



Mbuvi v Astral Aviation Company Limited & 2 others (Civil Appeal E224 of 2020) [2023] KEHC 21086 (KLR) (Civ) (27 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21086 (KLR)

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

CIVIL

CIVIL APPEAL E224 OF 2020

AA VISRAM, J

JULY 27, 2023

BETWEEN

PETER NGATIA MBUVI APPELLANT

AND

ASTRAL AVIATION COMPANY LIMITED 1ST RESPONDENT

THE OCS JKIA POLICE STATION 2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 3RD RESPONDENT

(Being an appeal from the entire judgment dated 11th September, 2020 of Hon. D.W.Mburu Ofisi Senior Principal Magistrate in Milimani CMCC Case No. 7085 of 2017)

JUDGMENT

Introduction

1. The Appellant (Plaintiff in the lower court) filed this suit in the lower court vide a plaint dated 10th January, 2019. He alleged that on or about 1st of August, 2016, the 1st Respondent (1st Defendant in the lower court) maliciously and without reasonable cause, provided false information to Jomo Kenyatta International Airport (JKIA) police station to the effect that he was involved in the offence of stealing goods in transit, contrary to section 268(1) as read with section 279 (c) of the Penal Code.
2. The Appellant alleged that despite pleading not guilty to the various charges preferred against him, the Respondents maliciously, and without reasonable and probable cause, proceeded to prosecute him vide Criminal Case No.76 of 2016. He was acquitted on 13th March, 2017 under section 215 of the Criminal Procedure Code.



3. Based on the above facts, the Appellant sought general damages for malicious and spiteful prosecution; costs, and interest at court rates. The suit was dismissed on 11th September, 2020, with costs to the Respondents.
4. Aggrieved by the lower court's judgment, the Appellant has filed this appeal dated 2nd October, 2020 on the following grounds:-
 1. The Learned Magistrate erred in law and in fact in finding that the prosecution of the Plaintiff who is the Appellant herein, was not actuated by malice.
 2. The Learned Magistrate erred in law and in fact in finding that there was reasonable and probable cause for the prosecution of the Plaintiff.
 3. The Learned Magistrate erred in law and in fact in finding that the Plaintiff was not entitled to compensation and general damages for malicious prosecution.
 4. The Learned Magistrate erred in law and in fact in his assessment of possible damages and made an assessment that is inordinately low.
 5. The Learned Magistrate erred in law in failing to consider the effect of the failure by the 2nd and 3rd Defendants to call witnesses.
 6. The Learned Magistrate erred in law and in fact in condemning the Plaintiff to pay costs to the Defendants.
 7. The Learned Magistrate erred in law in failing to consider in totality the material placed before him by the Appellant, and thus was plainly and clearly wrong in his findings of fact and law.
 8. The Learned Magistrate erred in law and in fact by applying a standard of proof higher than the required standard in civil cases.
5. The parties agreed to dispose of the appeal by way of written submissions and accordingly filed and served their respective submissions dated 24th January, 2023; 5th January, 2023; and 7th February, 2023.

Appellant's Submissions

6. The Appellant submitted that the prosecution was actuated by malice. He claimed that the investigation was rushed, and was not thorough. He contended that it was pre –meditated; intended to arrive at a particular decision. He submitted that there was no reasonable cause to make a complaint to the police in the first place.
7. The Appellant submitted that the lower court ought to have found that the 2nd and 3rd Respondents had not produced any evidence at the trial court, and accordingly, his case was uncontested. He relied on the decision of the High Court in *Kenneth Nyaga Mwigie v Austin Kiguta & 2 Others (2015) eKLR* where the Court stated the following:-

“The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in



evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record.”

8. He submitted that just because he had been put on his defence, that fact alone was not sufficient to dismiss his suit for malicious prosecution. In support of the above, he relied on the decision of the High Court in *Stephen Gachau Githaiga & another v Attorney General* [2015] eKLR, where the court stated as follows:-

“It is now trite law that acquittal whether after hearing both prosecution and defence witnesses or on a finding that there is no case to answer amounts to a termination in favour of the accused. The law is that for the purposes proof that the criminal proceedings have been determined in the Appellant’s favour it is enough that the criminal proceedings have been terminated without being brought to a formal end. Accordingly the finding of no case to answer or a withdrawal was a termination in favour of the first Respondent.”

9. Finally, he submitted that he ought to have been awarded general damages in the sum of Kshs. 500,000/=, which he contended was an appropriate figure based on his circumstances.

1st Respondent’s submissions

10. The 1st Respondent relied on the decision of the East African Court of Appeal in *Mbowa vs. East Menjo District Administration* [1972] EA 352, where the court outlined the principles applicable to malicious prosecution in the following terms:-

“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. In other words, the four requirements must "unite" in order to create or establish a cause of action. If the Plaintiff does not prove them he would fail in his action."

