



REPUBLIC OF KENYA



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**Ndiku v Muia & another (Civil Appeal 157 of 2019)
[2024] KEHC 9782 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9782 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 157 OF 2019**

JM OMIDO, J

JULY 31, 2024

BETWEEN

STANLEY KIOKO NDIKU APPELLANT

AND

MUSYOKA MUIA 1ST RESPONDENT

THE HON ATTORNEY GENERAL 2ND RESPONDENT

*(Being an Appeal from the Judgement and Decree of Hon. I.M. Kahuya, SRM
delivered on 27th September, 2019 in Machakos CMCC No. 820 of 2014)*

JUDGMENT

1. This appeal was preferred by Stanley Kioko Ndiku (hereinafter referred to as “the Appellant”), against the judgement and decree of Hon. I.M. Kahuya, Senior Resident Magistrate delivered on September, 2019 in Machakos CMCC No. 820 of 2014.
2. In the matter before the lower court, the Appellant herein was the Plaintiff while the 1st and 2nd Respondents were the 1st and 2nd Defendants respectively.
3. In the Amended Plaintiff dated 5th August, 2016 and filed in the lower court on 11th August, 2016, the Appellant sought the following reliefs;
 - a. General damages for unlawful arrest, false imprisonment and malicious prosecution.
 - b. Special damages of Ksh.150,200/-.
 - c. Costs of the suit and interest.
 - d. Any other relief that this Honourable Court may deem fit and just to grant.



4. After hearing the matter, the trial court in its judgement delivered on 27th September, 2018 concluded that the Appellant failed to prove his case on a balance of probabilities and proceeded to dismiss the suit with costs. Even so, as required of the trial court, the learned Magistrate assessed general damages with respect to malicious prosecution at Ksh.350,000/- which would have been the award if the Appellant had been successful in the suit.
5. Being aggrieved with the judgement of the trial court dismissing the suit, the Appellant presented the following grounds of appeal vide his Memorandum of Appeal dated 28th November, 2019:
 1. That the learned trial Magistrate erred in law by failing to find liability on the part of the Respondents and dismissing the Appellant's suit with costs despite the overwhelming evidence on record tendered by the Appellant during the hearing of the lower court suit.
 2. That the learned trial Magistrate erred in law and fact by making a finding that the Appellant had not proved his claim against the Respondents on a balance of probabilities when there was overwhelming evidence tendered by the Appellant during trial.
 3. That the learned trial Magistrate erred in law and fact by failing to make a finding that the Appellant had proved malice when the Appellant had tendered sufficient evidence that there was a suit between the Appellant and the 1st respondent's deceased father and the 1st Respondent was his father's witness in that case.
 4. That the learned trial Magistrate erred in law and fact by failing to consider the evidence by the Appellant that he was acquitted in the criminal case since ownership of suit property and interference of boundary features was not proved at all by the Respondents in the criminal case.
 5. That the learned trial Magistrate erred in law and fact by making a finding that the Appellant's acquittal in the criminal case was because of the high standard of prove in criminal (sic) when the Appellant tendered sufficient evidence before the court that he was acquitted for lack of evidence at all which was to be adduced by Respondents in the criminal case.
 6. That the learned trial Magistrate erred in law and fact in failing to consider the Appellant's substantive submissions on record in making her findings.
6. This being the first appellate court, I am required under Section 78 of the [Civil Procedure Act](#) and as was espoused in the case of *Sielle v Associated Motor Boat Co. Ltd* [1969] E.A. 123 to reassess, reanalyze and reevaluate the evidence adduced in the Magistrate's Court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.
7. In *Sielle*, Sir Clement De Lestang observed that:

“This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.

However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
8. Going to the evidence before the trial court, the Appellant testified as PW1 and told the court that on 27th December, 2011, he was summoned to Machakos Police Station and was locked up in the cells when he reported to the station. Later that evening, he was released on a police bond of Ksh.2,000/-



