



**Maina v Attorney General & another (Petition 82 of 2019) [2023] KEHC 3510 (KLR)
(Constitutional and Human Rights) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3510 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION 82 OF 2019

HI ONG'UDI, J

APRIL 27, 2023

BETWEEN

JACKSON MACHARIA MAINA PETITIONER

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

JUDGMENT

1. The amended petition dated August 10, 2018 was filed under Articles 2, 3, 10, 19, 20, 21, 22, 23, 27, 28, 29, 32, 33, 35, 36, 47, 48, 159, 162, 165, 258, 259 and 262 of the Constitution for the alleged enforcement of the Constitutional rights under Sections 70(a), 71(1), 72(3), 74(1), 77, 78(1), 79(1), 81(1) and 109 of the repealed Constitution and Articles 27, 28, 29, 32, 33, 35, 36 and 47 of the Constitution. Accordingly the petitioner seeks the following orders:
 - i. A declaration that the respondents conduct, acts of omission and/or commission are unlawful, illegal and/or unfair and are in violation of the petitioner's fundamental rights and freedoms to human dignity, freedom and security of the person as encapsulated under Articles 27, 28, 29(f), 32(1), 33, 35(1) and 39 of the Constitution and the said rights and freedoms have been violated, transgressed and trampled upon by the respondents.
 - ii. A declaration that the respondents conduct, acts of omission and/or commission are unlawful, illegal and/or unfair and are in violation of the petitioner's fundamental rights and freedoms to human dignity, freedom and



security of the person, as encapsulated under Sections 70(a),71(1) and 74(1) of the repealed Constitution.

- iii. A declaration that the prosecution of the petitioner on pretentious, fabricated and unfounded criminal charges at Makadara Chief Magistrate’s Court Criminal Case No.2562 of 2009 was a violation of the fundamental right of the petitioner to equal protection and equal benefit of the law and amounts to subjecting the petitioner to cruel, inhuman and degrading treatment contrary to Sections 70(a), 74(1) and 77 of the repealed Constitution and was in the whole circumstances an abuse of the criminal law, the process of court and a malicious prosecution.
- iv. An order for general damages.
- v. An order for compensation directed against the respondents jointly and severally to compensate the petitioner for violation his constitutional rights under Articles 27, 28, 29(f), 32(1), 33, 35(1) and 39 of the Constitution and Section 70(a), 74(1) and 77 of the repealed Constitution taking into account damages for loss of office, career stagnation, injury to reputation and loss of future income in the sum of Ksh 60,000,000 or as the Court may assess and grant.
- vi. Costs and interests.

The petitioner’s case

2. The petitioner’s case as supported by the averments in his affidavit of even date is that on June 21, 2009 he was arrested and detained at Muthaiga Police Station. He was charged with stealing contrary to Section 275 of the Penal Code and in the alternative handling of stolen property contrary to Section 322 of the Penal Code. The case was heard and dismissing vide a judgement dated December 3, 2010.
3. It is his case that he was charged without probable cause and this violated his right to freedom. He was also not presented to Court within the required 24 hours.
4. He further deponed that during the subsistence of the criminal case he was subjected to psychological torture, damaged reputation and physical trauma since the accusations were baseless and unwarranted. That the prosecution was driven by malice, flimsy evidence, biased investigations and an erroneous application of the law.
5. He deposed that as result of this prosecution he was dismissed from his employment at Kenya Power and Lighting Company where he worked as a casual employee from 1985 – 1989 and thereafter on a permanent and pensionable basis from 1989 – 2009. He was not able to secure employment after the case and was therefore rendered destitute. Likewise, he argued that the criminal case had portrayed him as an unfaithful and untrustworthy person to the public.

The 1st respondent’s case

6. The 1st respondent in reply filed its grounds of opposition dated May 11, 2020 on the premise that:
 - i. The petition raises a claim for malicious prosecution which is time-barred by the operation of Section 4 of the Limitation of Actions Act.
 - ii. The petition is devoid of any evidence of the elements of malicious prosecution by the respondents.



- iii. The petition raises no justiciable constitutional issues against the 1st respondent.
- iv. The petitioner has failed to present any evidence that the actions of the respondents were unlawful, illegal or beyond the scope of the powers vested in the respondents.
- v. The petition has failed to meet the threshold for a constitutional petition as established by the court in the cases of *Anarita Karimi Njeru v Republic* (1979) 1 KLR 154 and *Mumo Matemba v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR.
- vi. The petition is misconceived, misconstrued, misplaced and is a gross abuse of the court process as it discloses no reasonable cause of action against the 1st respondent.

