwe J).
7. The case before the trial court was founded on the tort of malicious prosecution. Case law, as stated in *Egbema vs. West Nile District Administration* [1972] EA 60 (Sir William Duffus P, Law Ag. VP & Lutta JA), *Kagane and others vs. Attorney-General and another* [1969] EA 643 (Rudd, J), *Katerregga vs. Attorney General* [1973] EA 287 (Mead, J), *Murunga vs. Republic* [1976-80] 1 KLR 1251 (Cotran, J), among others, is to the effect that the ingredients for the tort of malicious prosecution, and which any claimant for damages or compensation for that tort must prove, are: the prosecution was initiated by the defendant or defendants, it terminated in favour of the plaintiff, it was initiated without reasonable and probable cause and it was instituted with malice.
8. In *Kagane and others vs. Attorney-General and another* [1969] EA 643 (Rudd, J) and *Murunga vs. Republic* [1976-80] 1 KLR 1251 (Cotran, J) what constitutes reasonable and probable cause is defined. It was said that it is about the guilt of the accused person being based on reasonable grounds, and that there would be absence of reasonable and probable cause where a reasonable and cautious person would not have been satisfied that there was a proper case to be put before the criminal court. The person alleging malicious prosecution must place evidence or facts before the civil court to demonstrate



that the case that the defendants had placed before the criminal court did not have any reasonable or probable cause, and that it was on that account that the prosecution failed. An acquittal by itself is not adequate proof of lack of a reasonable and probable cause. The plaintiff must go beyond the acquittal, and present material designed to explain why the prosecution terminated with his acquittal. The mere fact that the prosecution failed, without more, will not do.

9. The foundation for the tort of malicious prosecution is malice. There ought to be evidence to demonstrate that the prosecution was not about pursuit of justice, but was designed to achieve some wrongful or improper intent or motive. The standard meaning of malice is spite, invective, ill-will, wrongful motive, wickedness, among others. It refers to an intent to commit a wrongful act, or to act with reckless disregard of the law or the legal rights of another. Malicious prosecution is the institution of proceedings against a person for an improper purpose, or from wrongful and improper motives. See Black's Law Dictionary, Tenth Edition, Thomas Reuters, 2009, 1101, and 1102; Nzoia Sugar Company Limited vs. Fungututi [1988] KLR 399 (Platt, Apaloo JJA & Masime Ag JA); Gitau vs. Attorney General [1990] KLR 13 (Trainor, J); Standard Chartered Bank Kenya Ltd vs. Intercom Services Ltd & 4 others [2004] eKLR (Gicheru CJ, Githinji & Onyango-Otieno JJA) and Peter Kituku Ngilu vs. Attorney General [2021] eKLR (Riechi, J).
10. So, what happened here? Did the appellant demonstrate that his prosecution was not for probable cause, and was actuated by malice? I have perused both the plaint, the witness statement and the oral testimony in court, and I have noted that the respondent made no effort to demonstrate that the criminal prosecution was malicious, in terms of it being driven by spite or ill-will, or some other wrongful or improper motive, or that it was designed to serve some improper or wrongful purpose, and that the criminal prosecution did not have any probable or reasonable cause. He merely presented evidence of a criminal prosecution that terminated in his favour, and because the investigating officer did not testify. He did not lead any evidence of the circumstances of the case which could have exhibited malice in the action taken by the respondents. He needed to do more than just prove that he had been arrested, prosecuted and acquitted. The burden of proof of malice and of lack of probable and reasonable cause, in cases of this nature, lies with the plaintiff, and shifts to the defendants only after the plaintiff has presented evidence of malice and of lack of probable or reasonable cause, for the defendants to explain themselves. From the facts of this case, the appellant did not discharge that burden, and did not establish any case against the appellant to warrant any orders being made in his favour. The trial court came to the right conclusion, for the appellant had failed to establish his case to the required standard.
11. Part of the reason why the appeal herein was filed was because the respondents did not attend court when the case was heard orally. The appellant thinks that he had a field day, and a walkover, as his testimony was not subjected to cross-examination, and the respondents did not present evidence to counter his. He appears to harbour the notion that since his testimony was not challenged, by way of cross-examination, and counter evidence, then the trial court should have treated it as unrebutted and uncontroverted, and should have found in his favour, on that score alone. The argument appears to be that since there was no counter evidence, whatever evidence he adduced was adequate, on account of balance of probability. It was the only evidence available, he thinks, and, therefore, it was preponderant.
12. Is that it? No. Let me reiterate what I have stated hereabove, at paragraph 10, that the burden of proving malice and of lack of probable and reasonable cause, with respect to the tort of malicious prosecution, lies with the plaintiff, and shifts to the defendants only after the plaintiff has presented evidence of malice and of lack of probable or reasonable cause, for the defendants to explain themselves. There can be no walkover, in a case of malicious prosecution, for one has to prove lack of probable cause and malice, to be entitled to a judgment in their favour, where the claim is undefended or uncontested.



In the instant case, that burden was not discharged by the appellant, and, therefore, the fact that the respondents did not attend court to present their case, was of little consequence. The legal and evidential burden of proof never shifted to them. See *Karugi & another vs. Kabiya & 3 others* [1983] eKLR (Hancox JA, Chesoni & Platt Ag JJA) and *Gichinga Kibutha vs. Caroline Nduku* [2018] eKLR (JG Kemei, J). The trial court was not in error.

13. In the end, I find that the appeal herein is not merited, and I hereby disallow it. The consequence is that the appeal is dismissed in its entirety. Each party shall bear its own costs. It is so ordered.

**JUDGMENT IS DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA,
THIS 24TH DAY OF JUNE 2024**

W MUSYOKA

JUDGE

Ms. Veronica, Court Assistant, Milimani, Nairobi.

Mr. Arthur Etyang, Court Assistant, Busia.

Advocates

Ms. Malambo, instructed by Charles Gomba & Company, Advocates for the appellant.

Mr. Achola, instructed by the Honourable the Attorney General, for the respondents.