- with a requirement that he visits the station weekly until investigations were completed. The arrest was premised on a report that had been made by the 1st Respondent.
9. The Appellant told the trial court that he was later charged at Machakos Law Courts with the offence of interfering with boundary features and was acquitted after the trial was held.
 10. The Appellant produced the following documents in support of his case before the lower court: Proceedings in the criminal case. Demand letter before filing suit.
 11. The Appellant told the trial court that he was the erstwhile councilor of Misakwani Ward and that his arrest, arraignment and trial negatively affected his political career in the 2013 elections. He explained that he had another civil case pitting him with the 1st Defendant's father.
 12. He stated that he incurred expenses of Ksh.150,000/-. As a result of the arrest and prosecution. He blamed the police for maliciously prosecuting him on the basis of shoddily conducted investigations.
 13. Upon being cross examined, the Appellant told the trial court that he was placed on his defence in the criminal case and was acquitted after tendering his defence. He blamed the 1st Respondent, whom he said made a false claim to the police against him.
 14. The 1st Respondent testified before the lower court as DW1 and told the court that he was the complainant in a report that he made to the police against the Appellant whom he said had committed the offence of interfering with the boundary features between his property known as plot No. 906 and Plot No. 905 that belonged to the Appellant. The witness produced the following documents in support of his case: Confirmation letter of ownership of Plot No. 906. Copy of title deed for Plot No. 906.
 15. The copy of the determination (judgement or ruling) of the court in the criminal trial was not produced in the civil case in the lower court.
 16. The witness stated that the prosecution in the criminal trial called one Reuben, who testified that he saw the Appellant uprooting sisal boundary features that were between the two plots. He denied making a false claim or acting maliciously.
 17. Police Constable Adan testified before the lower court as DW2. He told the court that he was the investigating officer in Machakos Criminal Case No. 314 of 2020 in which the Appellant was charged. The witness stated that the 1st Respondent made a report to the police and the same was investigated subsequent to which the Appellant was charged. He was placed on his defence and acquitted upon the conclusion of the criminal trial.
 18. In the judgement rendered on 27th September, 2018, in dismissing the suit, the learned Magistrate held that no malice had been proved against the Respondents as the acquittal of the Appellant in the criminal case was because of the high threshold placed on the prosecution in discharging the burden of proof and not because of the non-occurrence of the offence.
 19. Having considered the grounds in the Memorandum of Appeal, the submissions filed by the Appellant and the record in its entirety, I discern the issues for determination to be whether the elements of the tort of malicious prosecution were established by the Appellant in the lower court case and thus whether the trial Magistrate reached proper findings on liability.



20. Black's Law Dictionary, 9th Edition defines the term malice as:
- “the intent, without justification or excuse, to commit a wrongful act; the reckless disregard of the law or of a person's legal rights; ill will, wickedness of heart.”
21. The tort of malicious prosecution is an intentional tort in respect of which if proved on a balance of probabilities, a Plaintiff would be entitled to redress in the form of damages and recovery of and losses incurred or expended during the malicious proceedings which follow. The malicious proceedings must in the case have been initiated without any lawful reasonable and/or probable cause by the Defendant.
22. In the case of *Silvia Kambura v George Kathurima Japhet & 2 others* [2021] eKLR it was held that although it is within any person's rights to approach the courts and/or other quasi-judicial bodies to seek redress for wrongs committed against them, this right must be exercised within the confines and parameters of the law, for genuine and lawful reasons. If the right is exercised with other ulterior motives, this constitutes abuse of process, which is in itself a wrong and/or violation attracting a claim for damages for malicious prosecution.
23. The elements of the tort of malicious prosecution were laid down in the case of *Murunga vs The Attorney General* [1976-1980] KLR 1251 where the court outlined them as follows:
- i. That a prosecution was instituted by the defendant or by someone for whose acts he is responsible.
 - ii. That the prosecution terminated in the Plaintiff's favour.
 - iii. That the prosecution was instituted without reasonable and/or probable cause.
 - iv. That the prosecution was actuated by malice.
24. As was held in the case of *Attorney General v Peter Kirimi Mbogo & another* [2021] eKLR, all the four elements are conjunctively applicable and must therefore all be proved for a Plaintiff to be successful in a claim for malicious prosecution.
25. On the first ingredient whether the prosecution was instituted by the Respondent or by someone for whose acts he is responsible, it is clear from the proceedings in the criminal case and the lower court matter that gives rise to the instant appeal that it is the 1st Respondent who made the report to the police pursuant to which the Appellant was prosecuted.
26. Regarding the second ingredient as to whether the prosecution terminated in the Appellant's favour, it is instructive from the what the Appellant told the court in the civil matter that he was ultimately acquitted in the criminal matter.
27. Although the Appellant produced in the civil case, the proceedings of the criminal trial, he did not produce the ruling or judgement thereof and it is therefore unclear on how the case was terminated and/or concluded, if at all, and the reasons of the court for such termination and/or conclusion. However, as it was not disputed that the criminal case was terminated in the Appellant's favour, I will in the circumstances hold that it was.



