



REPUBLIC OF KENYA



KENYA LAW
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**Kweya v Wikama & 2 others (Civil Appeal E018 of 2023)
[2024] KEHC 9193 (KLR) (30 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9193 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CIVIL APPEAL E018 OF 2023**

**JN KAMAU, J
JULY 30, 2024**

BETWEEN

FRANCIS KONGO KWEYA APPELLANT

AND

BRENDA WIKAMA 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

INSPECTOR GENERAL OF POLICE 3RD RESPONDENT

(Being an appeal from the Judgment and Decree of Hon S. O. Ongeru (SPM) delivered at Vihiga in the Principal Magistrate's Court Civil Case No 86 of 2018 on 28th January 2020)

JUDGMENT

Introduction

1. In his decision of 28th January 2020, the Learned Trial Magistrate, Hon S. O. Ongeru, Senior Principal Magistrate, dismissed the Appellant's suit as against the 1st, 2nd and 3rd Respondents.
2. Being aggrieved by the said decision, on 31st July 2023, the Appellant filed a Memorandum of Appeal of even date. He relied on seven (7) grounds of appeal.
3. His Written Submissions were dated 2nd February 2024 and filed on 5th February 2024 while those of the 1st Respondent were dated 27th February 2024 and filed on 28th February 2024. The 2nd and 3rd Respondent did not file any written submissions despite the court having given them an opportunity to do so. The Judgment herein was therefore based on the said Written Submissions which the parties relied upon in their entirety.



Legal Analysis

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
5. This was aptly stated in the case of *Selle & Another v Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
6. Having looked at the Grounds of Appeal and the parties' Written Submissions, it appeared to this court that the Grounds of Appeal were all related and the issue that had been placed before it for determination was whether or not the Appellant proved his case on a balance of probabilities as required by law.
7. The Appellant submitted that it was not disputed that the 1st Respondent set the law in motion against him and the police arrested him and preferred charges against him. He contended that the Police did not carry out independent investigations before preferring the said charges against him.
8. He pointed out that although the Respondents filed a Defence, they failed to adduce evidence. He faulted the Trial Court for having dismissed his claim as the Respondents had failed to call witnesses both in the criminal and civil case and therefore there was no rebuttal to his pleadings, averments and testimony. He further faulted the Trial Court for having relied on the case of Makueni HCCA No 128 of 2017 *Susan Muthu Mia v Josephine Makau Mutua* (eKLR citation not given) where it was held that the Appellant ought to have proved collusion between the Complainant and the Prosecutor.
9. He asserted that whether or not the 1st Respondent was aware of the hearing date was a non-issue as it was her responsibility to have followed up with the Police and Prosecution to know when the case was coming up for hearing. He submitted that her omissions therefore, ought not to have been ruled in her favour. He argued that any infringement of freedom had to be justified in law.
10. He further submitted that if indeed the 1st Respondent had a good cause to have him arrested, she had a duty to present her reasons to the police, record a statement and testify in court but she ought not to have made a complaint and sat back. He further contended that it was upon the Police to have given evidence on their receipt of the complaint, their investigations and the basis of their decision to prefer charges. He added that it was upon the police to have informed him of the reasons for his arrest, investigations and the decision to charge.
11. He was emphatic that there was no justification for keeping him in custody for seven (7) days before his arraignment in court on a simple charge of causing disturbance. He asserted that the Trial Court made no finding on the manner in which the Police handled the complaint and termed that as callous and without due process and consideration of his rights. He urged this court to find that the complaint, arrest and prosecution was actuated by malice and blatant abuse of state apparatus.
12. He invited the court to consider the cases of *Lawrence Onyango Oduor v The Attorney General and Kenya Commercial Bank* Nairobi HCCC No 168 of 2011 and *Silvia Kambura v George Kathurima Janet Peterson Nyachae & A.G* Meru HCCA No E004 of 2020 (eKLR citation not given), without highlighting the holdings he relied on therein.