7. The 2nd respondent did not file any response or submissions to the petition.

The petitioner's submissions

8. The petitioner through the firm of Nyarango and Company Advocates filed written submissions and a list of authorities dated February 8, 2021. Counsel identified the issues for consideration as follows:
- i. Whether the suit is barred by the Statute of Limitations.
 - ii. Whether the petitioner's arrest and prosecution amount to malicious prosecution.
 - iii. Whether the petitioner's arrest, detention and prosecution was a violation of his rights under *the Constitution*.
 - iv. Whether the petitioner is entitled to general, special and exemplary or punitive damages as against the respondents.
9. On the first issue, counsel submitted that Section 4 of the *Limitation of Actions Act* applies to tortious claims not constitutional petitions. He argued that the instant petition being founded on violation of rights raised the issue of constitutional tort which was not amenable to the Statute of Limitation.
10. In support he relied on the case of *Kimunai Ole Kimeywa & 5 others v Joseph Motari Mosigisi (The then District Commissioner, Rongai District) & 3 others* (2019) eKLR where the learned Judge observed that a suit for malicious prosecution implicates deprivation of liberty and diminution of dignity of petitioners is a constitutional tort one to which there is no categorical statute of limitations. Also see the case of *Njuguna Githiru v Attorney General* (2016) eKLR.
11. Turning to the second issue, Counsel submitted that the petitioner's arrest, determination and prosecution for a crime he did not commit satisfied the principles of malicious prosecution set out in the case of *Dickson Chebuye Ambeyi v National Police Service & another; Peter Sifuna Wesonga & another (Interested Parties)* (2020) eKLR. He argued that the proceedings were instituted by the respondent who failed to ensure there was a full investigation before preferring any charge against the petitioner. Further that the charging of the petitioner without reasonable cause amounted to an act of malice.



12. Counsel urged that the prosecution case had been handled with unnecessary speed, in that when the petitioner was arraigned in Court on June 23, 2009 the prosecution already had 4 witnesses present. Further that the unfounded charge was prejudicial to the petitioner since he lost his job and future prospects. Finally that the charge was terminated in the petitioner's favour. To support this point he relied on the case of *Stephen Gachau Gitthaiga and another v Attorney General* (2015) eKLR.
13. He further submitted that the respondent's actions had violated the petitioner's right to presumption of innocence, human dignity and freedom from cruel, inhuman and degrading treatment. To buttress this point Counsel referred to the case of *Agnes Ngenesi Kinyua aka Agnes Kinywa v Director of Public Prosecution & another* [2019] eKLR where it was stressed that criminal proceedings ought not to be instituted to simply appease the spirits of the public yearning for the blood of its perceived victims. In arguing that the rule of law must be observed in all cases counsel relied on the case of *Edward Akong'o Oyugi & 2 others v Attorney General* (2019) eKLR.
14. In closing, Counsel submitted that the stated reasons justified the grant of the reliefs sought. He submitted that in the case of *Jamlik Muchangi Miano v Attorney General* (2017) eKLR it was held that an award of compensation goes a long way towards vindicating the infringed constitutional right. He therefore proposed an award of five (5) million shillings as damages.

The 1st Respondent's submissions

15. State Counsel, Michelle Omuom on behalf of the 1st respondent filed written submissions dated December 5, 2021 where she identified the issues for determination as:
 - i. Whether this Court has jurisdiction to hear this petition;
 - ii. Whether the claim is time barred by operation of the *Limitation of Actions Act*, Cap 22 of the Laws of Kenya;
 - iii. Whether the petitioner has made a case for the violation of his human rights;
 - iv. Whether the petitioner has made a case for malicious prosecution.
16. To begin with counsel submitted that the petitioner had misunderstood the role and responsibilities of the 1st respondent, and also failed to establish a nexus between the investigations, choice to prosecute him and the actions of the 1st respondent. It was argued that the petition did not raise any justiciable constitutional issues against the 1st respondent.
17. On the issue of time limitation, Counsel while relying on Section 4 of the *Limitation of Actions Act* submitted that an action in tort may not be brought after the end of 3 years from the date on which the cause of action accrued. It was argued that the petitioner had not explained the inordinate delay nor sought a time extension.
18. To buttress this point she cited the case of *Peter Gichuki Mwangi v Kenya Copyright Board & 3 Others* (2018) eKLR where it was held:

“..... the instant application the same is based on section 27 and 28 of the *Limitation of Actions Act* (Cap. 22) Laws of Kenya. The aforesaid sections are clear that for an Applicant to benefit or qualify for an extension for limitation period the torts claim should be for damages for negligence, nuisance or breach of duty; damages claimed in respect of personal injuries of any person and that the requirement of section 4(2) are fulfilled in relation to cause of action, if it is proved that material facts relating to the cause of action were or included facts



of a decisive character, were at all times outside the knowledge of the applicant until the date either after 3 years period of limitation prescribed for the cause of action was not earlier than one year before the end of that period and either case was a date not earlier than one year before the date on which the action was brought.”

