



REPUBLIC OF KENYA



**Obondo & 3 others v Otieno & another (Civil Appeal 3 of 2023)
[2024] KEHC 14941 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 14941 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL 3 OF 2023
A ONG'INJO, J
OCTOBER 31, 2024**

BETWEEN

**WYCLIFFE OUMA OBONDO 1ST APPELLANT
DIBOX ABILA OBONDO 2ND APPELLANT
GEORGE OCHIENG KOCHI 3RD APPELLANT
GILBERT OCHIENG ODHIAMBO 4TH APPELLANT**

AND

**GEORGE OLUOCH OTIENO 1ST RESPONDENT
THE ATTORNEY GENERAL 2ND RESPONDENT**

JUDGMENT

1. The Appellants in Migori Chief Magistrates Court Civil Case No. 102 of 2022 sued George Oluoch Otieno and The Attorney General seeking general damages for unlawful arrest wrongful confinement and malicious prosecution. They also sought aggravated damages against the 1st Defendant on the basis of false and malicious allegations fronted or made to the 2nd Defendants as well as mental anguish. They further sought special damages in the sum of Kshs127,000 together with interest at court rates and cost of the suit.
2. The suit was heard and determined on 10.1.23 where the trial Magistrate P. N. Areri reached the conclusion that the plaintiffs had not proved all the elements conjunctively to support their claim and the suit was therefore dismissed with costs.
3. Aggrieved by the judgment of the trial court the Appellants preferred the Appeals herein on the following grounds: -



- i. The Learned Trial Magistrate erred in law and in fact by failing to properly analyse the evidence on record and find that the key ingredients of the tort of malicious prosecution had been proved on the balance of probabilities.
 - ii. The learned Trial Magistrate misdirected himself by failing to evaluate the evidence presented by the Appellants clearly demonstrating that there was no probable cause to prosecute the Applicants of the offence of cutting down trees and in so doing arrived at an erroneous decision.
 - iii. The learned trial Magistrate erred in law and in fact by considering extraneous matters not pleaded and arriving at the erroneous decision that the prosecution was not malicious and instituted without reasonable and probable cause against the weight of evidence presented by the Appellants.
 - iv. The Judgment of the learned Trial Magistrate is a miscarriage of the justice and an affront to the constitutional right to the Appellants to enjoy protection of law.
 - v. In holding and/or directing that there was no malice on the part of the Respondents, the learned Magistrate disregarded the evidence adduced by the Appellants who adduced evidence that the 2nd Respondent willfully failed to consider vital information and/or statement placed before him by the Appellants in regards to ownership of the property where the trees were allegedly cut.
 - vi. The learned Trial Magistrate erred in law and fact by failing to find that the 1st Respondent's Report and/or complaint to the 2nd Respondent was actuated by malice on the basis that the 1st Respondent was not the registered owner of the suit property where the trees were allegedly cut and that there was a land dispute between the Appellants' Aunt one Roseline Odera and the 1st Respondent herein over and in respect of the property on which the trees were allegedly cut.
 - vii. While the learned Trial Magistrate appreciated and / or discerned the elements to be proved in a claim of malicious prosecution, same misapprehended the facts and evidence in respect of the Criminal Proceedings and thus arrived at an erroneous and unsound decision.
 - viii. The learned Trial Magistrate failed to properly evaluate, appraise and/or analyse the entire Evidence on record and thereby failed to Decipher the Salient features of the Appellants' case and thereby arrived at a Conclusion contrary to the weight of Evidence on record.
 - ix. The learned trial Magistrate failed to properly evaluate, appraise and/or analyse the submissions and/or Authorities advanced by and/or on behalf of the Appellants and thereby mistook and/or misconceived the crux of the Appellants' case and hence the learned Trial Magistrate arrived at a slanted Decision and/or Judgment
 - x. The Learned Trial Magistrate erred by making a finding that the Appellants had failed to prove their case against the Respondents contrary to the evidence presented before him.
4. The Appellant's case was that they were charged in Migori Chief Magistrate Criminal Case No. 300 of 2018 for the offence of malicious damages of the Respondents trees. That after trial they were acquitted under Section 210 of the *Criminal Procedure Code* on 27.2.2020. They claimed that the 1st Respondent report was malicious as the Land from which the trees were cut are from Roseline Awino Odera and not the 1st Respondent. That the said 1st Respondent did not see them cutting the trees as the offence was committed at night. They also said they sued the 2nd Respondent because the police did not do investigation before arresting them. They said that they were tilling their aunt Roseline Odera land



when they were arrested but the police did not want to hear the side of their story and neither did the police summon Roseline to record her statement. The Appellant further testified that Gilbert Ochieng the 4th Appellant and Wycliffe Ouma Obondo they were student at time of arrest, that the arrest made Wycliffe Ouma Obondo to fail his KCSE examination and that the arrest destroyed their reputation in the society as they were seen as criminals.

5. George Otieno Kochi the 3rd Appellant who testified on behalf of his co- appellants prayed that court awards them general damages and special damages together with interest and costs. He said that their aunt Roseline Odera paid their legal fees and stood surety for Wycliffe Obondo and their liberty was curtailed because they were kept in cells from Sunday to Monday. The Appellants claimed that George Oluoch instigated their arrest and that there was no probable cause to arrest them and that is why they were acquitted.
6. This Appeal was canvassed by way of written submissions dated 11.6.24 and filed on 12.6.24
7. On the 23.6. 24 the Respondent was granted leave to file their submissions within 14 days. They filed submission dated 9.9.24 and submitted that the grounds of appeal amount to general ground which cannot be used to impeach the decision of the trial court. The 1st Respondent relied on the submissions in the trial court dated 5.10.22 which are found in the record of Appeal at page 73-78.

Analysis And Determination

8. Having considered the grounds of appeal and the submissions filed by advocates for respective parties and reanalysed the evidence for both parties in the trial court both in Criminal and Civil suit as well as the Ruling on case to answer and judgment of the trial magistrate this court finds that is not indispute that the Appellants were charge d and with offence of malicious damage to the 1st Respondent's property. From the evidence by George Otieno Kochi who testified on behalf of other Appellants it is not indispute that trees on parcel of land No. Suna East / Wasweta 1/13087 registered in the name of Sharon Atieno the wife of the 1st Respondent were cut. As a consequences of the said damage the 1st Respondent made a report to the police as to the damage occasioned to their trees. It was therefore the duty of the police to investigate as admitted by PW1 under Article 157 (11) on the Constitution mandates the DPP to recommend charging of a person who is found culpable of committing a crime. The police on the other hand have a mandate to protect property and life from harm or any wrong doing. Although the Appellants were acquitted under Section210 of the Criminal Procedure Code because no one saw them committing the offence it has not been denied that there was reasonable and probable cause to investigate the compliant by the 1st Respondent and it was only upon the recommendation of the DPP that the Appellants were charged. The 1st Respondent cannot be faulted for action of the Police when there is clear evidence that his property was damaged. This court also finds there was no evidence of malice on the part of Complainant or police in preferring charges on the Appellants.
9. In the circumstances this court finds no reason to unsettle the decision of the trial court as the Appeal has no merit. The Appeal is dismissed with no orders to costs.

DELIVERED DATED AND SIGNED AT MIGORI THIS 31ST DAY OF OCTOBER, 2024.

.....
A. ONG'INJO

JUDGE

Judgment delivered in the presence of



..... Advocate for Appellants

..... Advocate for Respondents

Victor/ Lola – Court Assistants

