



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wagenaar v Indiek & another (Civil Appeal 27 of 2020)  
[2023] KEHC 1429 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1429 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL 27 OF 2020  
FA OCHIENG, J  
FEBRUARY 28, 2023**

**BETWEEN**

**PALS WAGENAAR ..... APPELLANT**

**AND**

**SAMUEL ADADA INDIEK ..... 1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

*(An appeal from the judgment of the Senior Resident Magistrate's Court at  
Kisumu (Hon. W. K. Okunya) in Civil Suit No. 397 of 2016 dated 15.5.2020)*

**JUDGMENT**

1. This appeal arises from the judgment delivered on May 14, 2020. By the said judgment, the learned trial Magistrate held the two defendants liable for malicious prosecution of the plaintiff.
2. The trial court awarded General Damages of Kshs. 2,000,000/- against the two defendants. She also awarded Punitive Damages of Kshs. 500,000/- against the 2<sup>nd</sup> defendant.
3. As the appellant herein was the 1<sup>st</sup> defendant, the award of punitive damages does not relate to him.
4. Being dissatisfied with the judgment, the 1<sup>st</sup> defendant lodged the current appeal. However, the Attorney General, who was the 2<sup>nd</sup> defendant did not file any appeal. The appellant cited 9 grounds of appeal, which can be summarised as follows:
  1. The trial court did not appreciate the law as regards Malicious Prosecution, and ended up misinterpreting the same.
  2. The appellant was acting as an employee of a disclosed principal.
  3. Although he made a report to the police, the said report was not based on malice.



4. There was no order permitting the breakage into the premises of the appellant's employer.
5. The trial court erred by holding that the fish products belonged to the 1<sup>st</sup> respondent.
6. The sum awarded as compensation was manifestly excessive.
5. Being the first appellate court, I am enjoined by law to re-evaluate all the evidence on record.
6. When I am drawing my own conclusions, from the fresh analysis, I am required to bear in mind the fact that I did not have the benefit of observing the witnesses as they were testifying.
7. The task that I shall now undertake is to ascertain whether or not the trial court erred in arriving at the decision that the appellant and his co-defendant were liable.
8. If the evidence adduced was sufficient to demonstrate that all the ingredients of Malicious Prosecution were proved, it would follow that the appeal lacked merit.
9. Perhaps it would be useful to commence by setting out the ingredients of malicious prosecution.
10. In the case of *Teresia Wanjiku Njoroge v Standard Chartered Bank Kenya limited & The Attorney General*, HCCC No 464 of 2013 A. Mbogholi Msagha J. (as he then was) held as follows;  

It is now well established that a claimant in a case for malicious prosecution must establish the following on a balance of probabilities:

  - i. That he/she was prosecuted by the defendant,
  - ii. That the prosecution was determined in his/her favour,
  - iii. That the defendant, in prosecuting him, acted without reasonable and proper cause,
  - iv. That the prosecution was actuated by malice.”
11. In this case, the criminal case against the 1<sup>st</sup> respondent was determined in his favour. Therefore, that aspect does not fall for determination.
12. To my mind therefore, what I am required to determine is whether or not the 1<sup>st</sup> respondent was prosecuted by the appellant: and if so, whether the appellant was actuated by malice or if he had a reasonable and probable cause for doing so.
13. The appellant conceded that he made a report at the Kisumu Central Police Station. He did so on April 26, 2013.
14. The appellant told this Court that the report made by him was to the effect that the 1<sup>st</sup> respondent and 26 other persons had broken into Peche Foods.
15. According to the appellant, it was immaterial that the 1<sup>st</sup> respondent had obtained an Order from the court, directing that 30 tons of fish fillet be released to him.
16. It was the appellant's case that the order in issue, did not mandate the 1<sup>st</sup> respondent to break into the premises of the appellant's employer.
17. As far as the 1<sup>st</sup> respondent was concerned, it was the appellant who failed to show that the criminal proceedings were instituted for a reasonable and probable cause.



