



REPUBLIC OF KENYA



**Raza v Inspector General of Police & 3 others (Civil Case 166 of 2018)  
[2023] KEHC 20882 (KLR) (Civ) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 20882 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL CASE 166 OF 2018  
DO CHEPKWONY, J**

**MAY 25, 2023**

**BETWEEN**

**SALIM RAZA ..... PLAINTIFF**

**AND**

**INSPECTOR GENERAL OF POLICE ..... 1<sup>ST</sup> DEFENDANT**

**DIRECTOR OF PUBLIC PROSECUTION ..... 2<sup>ND</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**TARIR MOHAMMED CHAUNDARY ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. This suit was commenced by way of a Plaint dated 13<sup>th</sup> July, 2018 and filed in court on even date against the Defendants seeking for the following prayers;
  - a. Special damages for Kshs.1,133,200/=.
  - b. Loss of earning.
  - c. Exemplary damages for malicious arrest, wrongful confinement, malicious prosecution and defamation.
  - d. General damages for malicious prosecution and wrongful detention.
  - e. Cost of this suit.
  - f. Interest on (a) and (b) above at court rates.



2. In his Pleint that on 13<sup>th</sup> September, 2009, the Plaintiff pleaded that while at his residential house, at around 4.40pm, he was attacked by eight people who were known to him and they caused him bodily harm which caused him to rush to Industrial Police Station to report the incident.
3. He stated that upon getting to Industrial Police Station, he found the 4<sup>th</sup> Defendant and his witness had maliciously made a report to the 1<sup>st</sup> Defendant's agent against the Plaintiff accusing him of assaulting them.
4. He further pleaded that the 4<sup>th</sup> Defendant in collusion with the 1<sup>st</sup> Defendant's agent officers from Industrial Police Station, maliciously, negligently and unlawfully caused the Plaintiff to be arrested and confined at industrial police station and later charged at Makadara Law Courts with the offence of assault *vide* Makadara Criminal case No.3734 of 2009, *Republic v Salim Raza*. The Plaintiff was acquitted on 9<sup>th</sup> October, 2016, under Section 215 of the [Criminal Procedure Code](#).
5. The Plaintiff pleaded particulars of malice by the 1<sup>st</sup> Defendant as follows:-
  - a. Instituting charges for no reasonable or probable cause.
  - b. Putting the Plaintiff in custody or detention beyond the required 24hours without any justifiable ground.
  - c. Denying the Plaintiff cash bail when there are compelling reasons for them to deny him.
  - d. Failing to conduct any or adequate investigations before instituting the charges.
  - e. Arresting the Plaintiff for no reasonable cause.
  - f. Unlawfully confining the Plaintiff at industrial police station and arraigning him in court on trumped up charges.
  - g. Refusing to hear the accused person's complaint and failing to carryout investigations.
6. The Plaintiff also pleaded malice by the 2<sup>nd</sup> Defendant particularized as follows:-
  - a. Prosecuting a case trumped with malice.
  - b. Colluding with the 1<sup>st</sup> Defendant's agents to rely on fabricated statement and shoddy and or no investigations was carried out.
7. It was the Plaintiff's case that he suffered loss and damages as a result and was acquitted on 9<sup>th</sup> October, 2016 under Section 215 of the [Criminal Procedure Code](#).
8. He averred that he was 43 years old at the time of his arrest and had a contract from P.J Dave Flowers Ltd as a Workshop Manager which was to start from 1<sup>st</sup> October, 2009, whereby he was to earn a monthly salary of Kshs.215,000/=, but due to the malicious prosecution, his contract was terminated which resulted to loss of employment.
9. The Plaintiff pleaded for damages for malicious arrest, false imprisonment, malicious accusation and defamation to his good character as he suffered embarrassment.
10. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed a joint statement of defence dated 3<sup>rd</sup> August, 2018 in response to the Plaintiff's claim. In their statement of defence, they denied the contents of the plaint and put the Plaintiff to strict proof of the contents.
11. Further, in the alternative and without prejudice, they stated that if at all the Plaintiff was arrested and prosecuted, the same was done following a valid complaint lodged with the police officers whereby



investigations were done in accordance with the law and in execution of Police Officers statutory duties particularized as follows:-

- a. To receive and act upon information that an offence cognizable in law has been or is likely to be committed.
  - b. To cause investigations to be undertaken and pursue every credible evidence upon reasonable cause.
  - c. To apprehend and detain in custody suspected offenders for the purpose of and incidental to the furtherance of (b) above.
  - d. To institute and undertake criminal proceedings against any person before any court in respect of offence alleged to be or have been committed by that person.
12. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants further stated that they reserve the right to raise a Preliminary Objection to the effect that the suit is time barred contrary to Section 3(1) of the *Public Authority Limitation Act*.