28. The third ingredient is whether the prosecution of the Appellant was instituted without reasonable and/or probable cause. On this, I will borrow from the persuasive authority of the High Court in *Silvia Kambura v George Kathurima Japhet & 2 others* [2021] eKLR where the court stated thus:

“The real thrust of the Appeal is found in this and the next issue. In a determination of whether there was any probable and/or reasonable cause, the reasonable man’s standard applies. In the case of *Hicks v Faulkner* (1878) 8 Q.B.D 167 at 171, Hawkins J held as follows with respect the meaning of reasonable and probable cause: -

“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.”

The test for whether a case was instituted with a reasonable and probable cause was also laid out by the Court of Appeal in *Kagane & others vs The Attorney General & Another* [1969] EA 643, where Rudd J held as follows: -

“...the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of an objective test. That is to say, to constitute reasonable and probable cause, the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material consisted of facts discovered by the prosecutor or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty. If and so far as that material is based upon information, the information must be reasonably credible, such that an ordinary reasonable prudent and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for the prosecution.”

In *Samson John Nderitu vs The Attorney General* [2010] eKLR, Nambuye J (as she then was) held as follows: -

“It is trite and this court, has judicial notice of the fact that before an accused person is taken to court, and arraigned in court for criminal prosecution, the prosecuting authority namely the police or whatever unit, whose functions fall under the office of the Defendant, usually carry out investigations, record statements from potential witnesses, analyze the facts to determine if the facts disclose an offence before arraigning such a person in a court of law.”

29. From the foregoing therefore, the test lies on the factors, facts, circumstances and evidence that the Prosecution relied on in charging the Appellant.
30. The Appellant was in the criminal case charged with the offence of interfering with boundary features contrary to Section 24 as read with Section 29 of the *Survey Act*. During the trial in the criminal case and even in the lower court proceedings from which this appeal emanates, the Appellant admitted that he shared a common boundary with the first Respondent on their respective plots of land.
31. As per the proceedings in the criminal case which were produced before the lower court in the civil case, one of the prosecution witnesses that testified was an eye witness who told the court that he saw the Appellant destroying by uprooting the sisal plants that formed the boundary features between the two plots. A surveyor was also called as a prosecution witness in the criminal trial and stated that indeed the sisal plants that served as boundary features between the two plots were uprooted.



32. From the above, it is clear to me that there were tenable reasons for the Appellant to be suspected to have committed the offence. There was therefore a basis to prosecute him for the same. I hold then that the prosecution was not instituted without reasonable and probable cause, as there was basis for the same.
33. With regard to the last ingredient, which is whether the prosecution was actuated by malice, as I have found that there was a reasonable and probable cause to institute the proceedings malice cannot be inferred in the circumstances. If anything, the trial court reached a finding, at the close of the prosecution case, that the prosecution had established a prima facie case, on the basis of the evidence that was adduced by the prosecution, warranting the Appellant to be placed on his defence. There is no evidence that the case was instituted to achieve some other ulterior purpose.
34. Moreover, as I have stated above, the learned Magistrate did not, and indeed even this court does not have the benefit of considering the manner and reasons of the termination of the prosecution as the determination of the trial court in the criminal case was not produced as an exhibit.
35. Having reached the above persuasion, as the third and fourth ingredients were not proved by the Appellant on a balance of probabilities, I find that the trial magistrate reached the proper conclusion, albeit on the basis of different reasons, that the Appellant did not prove the tort of malicious prosecution against the Respondents to the required standards.
36. Being of the foregoing persuasion, I find that the appeal herein lacks merit. I proceed to dismiss it. I make no order as to costs as the Respondents did not participate in the appeal.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 31ST DAY OF JULY, 2024

JOE M. OMIDO

JUDGE

For The Appellant: Mr. Kilonzo.

For The 1st Respondent: No Appearance.

For The 2nd Respondent: No Appearance.

Court Assistant: Ms. Njoroge.

