



REPUBLIC OF KENYA



KENYA LAW
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**Karanja v Njoroge & 4 others (Civil Appeal E122 of 2021)
[2023] KEHC 19564 (KLR) (30 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19564 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E122 OF 2021
RE ABURILI, J
JUNE 30, 2023**

BETWEEN

JAMES KARIUKI KARANJA APPELLANT

AND

LUCY WANJIRU NJOROGE 1ST RESPONDENT

POLICE CONSTABLE MICHA 2ND RESPONDENT

COMMISSIONER OF POLICE 3RD RESPONDENT

PERMANENT SECRETARY 4TH RESPONDENT

ATTORNEY GENERAL 5TH RESPONDENT

*(An appeal arising out of the judgement and decree of the Honourable
A.O. Odawo in the Chief Magistrate's Court at Kisumu delivered
on the 26th July 2017 in Kisumu CMCC No. 524 of 2013)*

JUDGMENT

Introduction

1. The appellant in the lower court vide a plaint dated 29th November, 2013 sought for orders for general damages for defamation of character, malicious prosecution and false imprisonment. The respondents denied the averments made out in the plaint and put the appellant to strict proof.
2. The trial court found that the appellant failed to prove his case on a balance of probabilities and proceeded to dismiss his case. Aggrieved by the said decision, the Appellant instituted this appeal vide a memorandum of appeal dated 8th October 2021 and filed on the same dated that raised the following grounds;



- a. The learned magistrate erred in fact and in law in failing to appreciate that the respondents failed to prove their case to the required standard.
 - b. The learned magistrate failed in fact and in law to consider any of the compelling evidence adduced by the appellant at the trial court.
 - c. The learned magistrate erred by failing to find that in fact the appellant had proved his case to the required standards.
 - d. The learned magistrate erred in law by locking the appellant out from the proceedings in the trial court.
 - e. The learned magistrate erred in law and fact by failing to find out that the appellant was maliciously detained and prosecuted as pleaded in the lower court's pleadings.
 - f. The learned magistrate erred and proceeded on the basis of discredited and unreliable evidence.
 - g. In the further result, the learned magistrate erred by disregarding and failing to take into account credible and reliable evidence presented by the appellant.
 - h. All in all the learned magistrate so misdirected himself on matters of both law and fact as to occasion a miscarriage of justice against the appellant.
3. The parties agreed to canvass the appeal by way of written submissions.

The Appellant's Submissions

4. The appellant submitted that he was illegally arrested, detained and maliciously prosecuted by the 2nd respondent. Reliance was placed on the case of *James Kabindi Simba v Director of Public Prosecution & Others* [2020] eKLR where the court held inter alia that the arresting officer must have sufficient information justifying the arrest of a suspect. The appellant also relied on the case of *Joseck Simiyu Prichani & 11 Others v Attorney General & 2 Others* [2020] eKLR.
5. The appellant submitted that the person who instructed the police to arrest and detain him in Kondele was Lawrence Kagai. He further submitted that he came to know that it was the 1st respondent who lodged a complaint against him to the police after he was arraigned before the SPM's court at Winam on the 10th May 2012.
6. It was his submission the fact that the court disallowed the application made by the prosecution on the 24th January 2013 to withdraw the criminal case No. 707 of 2012 under section 87 (a) of the *CPC* but acquitted him under section 210 of the *CPC* was evidence that the case terminated in his favour and he thus deserved general damages for malicious prosecution and for character assassination.
7. The appellant submitted that he was entitled to general damages of Kshs. 3,000,000 for malicious prosecution and Kshs. 1,500,000 as costs for loss of business. Reliance was placed on the case of *Antony Murimi Waigwe v Attorney General & 4 others* where the court awarded the plaintiff, a supermarket attendant who was arrested and prosecuted and waited for 23 months for hearing of his case, a global sum of Kshs. 4,500,000 as general damages for loss of employment and reputation.

The 1st Respondent's Submissions

8. It was submitted that the plaintiff before the trial court had to prove all four elements of the tort of malicious prosecution in order to succeed in his claim.



9. The 1st respondent submitted that the appellant did not produce any documents in support of his case whereas she detailed the malicious damage to her property occasioned by the appellant and thus the appellant failed to prove his case on a balance of probabilities.
10. It was further submitted that the appellant failed to establish that the 1st respondent made a false or malicious report leading to his arrest and detention and further that the 1st respondent participated in his arrest, detention and prosecution.
11. The 1st respondent submitted that the appeal lacked merit as the appellant had not set out sufficient material to demonstrate that the trial magistrate erred in arriving at the decision to dismiss his case.