### **Evidence**

13. This matter proceeded for hearing on 10<sup>th</sup> March, 2022. The Plaintiff, Salim Raza, testified as PW1 and stated that he stays in Mariakani Estate in South B and he is a mechanic. PW1 told court that he recorded a witness statement with his advocate on 13<sup>th</sup> July, 2022, which he wished to rely on as his evidence in-chief and prayed that it be adopted as such.
14. PW1 also filed a list of documents dated 13<sup>th</sup> July, 2018 and a supplementary list of documents dated 27<sup>th</sup> November, 2018. He has a criminal receipt of when he was charged in court on 15<sup>th</sup> September, 2009. He had receipts for taxi transport for the times he went to both High Court and lower Court. There is a second bundle which is receipts from his lawyers. He said that he was supposed to be employed by a flower firm but missed the opportunity after he was arrested in his house and charged in court.
15. During cross examination, PW1 stated that he filed his plaint on 13<sup>th</sup> July, 2018. He told court that he was acquitted in the Makadara Chief Magistrate's Criminal case No.3734 of 2009 on 9<sup>th</sup> October, 2016. That he served the Government. There is a court order allowing him to file the suit after the time had lapsed. He stated that they would not be in court had they not been allowed to file the suit. He is claiming general damages for malicious prosecution and defamation.
16. It was the Plaintiff's case that he was in his house and was attacked by 8 people. When he went to the police station they locked him in and it took him 3 days to get to hospital. The taxis would have to wait for him to finalize with the court. The charges depend on the amount of time he kept there waiting. Sometimes he had witnesses. He was charged with the offence of assault. The Judgment has the answers. What the witnesses said is their evidence. The court found otherwise. The police never went to the scene for investigations. The police had no reason to file a case against him. They refused to hear him. They refused to attend to him. He was forty. He was denied his rights and they refused to give him bond. They kept him in cells for more than 24 hours. When he reached court, there was no witness statement. He was arrested at night on a Sunday at around 9.30pm. He is still unemployed and he lost a job opportunity. Since then he cannot be able to get a stable job. This is defamation. He lives in an estate with over 40 families. He has friends and they all kept talking about him being arrested. The police did not hear him and neither did they carry out any investigations. He is claiming for damages for the time he did not work.



17. The Plaintiff closed his case and the Defendants closed their case without calling any witness to testify in this matter.
18. At the close of the hearing, the parties were directed to file their respective written submissions. On record are submissions by the Plaintiff but there are no submissions filed on behalf of the Defendants. I have read through the pleadings, the submissions alongside the cited authorities, for consideration in my final analysis and determination of this appeal.
19. It is trite law that this being the first appellate court, it has a duty to firstly evaluate, re-analyse and re-assess the evidence that was adduced before the trial Court before drawing its own conclusion. That is the position that was held in the case of *Selle & another v Associated Motor Boat Co. Ltd & Others* [1968]EA 123, where the Court held as follows:-

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has 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.”

### **Analysis and Determination**

20. It is trite law that an appellate court will only interfere with a finding of a trial Court if it is satisfied that the decision was arrived at based on the correct principles of facts and the law (See case of *Mbogo & another v Shab* [1968]EA 93).
21. Having considered the pleadings, the written submissions on record and the authorities cited, this Court finds the following issues crystalizing for determination:-
  - a. Whether the Plaintiff was maliciously prosecuted by the Defendants.
  - b. Whether the Plaintiff is entitled to any remedies.

#### **a) Whether the Plaintiff was maliciously prosecuted by the Defendants**

22. The tort of malicious prosecution is committed where there are no justifiable legal reasons for instituting criminal proceedings against an individual. In the case of *Mbowa v East Mengo District Administration* [1972] EA 352), the East African Court of Appeal highlighted the essential elements constituting the tort of malicious prosecution as follows:-

“The action for damages for malicious prosecution is part of the common law of England...The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than for the public benefit. It originated in the medieval writ of conspiracy which was aimed against combinations to abuse legal procedure, that is, it was aimed at the prevention or restraint of improper legal proceedings...It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion of the truth. Its essential ingredients are: (1) the criminal proceedings must have been instituted by the defendant, that is, he



was instrumental in setting the law in motion against the Plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the Plaintiff or a person arrests the Plaintiff and takes him before a judicial authority; (2) the defendant must have acted without reasonable or probable cause i.e. there must have been no facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified; (3) the defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose; and (4), the criminal proceedings must have been terminated in the Plaintiff's favour, that is, the Plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge...The Plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage....."