19. On the specificity required in drafting constitutional petitions, Counsel while relying on the case of *Anarita Karimi Njeru v Republic* No 1 (1979) KLR 154 submitted that the petitioner had not drafted his petition in a specific manner and failed to explain with reasonable precision or provide particulars for the allegations of infringements under Articles 27, 28, 29 (f), 32(1), 33, 35 (1) and 39 of *the Constitution*. Likewise, that the petitioner had failed to prove violation of his rights by the respondents in carrying out their mandate. For instance Counsel noted that the petitioner stated that he had been illegally detained yet failed to raise the same before the trial court.
20. On malicious prosecution, she submitted that the elements to prove such a claim which have been discussed in a plethora of cases were outlined in the case of *Murunga v The Attorney General* (1979) KLR 138. They are that: (i) a prosecution was instituted by the defendant or by someone for whose acts he is responsible, (ii) that the prosecution terminated in the plaintiffs’ favour, (iii) that the prosecution was instituted without reasonable and probable cause and (iv) it was actuated by malice.

Also see (i) *Mbowa v Easy Mengo Administration* (1972) E.A., (ii) *Zablon Mwauma Kadori v National Cereals and Produce Board Mombasa* HCCC No 152 of 1997 (iii) *Kagane v Attorney General and another* (1969) EA 643.
21. Counsel while referring to the petitioner’s annexed documents stated that the petitioner had failed to disclose that he was charged alongside six other persons and the circumstances that led to their arrest and prosecution. She stressed that it was clear that there was reasonable and probable cause for prosecution of the petitioner despite his acquittal.
22. It is Counsel’s contention that the petitioner had failed to demonstrate any malice on the part of the respondents noting that an acquittal is not proof of malice as held in the case of *GBM Kariuki v AG* (2016) eKLR. Additional reliance was placed on the case of *James Karuga Kiiru v Joseph Mwamburi and 3 others* (NBI) CA No 171 of 2000, *Isaac N Okero V Samuel Otieno Onyango* [2017] eKLR, *Attorney General & 2 others v Joseph Marangu* [2018] eKLR and *Nzoia Sugar Company Ltd v Fungututi* [1988] KLR 399.
23. On the petitioner’s prayer for damages, Counsel stated that the petitioner was not entitled to damages or compensation as he had failed to prove the claim for Kshs 60,000,000 or provide a basis for the grant of the orders. In support she relied on the case of *John Kipkemboi & another v Morris Kedolo* (2019) eKLR where it was emphasized that special damages must be specifically proved. Also see *China Sichuan International Company Limited v Felix Ouma Odhiambo* [2021] eKLR.
24. She further contended that owing to the fact that the claim was based on loss of office, career stagnation, loss of future income and arose from an employer employee dispute, the same was within the exclusive jurisdiction of the Employment and Labour Relations Court as provided under Section 13 of the *Employment Labour Relations Court Act*.

Analysis and determination

25. Having carefully considered the pleadings, responses, submissions, cases cited and the law, I find the issues for determination to be:
 - i. Whether the instant petition is a tort or constitutional tort;



- ii. Whether the respondents acted within their legal mandate in light of the malicious prosecution claim;
- iii. Whether the petitioner's constitutional rights were violated by the respondents; and
- iv. Whether the petitioner is entitled to the reliefs sought.

Whether the instant petition is a tort or constitutional tort

26. The petitioner's main argument in the petition is that he was maliciously prosecuted by the respondents which violated his constitutional rights. He described this as a constitutional tort hence not amenable to limitation of time under the Statute of *Limitation of Actions Act*.
27. On the flipside, the 1st respondent asserted that the case of malicious prosecution falls under the law of tort and as such the petition is time barred owing to Section 4 of the *Limitation of Actions Act*.
28. Ordinarily, malicious prosecution is founded in civil law as a tort. In the recent times, a legal concept called constitutional tort has been developed with a view of offering damages for violation of constitutional rights. This concept was aptly defined in the case of *John Atelu Omilia & another v Attorney General & 4 others* [2017] eKLR as follows:

A "constitutional tort" refers to a private civil suit brought to redress a constitutional violation. [18] Constitutional torts are violation of one's constitutional rights by a government servant. "Constitutional tort" actions are an avenue through which individuals can directly appeal to *the Constitution* as a source of right to remedy government-inflicted injury
29. The Court went on to state that:

"Constitutional tort" actions compensate and deter constitutional rights violations. That is, remedying an individual's injury with a damage award which enforces *the Constitution* and sets adequate monetary disincentives to unconstitutional action. "Constitutional tort" actions are not only about rights protecting individuals from certain forms of injuries but also about norms that regulate government action; a court determines both that the plaintiff has a right rooted in the law and that a defendant has a correlative duty to the plaintiff to avoid violating that right. Thus, a protective right in a sense imposes a correlative duty on the government."
30. The Legal Information Institute defines a constitutional tort as a violation of one's constitutional rights by a government employee. The alleged constitutional violation creates a cause of action that is distinct from any otherwise available state tort remedy.
31. This was also observed by the Court of Appeal in the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR where it was held that:

"...It is important to state from the outset that damages arising out of Constitutional violations also known as Constitutional Tort Actions are within public law remedies and different from the common law damages for tort under private law."
32. My humble view is that a tort and a constitutional tort are two distinct legal concepts as discussed above. A tort which generally arises from common law is a breach of a duty fixed by law and owed to



people which entitles the aggrieved party damages. A constitutional tort on the other hand is a violation of constitutional rights by a State officer which also entitles one to damages.

33. When faced with a case that presents similarities of the two concepts it is my view that it is the court's duty to keenly examine the circumstances of the case, and endeavor to separate a common law tort from constitutional violations before making a determination. Parties have a tendency of conveniently invoking constitutional provisions in such circumstances, hence the court's keenness on the same.
34. It must therefore be determined whether the petitioner has a good claim for breach of a substantive constitutional right or a claim under the ordinary tort law. In my humble opinion, this determination is embodied in a test, focusing on the substratum of the case and whether that substratum will make this Court at first instance to principally consider constitutional values and principles as opposed to the principles of the tort.
35. Following an analysis of the material before this Court and the key question raised for determination, it is discernible that the petition is premised on malicious prosecution as its substratum. At the core of the matter this Court is called to principally determine whether the respondents breached their duty in instigating the arrest, charge and prosecution of the petitioner.
36. Conversely it is my view that in order to address the petitioner's issue, one of the main issues that must be determined is whether the respondents' actions amounted to malicious prosecution. This basically forces this Court to address the tort of malicious prosecution question first before answering the constitutional question.
37. This is by ascertaining whether the ingredients of the tort of malicious prosecution have been satisfied by the petitioner through the evidence adduced. Manifestly, this redress is adequately covered under the civil law. In this regard the Supreme Court in the case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR opined as follows:

“(256) The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v. Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:
“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

(257) Similarly the US Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (*Ashwander v Tennessee Valley Authority*, 297 US 288, 347 (1936)).”

38. From the foregoing it is my humble view that owing to the circumstances of this case, the instant petition is one that largely invokes the common law tort of malicious prosecution as opposed to a constitutional tort.

Whether the respondents acted within their legal mandate in light of the malicious prosecution claim

39. For completeness of the matter, the next question to answer is whether the petitioner has established his claim for malicious prosecution. In addition to the authorities cited by the parties, the Court in



the case of *Calvin Ouma Magare & 18 others v Director of Public Prosecutions & 4 others* [2022] eKLR citing the case of Cotran, J in *Murunga v Attorney General* (1979) KLR, 138 observed as follows:

“ 104. The principles governing a claim founded on malicious prosecution were laid down by Cotran, J in *Murunga v Attorney General* (1979) KLR, 138 as follows:

- a. The Plaintiff must show that the prosecution was instituted by the Defendant, or by someone for whose acts he is responsible;
- b. The Plaintiff must show that the prosecution terminated in his favour;
- c. The Plaintiff must demonstrate that the prosecution was instituted without reasonable and probable cause;
- d. He must also show that the prosecution was actuated by malice.”

46. Accordingly, a party who claims that he was unlawfully arrested and falsely imprisoned and or maliciously prosecuted, bears the burden of proving that the arrest had no basis in law at all. It will not be enough for him to merely state that the arrest was unlawful. Similarly, an acquittal alone cannot amount to proof of malice. There must be something more than just acquittal. In the case of *Nzoia Sugar Company Limited supra*, the Court of Appeal observed:

“It is trite learning that acquittal, per se, on a criminal case charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill will must be proved against the prosecutor. The mental element of ill will or improper motive cannot be found in an artificial person like the appellant. But there must be evidence of spite in one of its servants that can be attributed to the company.”