The 2nd to 5th Respondents' Submissions

12. It was submitted that the appellant had not demonstrated how the trial court erred in its finding of fact or law and that this court ought not to disturb the trial court's finding but rather dismiss the instant appeal.
13. It was submitted that the appellant did not demonstrate how his prosecution was done without probable cause and with malice and as such the trial court was right in its finding that the 2nd respondent were not wrong to have arrested the appellant.
14. The 2nd to 5th respondents further submitted that acquittal does not amount to malicious prosecution and that the appellant had to show the existence of all four elements which the appellant failed to do and that on the contrary there was probable cause for the arrest and prosecution of the appellant.
15. It was submitted that the instant appeal ought to be disallowed as the trial court properly applied the law to the facts in finding that the claim for malicious prosecution was not proven on a balance of probabilities.

Analysis and Determination

16. This being a first appeal, the court is tasked to peruse the entire record cognizant of the fact that it did not have the benefit of hearing the witnesses first hand. The court is further expected to make its own independent conclusions of the law and fact as was established in the case of *Selle & another v Associated Motor Boat Company Limited & others* [1968] EA 123.
17. From the Memorandum of Appeal and submissions by parties, the only issue arising for determination is Whether the elements for the tort of malicious prosecution were proved by the appellant.
18. The tort of malicious prosecution is an intentional tort that seeks to provide redress to a Plaintiff, for losses incurred following unsuccessful and malicious proceedings which had been initiated without any lawful reasonable and/or probable cause by the Defendant.
19. While it is within any person's rights to approach the Courts and/or other quasi-judicial bodies to seek redress for what they believe was a violation of rights and/or was an offence committed, this right must be exercised within the confines and parameters of the law, and for the genuine and proper reasons the law allows for, otherwise, such exercise may be tantamount to abuse of process, which is in itself a wrong and/or violation attracting a claim for damages for malicious prosecution.
20. Turning to the element of the said tort, judicial authorities have indicated them to be as follows:
 - i) The Defendant must have been responsible for having caused the charge to be brought against the plaintiff



- ii) The claim must have been determined in the Plaintiff's favour.
 - iii) The claim must have been brought without reasonable and/or probable cause.
 - iv) The Defendant must have been actuated by malice.
 - v) The Plaintiff must have suffered damage.
21. Instructively, the five elements apply conjunctively and all five must be present in order to successfully sustain a claim for damages for malicious prosecution. In the instant matter, the 1st Respondent claims to have been prosecuted with malice and without reasonable and /or any probable cause.
22. It is not in dispute that it was the 1st Respondent who occasioned the appellant's arrest. Further, it is evident that the appellant was apprehended to court at Winam on the 10th May 2012 and subsequently was acquitted with no case to answer under section 210 of the Criminal Procedure Code on the 24.1.2013 after numerous failures by the complainant to attend court. In the premises, acquittal of the appellant leads to a positive finding that the proceedings were determined in the appellant's favour.
23. I now turn to the question whether the claim against the appellant was brought without reasonable or probable cause. In order to determine whether there was any probable and/or reasonable cause, the reasonable man standard applies. In the case of *Hicks v Faulkner* (1878) 8 Q.B.D 167 at 171, the Court adopted the following definition of reasonable and probable cause: -
- ‘An honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead any ordinarily 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.’
- See also the case of *Kagane & Others vs Attorney General & Another* (1969) E.A. 643.
24. In the case of *Emmanuel Kuria Wa Gathoni v Commissioner of Police & another* Civil Suit No. 934 of 2004 [2017] eKLR , L. Njuguna J held as follows with respect to the element of reasonable and probable cause: -
- “Also, in *Samson John Nderitu v. The Attorney General* (2010) eKLR it was held as follows: -
- “It is trite and this court, has judicial notice of the fact that before an accused person is taken to court, and arraigned in court for criminal prosecution, the prosecuting authority namely the police or whatever unit, whose functions fall under the office of the Defendant, usually carry out investigations, record statements from potential witnesses, analyze the facts to determine if the facts disclose an offence before arraigning such a person in a court of law.”
25. It is thus clear that the existence of a reasonable and probable cause is dependent on the facts, circumstances, materials that the Prosecution had when charging the Plaintiff. It would thus be prudent to first of all ask the question whether there were any state of facts upon which the charges could be founded.
26. In the present case, the appellant was charged with the offence of malicious damage to property contrary to section 339 (1) of the *Penal Code*. The 1st respondent testified that there was a boundary dispute on the land where he and the appellant stayed and though the boundaries were well known to the appellant and other members of the family, as soon as her husband died, the appellant's father