23. The same principles were echoed in the case of *George Masinde Murunga v Attorney-General* [1979]eKLR as follows:-
- a. That the prosecution was instituted by the Defendant or by someone for whose acts he is responsible.
  - b. That the prosecution terminated in the Plaintiff's favour.
  - c. That the prosecution was instituted without reasonable and probable cause; and
  - d. That it was actuated by malice.
24. The said principles were further elaborated by Justice John M. Mativo (as he then was) in the case of *Stephen Gachau Githaiga & another v Attorney General* [2015] eKLR that;
- a. Malicious prosecution is an intentional tort designed to provide redress for losses flowing from an unjustified prosecution. Under the first element of the test for malicious prosecution, the Plaintiff must prove that the prosecution at issue was initiated by the Defendant.
  - b. This element identifies the proper target of the suit, as it is only those who were actively instrumental in setting the law in motion that may be held accountable for any damage that results.
  - c. The second element of the tort demands evidence that the prosecution terminated in the Plaintiff's favour. This requirement precludes a collateral attack on a conviction properly rendered by a criminal court, and thus avoids conflict between civil and criminal justice. The favourable termination requirement may be satisfied no matter the route by which the proceedings conclude in the Plaintiff's favour, whether it be an acquittal, a discharge at a preliminary hearing, a withdrawal, or a stay.
  - d. The third element which must be proven by a Plaintiff – absence of reasonable and probable cause to commence or continue the prosecution – further delineates the scope of potential Plaintiffs. As a matter of policy, if reasonable and probable cause existed at the time the prosecutor commenced or continued the criminal proceeding in question, the proceeding must be taken to have been properly instituted, regardless of the fact that it ultimately terminated in favour of the accused.
  - e. Finally, the initiation of criminal proceedings in the absence of reasonable and probable grounds does not itself suffice to ground a Plaintiff's case for malicious prosecution, regardless



of whether the defendant is a private or public actor. Malicious prosecution, as the label implies, is an intentional tort that requires proof that the defendant's conduct in setting the criminal process in motion was fueled by malice. The malice requirement is the key to striking the balance that the tort was designed to maintain: between society's interest in the effective administration of criminal justice and the need to compensate individuals who have been wrongly prosecuted for a primary purpose other than that of carrying the law into effect."

25. There is no dispute that the criminal prosecution of the Plaintiff was instituted by or at the instigation of the 4<sup>th</sup> Defendant who made a complaint with the police. There is also no dispute that as a result the Plaintiff was charged with the offence of Assault Causing Bodily Harm contrary to Section 251 of the *Penal Code* at Makadara Law Courts in Criminal Case No.3734 of 2009 *Republic v Salim Raza*. Thereafter, the criminal prosecution of the Plaintiff was terminated in an acquittal under Section 215 of the *Criminal Procedure Code*, which means that the criminal proceedings ended in favour of the Plaintiff.
26. It is this evident that the Plaintiff has established the element that the prosecution was instituted by the defendant or by someone for whose acts he is responsible and that the prosecution terminated in the Plaintiff's favour as per the requirements in (a) and (b) as set out in the case of *Mbowa v East Menngo District Administration (supra)*.
27. Having demonstrated that the prosecution was instituted by the Defendant and the prosecution terminated in his favour, the next element to be satisfied is whether the Defendants acted without reasonable and probable cause in prosecuting the Plaintiff. Reasonable and probable cause was defined in the case of *Edirisa Semakula v A.G* [1776] HCB 171 as follows;

"An honest belief in the guilt of the accused based upon full conviction, founded on reasonable grounds, of the existence of a state of circumstances which assuming them to be true, would reasonably lead any ordinary 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".
28. In the instant case, the police acted upon a reasonable complaint by the 4<sup>th</sup> Defendant. The Plaintiff has not shown by way of evidence that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants had any improper and wrongful motive in placing charges against the Plaintiff.
29. Lastly, the Plaintiff must show that the Defendants acted maliciously. To act maliciously is to act with improper motive not based on good faith. In a claim of malicious prosecution, the Plaintiff has to prove that the prosecution was for a purpose other than to vindicate the ends of justice.
30. In the case of *James Kiiru v Joseph Mwamburi & 2 Others* [2001]eKLR, the Court of Appeal held that:-

"To prosecute a person is not *prima facie* tortious, but to do so dishonestly or unreasonably is. Malicious prosecution thus differs from wrongful arrest and detention, in that the onus of proving that the prosecutor did not act honestly or reasonably lies on the prosecuted".
31. In regard to the allegations that the Plaintiff was held in police custody beyond 24 hours, there is no evidence on record to show the period the Plaintiff spent in custody. A mere claim that he was held for more than 24hours by the police is not enough. There must be evidence presented by a witness in the form of police records to show when he was arrested, arraigned in court and or released.



32. In the premises, this Court finds that the Defendants are not liable for malicious prosecution of the Plaintiff. Further, there is no evidence that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were motivated by any other fact other than for justice to be done.

**Whether the Plaintiff is entitled to any remedies**

33. Having failed to establish the claim for malicious prosecution, this Court finds that the Plaintiff has failed to furnish and determine this issue of whether the Plaintiff is or is not entitled to any remedies or damages in this matter.

34. The upshot of the foregoing is that this suit lacks merit and is hereby dismissed. However, the Plaintiff lost a job opportunity, each party to bear their own costs of this suit.

It is so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 25<sup>TH</sup> DAY OF MAY, 2023.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

Mr. Ngumbi counsel for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

Court Assistant - Martin