18. The converse is actually the correct legal position; it is the 1<sup>st</sup> respondent who had a duty to prove the particulars of the malice which he attributed to the appellant.
19. He had asserted that the appellant made a report of a commission of a criminal offence, despite having express knowledge of a court order that allowed the collection of the fish from the cold-room.
20. The 1<sup>st</sup> respondent had further asserted that the appellant proceeded to instigate the arrest of the 1<sup>st</sup> respondent, even though he had actual knowledge that the 30 tons of fish fillet, which were alleged to have been stolen, belonged to the 1<sup>st</sup> respondent.
21. According to the 1<sup>st</sup> respondent, the police proceeded to maliciously arrest him, and later arraigned him in court because they were beholden to the appellant.
22. Nonetheless, the 1<sup>st</sup> respondent appeared to acknowledge (at paragraph 11 of the plaint) that it was the police who subsequently prosecuted him.
23. Indeed, in the particulars of the alleged malice which he attributed to the police, the 1<sup>st</sup> respondent faulted the police for prosecuting him.
24. At paragraph 12 of the plaint, the 1<sup>st</sup> respondent prayed for an award of Punitive Damages to be made against the police because he was of the view that there had been;
  - a. Abuse of police powers and ultimately abuse of the court process, by knowingly instituting and proceeding with an illegitimate prosecution.”
25. I would have expected that if the 1<sup>st</sup> respondent believed that the appellant was actually involved in the prosecution of his case, he would have expressly made such an assertion against the appellant.
26. He chose to limit the claim of the institution and carrying out of the prosecution, to the police.
27. In his submissions, the 1<sup>st</sup> respondent said that;

The appellant testified in the criminal case against the 1<sup>st</sup> respondent and others, on a charge of breaking and stealing, well aware that the fish fillets did not belong to him, and there existed a court order.”
28. In my considered opinion, the fact that a person testifies as a witness, in a criminal case, cannot of itself, render him liable for a charge of malicious prosecution.
29. Pursuant to the provisions of article 157(10) of the *Constitution* of Kenya, the Director of Public Prosecution is an independent office. It does not require the consent or authority of any person to commence criminal proceedings; and in the exercise of his or her powers or functions, the Director of Public Prosecution shall not be under the direction or control of any person or authority.
30. In her judgment, the learned trial Magistrate noted as follows:

Upon being cross-examined by counsel for the 1<sup>st</sup> defendant, he stated that whereas prosecution was done by the state, the person who recorded a statement was Mr. Paul Wagenaar, the 1<sup>st</sup> defendant, and he was part of the case.”
31. Indeed, he was part of the case. He made a report to the police, and thereafter, he was a witness.



32. When summarizing the testimony of the 1<sup>st</sup> respondent herein, the trial court noted thus;
- He further stated that he obtained an order from the court on 22/4/2013 directing the respondents to release the fish to him, which was served upon the 1<sup>st</sup> respondent on 26/4/2013, through the OCS.
33. That the order was served 4 days after it was issued, since the police took time to enforce the same.
34. He denied that he had an intention of ambushing the 1<sup>st</sup> respondent.
35. He further stated that the order did not have a provision for breaking into the 1<sup>st</sup> defendant's building.”
36. From the foregoing, I find that there is an order which the court issued on April 22, 2013, but which was served 4 days later.
37. In his witness statement dated October 9, 2019, the appellant said;
- I went to Police Station in Kisumu, in the company of my Managing Director Amin Gilani, and made a report as the Group General Manager of Mayfair Holdings, that the plaintiff and others were breaking into the premises of Peche Foods. This was after I realized that the order they had availed did not allow them to break into the premises of Peche Foods.”
38. In effect, the evidence tendered by both the appellant and the 1<sup>st</sup> respondent confirmed that the court order did not mandate the 1<sup>st</sup> respondent to break into the premises.
39. According to the appellant, he had no malice when he reported about what was happening on the ground.
40. The 1<sup>st</sup> respondent made available a letter written by his advocates on April 26, 2016, when he sent out a demand notice to the appellant and to the Attorney General. By that letter, it was clear that the criminal charges were preferred against the 1<sup>st</sup> respondent (together with his co-accused) on April 29, 2013.
41. The said information was verified by this court, by perusing the Charge Sheet, upon which it was indicated that the accused persons were taken to court on April 29, 2013.
42. The offence with which the accused persons were charged is Breaking into a building and committing a felony contrary to section 306(a) of the *Penal Code*.
43. It therefore follows that by the time when Mr. Wilson Yegon wrote a letter on June 5, 2013, on behalf of the DCIO, Kisumu, the accused persons had already been charged.
44. When the prosecution preferred charges against the 1<sup>st</sup> respondent, it cannot be said that the prosecution had acted in violation of the advice contained in a letter that was written more than one month after the charges had been preferred.
45. The letter dated June 5, 2013 was produced in court, by the 1<sup>st</sup> respondent. It is a part of his evidence. I therefore presume that the contents constitute what the 1<sup>st</sup> respondent wanted the court to act upon.
46. The letter says that the 1<sup>st</sup> respondent took the letter to the OCS Kisumu Police Station, on April 26, 2013. That would imply that it was not the police who delayed in taking action after the court order was made available to them.