11. The 1st Respondent submitted that it had proper and reasonable cause to report the occurrence of the theft to the police, from which the prosecution emanated. It submitted that the police conducted a proper and full investigation before charging and arraigning the Appellant. Further, that the decision to prosecute was, and is made, by the Director of Public Prosecution. It was a reasonable and justified decision because the court put all the accused persons to their defence.
12. It contended that there could not have been malice because none of the arresting officers knew the Appellant prior to the incident. Moreover, three out of the five accused persons were eventually found guilty, and were convicted of the offence of stealing goods in transit. Finally, it contended that there was no evidence of malice in the lower court. In support of the above, the 1st Respondent relied on the High Court decision of *Margaret Ndege & 3 Others v Moses Oduor Ademba* (2021) eKLR where the court held as follows:-

"In the instant case, there is no evidence of malice, no evidence of unlawful actions, no evidence of excess or want of authority, no evidence of harassment or intimidation or even of manipulation of court process so as to seriously deprecate the likelihood that the Appellants' did not get a fair hearing and trial as provided for under Article 50 of *the Constitution*. 28. It is not enough to simply state that the criminal proceedings were malicious. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the Appellants were under serious threat of being undermined by the criminal prosecution. In the absence of concrete grounds for supposing that a criminal prosecution is an "abuse of process", is a "manipulation", "amounts to selective prosecution" or such other processes, or even supposing that the Appellants did not get a fair trial as protected in *the Constitution*, it is not mechanical enough that the existence of an acquittal on two out of three charges is sufficient enough to amount to malicious prosecution and false imprisonment.

The law remains very clear that the mere fact that a person has been acquitted of criminal charges does not necessarily connote malice on the part of the prosecution. In *Nzoia Sugar Company Ltd v. Fungututi* (1988) KLR 399 the Court of Appeal held that: "Acquittal person 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..."



2nd and 3rd Respondents submissions

13. The 2nd and 3rd Respondents did not raise any new matters in their joint submissions. In their view, the police had acted reasonably and with probable cause because several of the staff, charged together with the Appellant, were eventually found guilty.
14. Further, that the rationale for charging the Appellant was because he was on duty the night that the cargo was stolen; and he was in control of the inventory at the time that the phones went missing. Finally, the entire team that was on duty were also investigated and held accountable for the loss, not just the Appellant.

Analysis and Determination

15. I have read the record in its entirety and considered the grounds of appeal raised by the Appellant. The central issues that arise for determination are as follows:-
 - i. Was the prosecution actuated by malice?
 - ii. Was the prosecution based on reasonable and probable cause?

Was the prosecution actuated by malice?

16. As this is a first appeal, I have a duty to re-evaluate the evidence before me. This principle as set out in the Court of Appeal decision of *Selle and Another Versus Associated Motor Boat Company Ltd & Others* [1968] EA 123, where the court stated that:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion. 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, this Court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed in 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 on the case generally.”

17. The law guiding the tort of malicious prosecution is well settled in this country. In *Mbowa vs. East Meno District Administration* [1972] EA 352, the East African Court of Appeal expressed itself 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. In other words, the four requirements must "unite" in order to create or establish a cause of action. If the Plaintiff does not prove them he would fail in his action. The damage that is claimed is in respect of reputation but other damages might be claimed, for example, damage to property...The damage to the Plaintiff results at the stage in the criminal proceedings when the Plaintiff is acquitted or, if there is an appeal, when his conviction is quashed or set aside. In other words, the damage results at a stage when the criminal proceedings came to an end in his favour, whether finally or not. The Plaintiff could not possibly succeed without proving that the criminal proceedings terminated in his favour, for proving any or all of the first three essentials of malicious prosecution without the fourth which forms part of the cause of action, would not take him very far. He must prove that the court has found him not guilty of the offence charged...The law in an action for malicious prosecution has been clearly defined and in so far as the ordinary criminal prosecution is concerned the action does not lie until the Plaintiff has been acquitted of the charge. In this case the respondent could have brought his action for malicious prosecution until the prosecution ended in his favour. He could not have maintained his action whilst the prosecution was pending nor could he have maintained an action after he had been convicted. His right to bring the action only accrued when he secured his acquittal of the charge on appeal, and he then had the right to bring this action for damages...Time must begin to run as from the date when the Plaintiff could first successfully maintain an action. The cause of action is not complete until such a time, and in this case this was only after he was acquitted on appeal." (emphasis mine)

18. In James Karuga Kiiru –vs- Joseph Mwamburi and 3 Others, Nrb C.A No. 171 of 2000, the court held:-

"To prosecute a person is not prima facie tortuous, but to do so dishonestly or unreasonably is. And the burden of proving that the prosecutor did not act honestly or reasonably lies on the person prosecuted." (emphasis mine)



19. In *Kagane vs. Attorney General* (1969) EA 643, the court set the test for reasonable and probable cause. Citing *Hicks vs. Faulkner* [1878] 8 QBD 167 at 171, *Herniman vs. Smith* [1938] AC 305 and *Glinski vs. McIver* [1962] AC 726 the learned judge stated as follows:-