40. Firstly the 2nd respondent is obligated to prosecute criminal suits cases in line with his mandate under Article 157 of *the Constitution*. He is however required to do so in conformity with the principles of *the Constitution* as stipulated under Article 157(11). The petitioner in support of his claim sought to rely on the following documents: the charge sheet dated June 23, 2009, the judgment of the Chief Magistrate’s Court in Criminal Case No 2562 of 2009 dated December 3, 2010, his employment documentation and employment dismissal notice.

41. The facts in the criminal case were that the petitioner and the other co-accused persons on June 22, 2009 at Kenya Power and Lighting Company (his employer), jointly stole two transformers, aluminum conductors, clamps and other assorted material valued at Ksh 2,000,000. The police while investigating the suspicious activity at the location, asked the persons in the lorry carrying the goods to stop for a check. The driver declined to do so.

42. The lorry was later intercepted and stopped at a nearby roadblock, by the police who alerted Kenya Power and lighting Company who came to the scene and identified the goods as belonging to them. The occupants of the lorry who included the petitioner were arrested. The case was heard and the petitioner was subsequently acquitted under section 215 of the *Criminal Procedure Code* on December 3, 2010.

43. The ingredients of malicious prosecution require a petitioner or plaintiff to prove all the elements so as to secure a pronouncement in its favour. From a perusal of the facts above, it is clear that, the



prosecution was instituted by the 2nd respondent. Secondly, that the prosecution was terminated in the petitioner's favour. These two elements have thus been proved.

44. The next ingredient to be proved is the element of malice as the basis for the prosecution. The facts presented before this Court show that a crime was proved to have been committed. The Police investigated and referred the matter to the 2nd respondent for purposes of prosecution. This as is known, is one of the mandates of the police under Section 35 of the [National Police Service Act, 2011](#). The petitioner's evidence details the 2nd respondent as having carried out his mandate as required by the law. What is key to prove in these two elements is a demonstration of extrinsic unlawful factors contrary to those stipulated by the law that the respondents adopted in carrying out their mandate. It was the petitioner's duty to demonstrate that the respondents acted unreasonably and with no justification. The petitioner was placed on his defence under section 210 of the [Criminal Procedure Code](#) before his acquittal under section 215 of the [Criminal Procedure Code](#). The prosecution had therefore presented prima facie evidence before the Court.
45. In light of the above I find that although the petitioner asserts that the criminal case was malicious, he has not adduced any evidence to prove any element of malice in the prosecution of his case. He has further not demonstrated the exercise of the respondents' power which may appear to a reasonable man to be deployed for an ulterior or collateral motive other than for advancing the ends of justice.
46. The petitioner claims that his constitutional rights were violated when he was not presented before the criminal court within the required time. This is an issue which ought to have been raised before the trial court. There is no evidence that the same was done and so it fails.
47. On the flipside, as pointed out by the 1st respondent, tortious claims are subject to the statute of Limitations of Actions Act. A tortious claim under Section 4 of the Act is required to be presented before the lapse of 3 years from when the cause of action arose. The cause of action in this petition arose in 2009 and the initial petition filed in 2016. This was seven years after the occurrence of the cause of action. The divergence from the law to that extent was not justified at all by the petitioner. Had he been successful in his claim for malicious prosecution it is evident that the petition would have subsequently failed on this limb. The petitioner was well aware of this requirement and so avoided filing the matter as a civil claim, covering it as a constitutional petition.
48. The mere fact of acquittal of the petitioner by the criminal court is not in itself proof of a violation of his constitutional rights. The petitioner had the burden to prove that in arresting, charging and arresting him the Police and 2nd respondent acted without any basis thus maliciously. There was evidence of theft of properties of Kenya Power & Lighting Company. The Petitioner was working for the said company. He was in the lorry that was found carrying the stolen items. As stated above the determination of violation of constitutional rights in this petition was pegged on proof of the malicious prosecution claim which has failed. The claim therefore automatically fails as it was not separate from the malicious prosecution claim.
49. As I close, I am inclined to reject the 1st respondent's assertion that the matter invokes the Employment and Labour Relations Court jurisdiction, because the case arose from an employer – employee dispute. From the facts it is clear that the matter was not based on a dispute between an employer and employee, but was a criminal case investigated by the police and prosecuted by the 2nd respondent. The matter was therefore properly before this Court, as the High Court.
50. Having discussed the salient issues in this case and making the above findings, it is my conclusion that the petitioner is not entitled to the reliefs sought.
51. The upshot is that the petition dated August 10, 2018 lacks merit and is hereby be dismissed, with costs.



52 Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 27TH DAY OF APRIL 2023 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