13. He urged this court to find that the complaint, his arrest and arraignment were actuated by malice, without probable cause and blatant use of State apparatus. He asked this court to allow his appeal and award him Kshs 1,000,000/= and costs of the lower court and the appeal.
14. On her part, the 1st Respondent placed reliance on the cases of *Murunga v Attorney General* (1979)KLR, 138 and *Susan Muthelu Muia v Joseph Makau Mutua* [2018]eKLR where the common thread was that in a claim for malicious prosecution, the plaintiff had to show that the prosecution was instituted by the defendant or by someone for whose acts he was responsible, the prosecution terminated in his favour, the prosecution was instituted without reasonable and probable cause and that prosecution was actuated by malice.
15. She submitted that it was not in dispute that she instituted the arrest of the Appellant and that the Prosecution terminated in his favour. She, however, asserted that the Appellant had not proven that the said prosecution was instituted without reasonable and probable cause and that the same was actuated by malice.
16. She argued that he was under a duty to prove that there was malice in making the report that led to his arrest and prosecution to the required standard before he could be awarded damages. She was emphatic that acquittal alone could not amount to proof of malice.
17. In this regard, she cited the case of *Robert Okeri Ombaka v Central Bank of Kenya* [2015] eKLR where the court held that an acquittal in a criminal case was not a ground for filing a civil suit claiming damages for malicious prosecution or false imprisonment and that evidence of spite, ill will, lack of reasonable and probable cause had to be established.
18. She contended that it was important for the Trial Court to have determined whether she was aware of the hearing dates in the criminal case in order for it to have ascertained if her failure to attend court was out of malice or not. It was her contention that the absence of a complainant in a criminal matter was a critical matter that could be advanced by many factors and that failure to bond a witness and/or complainant was one such factor.
19. It was her contention that the Appellant's acquittal in the criminal case was not as a result of malicious prosecution but rather, that the same was a miscarriage of justice as the Prosecution failed to bond her to attend court and failed to avail the police file.
20. She asserted that the Prosecution failed to prove that she was bonded and failed to attend court for the hearing and that despite having been granted the last adjournment, it did not bond her to attend the hearing and proceeded to close its case without making attempts to reach out to her.
21. She cited the definition of malice in the *Black's Law Dictionary*, 9th Edition, which was:-

“the intent, without justification of excuse, to commit a wrongful act; the reckless disregard of the law or of a person's legal rights; ill will wickedness of heart.”
22. She submitted that the Appellant had failed to prove the four (4) elements that had to apply conjunctively for a claim of malicious prosecution as was held in the case of *Attorney General v Peter Kirimi Mbogo & Another* [2021] eKLR. She thus urged this court to dismiss the Appeal herein, uphold the Trial Court's Judgment and award her costs of the lower court and Appeal.
23. The Appellant told the Trial Court that the 1st Respondent was his Chief and that she caused him to be charged in Criminal Case No 256 of 2017 but did not appear to give evidence whereupon the case



was dismissed. He produced the proceedings in the said criminal case in support of his case and prayed for compensation for having been charged maliciously.