- and the appellant demolished part of her shops and encroached on her portion of the land. It was her testimony that she reported to the police that the appellant had demolished her shops and taken away the iron sheets as well encroached on the land.
27. The appellant on his part had testified that the land belonged to his father though he did not produce any documents in support thereof.
28. Section 24 of the *National Police Service Act* empowers the police to arrest persons believed to have committed an offence. I further note that the appellant’s trial failed to kick off on three occasions as the prosecution failed to secure the 1st respondent’s attendance thus leading the trial magistrate to acquit the appellant under section 210 of the Criminal Procedure Code. There is no evidence that the complainant was bonded and deliberately failed to attend court on those e occasions.
29. There must be a balance between freedom of the prosecutor to perform the duty of prosecuting criminal offenders and the protection of an individual from false accusations. This resonates with the pronouncement of the Court of Appeal in the case of *Commissioner of Customs & Excise v Hasmukh Shamji Halai & 3 others* [2018] eKLR where it observed:
- “It would be a sad day, and a dangerous precedent in our criminal justice system, if we celebrated the acquittal of an accused due to the absence of witnesses and documents, regardless of the reasons for their absence, and equating the acquittal to proof of innocence. Acquittal in a criminal trial, for whatever reasons, is one of the necessary elements for proof in a suit for malicious prosecution.”
30. In the case of *Kagane & Others v The Attorney General & Another* [1969] E.A 643 RUDD J. stated:
- “The test whether the prosecution was instituted without reasonable and probable cause is whether the material known to the prosecution would have satisfied a prudent and cautious man that the Plaintiff was probably guilty of the offence.”
31. In the circumstances of this case, I find that the acquittal of the appellant due to the fact that the prosecution failed to secure the 1st respondent’s attendance in court did not equate to proof of the appellant’s innocence but on the contrary, based on the 1st respondent’s complaint and the evidence placed before the trial court of the land dispute over the said land, I find that the material placed before the prosecution was sufficient to satisfy them to arrest and charge the appellant with a cognizable offence.
32. What about malice? In *Nzoia Sugar Company Ltd v Fungututi* {1988} KLR 399, the Court of Appeal held;
- “Acquittal per se on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecutor. ...”
33. The appellant herein was well aware of the boundary dispute over the said land. For him to resort to allegedly shift boundaries that were earlier agreed on, especially after the 1st respondent’s husband had passed on, and with full knowledge of pending cases over the same in court and of the 1st respondent’s distance from the said land, the appellant was well intent in causing mayhem. It would be reasonable to expect that the 1st respondent would react by making a report to the police. That is what was expected of her in the circumstances.
34. I find no malice on the part of the 1st respondent in making her complaint to the police and further that it was reasonable for the prosecution to bring forth a case against the appellant.



35. In *Thomas Mutsotso Bisembe v Commissioner of Police & Another* {2013} eKLR, the Court relied on the case of *James Karuga Kiiru v Joseph Mwamburi & 3 others*, Nrb C.A. No. 171 of 2000 where it was held that:

“..... to prosecute a person is not prima facie tortuous, but to do so dishonestly or unreasonably is the burden of proving that the prosecutor did not act honestly or reasonably being on the person prosecuted. Malice, however, can either be express or can be gathered from the circumstances surrounding the prosecution. A prosecution can either be mounted based on an offence committed in the presence of law enforcement officers or by way of a complaint lodged by a person to the said officers or agencies. However, the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence.”

36. After examining the circumstances surrounding the prosecution of the appellant, I find that there was no malice in the making of the complaint and in the attempted prosecution of the appellant.

37. I thus find and hold that the appellant failed to prove his case on a balance of probabilities before the trial court. I The upshot of the above is that I find and hold that this appeal lacks merit and is hereby dismissed with an order that each party bear their own costs of the appeal.

38. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 30TH DAY OF JUNE, 2023

R.E. ABURILI

JUDGE