“Reasonable and probable cause is 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 an 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...Excluding cases where the basis for the prosecution is alleged to be wholly fabricated by the prosecutor, in which the sole issue is whether the case for the prosecution was fabricated or not, the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of objective test. That is to say, to constitute reasonable and probable cause the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material consisted of facts discovered by the prosecutor or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty. If and insofar as that material is based on information, the information must be reasonably credible, such that an ordinary reasonable prudent and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for the prosecution...If it is shown to the satisfaction of the judge that a reasonable prudent and cautious man would not have been satisfied that there was a proper case to put before the court, then absence of reasonable and probable cause has been established. If on the other hand the judge considers that prima facie there was enough to justify a belief in an ordinary reasonable prudent and cautious man that the accused was probably guilty then although this would amount to what I call primary reasonable and probable cause the judge may have to consider the further question as to whether the prosecutor himself did not believe in the probable guilt of the accused, and this is obviously a matter which is to be judged by a subjective test. This subjective test should only be applied where there is some evidence that the prosecutor himself did not honestly believe in the truth of the prosecution...In as much as this subjective test only comes into operation when there were circumstances in the knowledge of the prosecutor capable of amounting to reasonable and probable cause, the subjective test does not arise where the reason alleged as showing absence of reasonable and probable cause is merely the flimsiness of the prosecution case or the inherent unreliability of the information on which the case was based, because this is a matter for the judge alone when applying the objective test of the reasonable prudent and cautious man. Consequently the subjective test should only be applied where there is some evidence directly tending to show that the prosecutor did not believe in the truth of his case. Such evidence could be afforded by words or letters or conduct on the part of the prosecutor which tended to show that he did not believe in his case, as for example a failure or reluctance to bring it to trial, a statement that he did not believe in it and, I think possibly, an unexplained failure to call an essential witness who provided a basic part of the information upon which the prosecution was based.”

20. In my view, the foregoing is the applicable law and various conditions to be satisfied in order for a Plaintiff to succeed in the tort of malicious prosecution.
21. In the present matter, it is evident that the criminal proceedings terminated in the Appellant's favour since the Appellant was acquitted following a full hearing.



22. As regards the question of whether criminal proceedings were instituted by the 1st respondent, the 1st Respondent's case was that it simply reported the facts relating to the theft to the police, who carried out their investigations independently, and thereafter charged the Appellant in accordance with the law. Based on the record, the lower court found that the decision to charge and eventually prosecute the Appellant was reasonable based on the facts of the case. I have subjected the evidence to scrutiny and I am satisfied that the lower court reached a reasonable conclusion in this regard.
23. The law is clear that the mere fact that a person has been acquitted of the criminal charge does not necessarily mean that there was malice on the part of the prosecutor. Based on the record before me, it is evident that the decision to charge and prosecute the Appellant was based on a reasonable presumption and was applied equally to all the individuals who were on duty at the time of the theft. Moreover, the fact that several of the individuals who were charged were actually found guilty, shows that the decision was not baseless.
24. In the circumstances, as set out above, applying the law as stated in Kagane (supra) and Mbowa (supra) I do not think that the prosecutor acted in a dishonest or unreasonable manner. Moreover, as has been stated above, the burden of proving that the prosecutor did not act honestly or reasonably lay on the Appellant, as the person being prosecuted. I do not think this was done. I say so because looking at the record, it is clear to me that the 1st Respondent did not know the Appellant at the time he initiated the investigation relating to the theft of the 2nd Respondent's cargo.
25. Further, the arresting officers had never met the Appellant prior to the incident. They were merely carrying out their proper role as officers of the law. Finally, the decision to prosecute an individual in Kenya lies with the Director of Public Prosecutions, and not with the complainant. Based on the record before me, I am therefore satisfied that the Appellant was prosecuted in accordance with the proper processes contemplated within the law, and without malice.
26. As regards the argument that being put on one's defence does not defeat a claim for malicious prosecution, I would agree that this fact alone ought not to defeat a genuine claim. I am however of the view that in the present matter, the reasons for which the Appellant was put to his defence, disclosed a genuine case to answer, which, based on the facts, required a rebuttal of evidence before the court. Moreover, while no single factor may be determinative in relation to whether or not a case for malicious prosecution ought to succeed, the court cannot ignore the fact that a judicial officer felt the need to probe further, and investigate, whether or not a crime had been committed by the accused. The need for further forensic examination, to my mind, means that the case was not as clear-cut as the Appellant makes it out to be, because there was a need for further consideration and exploration as to whether or not a crime had been committed.
27. Based on the reasons as set out above, I do not think the Respondents ought to be faulted for reporting a genuine crime and for carrying out their lawful roles of investigating, and eventually prosecuting the same. In the end, I am of the view that the lower court reached a reasonable conclusion on all the issues raised.
28. Based on the reasons set out above, I find that the appeal lacks merit and the same is accordingly dismissed with costs.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 27TH DAY OF JULY 2023.

ALEEM VISRAM

JUDGE



In the presence of;

..... for the Appellant
..... for the 1st Respondent
..... for the 2nd Respondent
..... for the 3rd Respondent