24. The 1st Respondent was categorical that she was not informed of the date to attend court for the hearing of the said criminal case. She pointed out that she was bonded on 31st October 2016 to appear in court on 3rd November 2016. She attended court but the case did not proceed. Her testimony was that from that time, she was not summoned again. Her evidence was that when she inquired from the Investigating Officer, he informed her that the case had been transferred to Vihiga Law Courts and that new dates would be given.
25. In her cross-examination, she was emphatic that the criminal case was not dismissed. She referred to Vihiga Criminal Case No 256 of 2017 and Miscellaneous Criminal Case No 837 of 2016 but the recording of her responses were not clear to this court. She alluded to a case that was still pending and that she had no information that the same had been dismissed.
26. The tort of malicious prosecution was an arrest and prosecution of a claimant without reasonable and/or probable cause. The Court of Appeal for Eastern Africa in *Mbowa v East Mengo District Administration* [1972] EA 352 stated that the essential ingredients of the tort of malicious prosecution were as follows:-
 - a. the criminal proceedings must have been instituted by the defendant;
 - b. the defendant must have acted without reasonable or probable cause;
 - c. the defendant must have acted maliciously;
 - d. the criminal proceedings must have been terminated in the plaintiff's favour.
27. This court also had due regard to the case of *Attorney General v Peter Kirimi Mbogo & Another* [2021] eKLR, where it was held that the above mentioned four (4) elements had to apply conjunctively and all had to be proved to successfully claim for damages for malicious prosecution.
28. It was not disputed that the Appellant was charged in a criminal case and acquitted. There was therefore no need to analyse whether or not he had demonstrated two (2) ingredients namely, that a case was instituted against him and that the criminal proceedings were terminated in his favour.
29. This court assessed, evaluated and analysed the evidence that he adduced to establish if he had demonstrated that the criminal proceedings were instituted without any probable or sufficient cause and that the same were actuated by malice.
30. A reading of the criminal proceedings indicated that the substance of the charge was read to the Appellant and when he denied having committed the offence of causing disturbance whereupon the matter was set down for hearing.
31. On 21st February 2018, the Trial Court noted that the matter had taken long to be prosecuted having been instituted in 2016. It therefore disallowed the Prosecution's application for adjournment. It then acquitted the Appellant herein under Section 202 of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).
32. Notably, there was a procedure of charging once a complaint was made. Investigations and the decision to charge was undertaken by the Republic through the Kenya Police. After the police a file with a recommendation to charge, it was the mandate of ODPP to make a decision of whether to prosecute a suspect or not. The ODPP was not under the control or direction of any person or authority.



33. Under Article 158 (10) of the *Constitution* of Kenya, 2010, it is provided that:- “The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.”
34. Once the 1st Respondent lodged a complaint with the 3rd Respondent, the matter moved from her hands. As preferring charges was the mandate of the ODPP, the Appellant failed to demonstrate how the ODPP instituted proceedings against him without reasonable or probable cause. He seemed to assume that his acquittal was enough to prove his claim in malicious prosecution.
35. Malice cannot automatically be transferred to the prosecutor unless it was proved that there was collusion between the complainant and the prosecutor prosecuting the matter as was held in the case of *Music Copyright Society of Kenya v Tom Odhiambo Ogowl* [2014] eKLR.
36. The Appellant was required to prove that the prosecution was actuated by malice. As stated above, the prosecution was carried out by the ODPP. He ought to have led evidence to prove malice on the part of the 1st, 2nd and 3rd Respondents.
37. However, he did not demonstrate that there was any malice on the part of the police and/or the prosecutor. As he was acquitted without the matter having been heard on merit, he did not demonstrate that there was no probable cause for the Prosecution to have instituted the criminal proceedings against him. If there was malice and/or probable cause, he did not demonstrate and/or prove the same.
38. This court therefore agreed with Trial Court’s reasoning for not having faulted the 1st Respondent’s non- attendance as she ought to have been informed of the hearing dates by ODPP and/or the Investigating Officer.
39. Accordingly, having carefully considered the Written Submissions by the respective parties, this court found and held that the Appellant failed to prove his case for malicious prosecution to the required standard, which in civil cases is proof on a balance of probability. Consequently, his prayer for general damages under this head failed.

Disposition

40. For the forgoing reasons, the upshot of this court’s decision was that the Appellant’s Memorandum of Appeal dated and lodged on 31st July 2023 was not merited and the same be and is hereby dismissed. As this matter emanated from criminal proceedings that were instituted by the Republic of Kenya, there will be no orders as to costs.
41. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 30TH DAY OF JULY 2024

J. KAMAU

JUDGE