The letter said;

The said order marked “B ‘1’” was to be served on Mayfair Holdings Ltd. The order stated that 30 tons of fish fillets stored at Peche Foods Ltd, belonging to the said Das Group Kenya Limited be released to the said Samuel Adada Ondiek.”

47. By his own evidence, the 1<sup>st</sup> respondent had said that the fish fillets belonged to Das Group Kenya Ltd. In other words, the fish fillets did not belong to the 1<sup>st</sup> respondent. I therefore find that there is no merit in the submissions of the 1<sup>st</sup> respondent that he could not steal something which belonged to him.
48. It is not unknown for employees or agents of companies, to steal from their employer or their principal.
49. In the letter dated June 5, 2013, it was further stated as follows;

The OCS on receiving the order sent his officers led by CPL John Maiyo to serve the order at Peche Foods Ltd where the fish was stored. Peche Foods Ltd is related to Mayfair Holdings. On arrival, the officers served the order to the general manager of Peche Foods Ltd, Mr. Pattampady Kunjappan John, who received and signed the order.”

At that stage, it is clear that the order was not served upon the appellant.

50. The DCIO goes on to state as follows in his letter;

When the officers, including the OCS were with the general manager in his office, the accused persons went to the cold room and cut the padlocks and started loading the fish fillets into the lorries.

This was contrary to the orders.”

51. He said that the actions of the accused persons were captured on CCTV. He then identified the specific person who cut the padlocks as one James Kirimba Mutuku, who was the 3<sup>rd</sup> accused.
52. The DCIO made it clear that when the accused persons had gone behind the backs of the police officers who had accompanied them; and when they cut padlocks on the doors leading into the cold room, the OCS called for reinforcements and the accused persons were arrested.
53. At that stage, the appellant was not featuring at all; leave alone being the person who exerted pressure upon the police to take action against the 1<sup>st</sup> respondent.
54. The other letter which the 1<sup>st</sup> respondent produced is dated July 30, 2013.
55. Considering that the 1<sup>st</sup> respondent was charged on April 29, 2013, it is obvious that the decision to prefer charges cannot have been made in defiance of a recommendation which was written more than 2 months later.
56. Furthermore, in the letter dated July 3, 2013, the Senior Prosecution Counsel, Kisumu, said the following;

The accused persons acted pursuant to the order of the court envisaged in your letter, though unprocedurally, by cutting the padlock and gaining access to the cold room without enduring patience to be afforded same.”

57. Although the learned prosecution counsel termed the offence as “petty”, it was nonetheless an offence.



58. In the circumstances, based upon the evidence which was produced by the 1<sup>st</sup> respondent, I find that the appellant had reasonable and probable cause to make a report to the police.
59. The actions undertaken under the leadership of the 1<sup>st</sup> respondent were not sanctioned by the order issued by the court. Therefore, the appellant cannot be faulted for making a report to the police about the breaking into the premises of Peche Foods Ltd.
60. The 1<sup>st</sup> respondent failed to demonstrate that the appellant was motivated by malice.
61. In the event, the judgment of the trial court is set aside, and is substituted by an order dismissing the suit against the appellant.
62. The 1<sup>st</sup> respondent will pay to the appellant, the costs of the appeal as well as the costs of the suit.

**DATED, SIGNED AND DELIVERED THIS 28<sup>TH</sup> DAY OF FEBRUARY 2023.**

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**FRED A. OCHIENG**

**JUDGE**

*I certify that this is a  
true copy of the original.*

**DEPUTY REGISTRAR**

