



**Mawere v Director of Public Prosecution & 3 others (Civil Case  
288 of 2018) [2023] KEHC 21704 (KLR) (Civ) (7 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21704 (KLR)

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

**CIVIL**

**CIVIL CASE 288 OF 2018**

**AN ONGERI, J**

**AUGUST 7, 2023**

**BETWEEN**

**EVANS OKETCH MAWERE ..... PLAINTIFF**

**AND**

**DIRECTOR OF PUBLIC PROSECUTION ..... 1<sup>ST</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**CORPORAL COSMAS KATINDI ..... 3<sup>RD</sup> DEFENDANT**

**INSPECTOR GENERAL OF POLICE ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff in this case Evans Oketch Mawere filed a plaint dated 11/12/2018 seeking for general damages for false imprisonment and malicious prosecution.
2. The defendants filed a defence dated 16/1/2019 denying the plaintiff's claim.
3. The case proceeded by way of *viva voce* evidence.
4. The plaintiff who testified as PW 1 produced his written statement dated 11/12/2018 as his evidence in chief and relied on his bundle of documents dated 11/12/2018 as exhibits.
5. The plaintiff's evidence was that on 5/12/2010, the 1<sup>st</sup> defendant charged the plaintiff with the offence of murder before the High Court of Kenya in Criminal Case no. 97 of 2010.
6. The proceedings were terminated on 13/12/2-17 in favour of the plaintiff after the plaintiff had been in custody for 7 years.



7. The High Court in acquitting the plaintiff found that the case was poorly investigated and that the 1<sup>st</sup> defendant was under pressure to charge the plaintiffs.
8. The plaintiff said in cross-examination that he stayed in custody for 7 years because he could not afford bond.
9. The plaintiff said he was not capable of raising bail. He was arrested on 24/11/2010 and taken to court on 5/12/2010.
10. Prior to his arrest, the plaintiff admitted that he used the deceased's phone on 4/6/2010.
11. The defendant called one witness, DW1, Corporal Cosmas K. Atindi who was the investigating officer in the case where the plaintiff was charged.
12. DW 1 adopted his written statement dated 26/2/2020 and filed in court on 10/3/2020 as his evidence in chief.
13. In his written statement DW1 stated as follows;

That he is the 3<sup>rd</sup> defendant in this case. He said he was investigating this case together with Inspector Benjamin Wasike and P.C Burgei.
14. DW1 said he testified in the criminal case against the plaintiff. His evidence was that from mobile data obtained from Safaricom the plaintiff used the phone belonging to deceased.
15. DW 1 said three other people had used the mobile phone. He said the other 3 were arrested and subsequently released after recording statements and they were not available to testify since they switched off their mobile phones and he could not trace them.
16. DW 1 also said he was not malicious since he was guided by the data from safaricom and further that the plaintiff was identified by a police informer.
17. DW 1 also said one Shadrack Wambua who said he knew the people who killed the deceased also disappeared.
18. In cross examination, DW 1 said the deceased was last seen on 2/6/2010. The body was found around mid-night on 2/6/2010.
19. DW 1 further said in cross examination that the mobile phone of the deceased was not produced as an exhibit in the criminal case and further that the mobile data from safaricom did not have records from 2<sup>nd</sup> to 3<sup>rd</sup> June 2010 when the deceased met his death.
20. DW 1 said his evidence against the plaintiff was that from the data obtained from safaricom, the plaintiff used the deceased's phone on 4/6/2020 two days after the deceased met his death on 2/6/2020.
21. DW 1 said the watchmen at Mbuthia Bar did not record their statements and neither were two people who were mentioned adversely as the killers of the deceased namely Alfred Kyalo and one Kemboi.
22. DW 1 also said that he used the deceased's phone on 4/6/2010 when the deceased had already passed away.
23. DW 1 said the record from safaricom had missing records for 2<sup>nd</sup> and 3<sup>rd</sup> June 2010.
24. DW 1 said Alfred Kyalo and one Kemboi recorded statements in the criminal case but they did not appear in court to testify.



25. He said he did not record the statement of the watchman at the bar where the deceased was before his body was found on 2/6/2010. He said he went to the bar but he did not meet the watchman.
26. The parties filed written submissions which I have duly considered.
27. I have carefully considered the evidence adduced in this case together with the written rival submissions.
28. It is the duty of the plaintiff to prove his case to the required standard in civil cases which is on a balance of probabilities.
29. The issues for determination in this case are as follows;
  - i. Whether the plaintiff proved his case to the required standard.
  - ii. Whether the defendants have a valid defence against the plaintiff's claim.
  - iii. Whether the plaintiff is entitled to the remedies he is seeking against the defendants.
30. On the issue as to whether the plaintiff proved his case, I find that the only evidence the 3rd defendant had against the plaintiff was that according to the data from Safaricom, the plaintiff used the mobile phone of the deceased on 4/6/2010.
31. The said mobile phone was not produced as an exhibit in the criminal case and the plaintiff was not given an opportunity to explain how he came in possession of the deceased's phone.
32. The Trial court said in the criminal case that the plaintiff was only charged in court because "the investigators were under pressure to charge someone since the deceased was an army officer."
33. There is also evidence that there were other people who used the same phone and they were also arrested but they were not charged as they were released under unclear circumstances.
34. The DPP is mandated to charge persons suspected to have committed offences. However, there has to be reasonable and probable cause which an ordinary prudent and cautious man would have relied upon to charge a suspect and I find that failure to establish the same constitutes malicious prosecution.
35. Article 157 of the constitution of Kenya provides as follows;
  - "(4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.
  - (6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—
    - (a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
    - (b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and



(c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”

36. I find that in the instant case there was an abuse of the legal process since there was pressure from unknown sources to charge the plaintiff with offence of murder.

37. The charge of murder is a serious one and I find that the police did not have sufficient evidence to arrest the plaintiff and arraign the plaintiff in court in the circumstances of this case.

38. I find that the plaintiff has proved that he was arrested and charged without reasonable and probable cause. There was evidence that the real culprits were known but the investigators did a shoddy job and recklessly charged the plaintiff hurriedly.

39. The essential ingredients to establish for the tort of malicious prosecution as follows;

1. That the proceedings were instituted or continued by the defendants.
2. That the defendants acted without any reasonable and probable cause.
3. That the defendants acted maliciously.
4. That the proceedings were terminated in favour of the plaintiff.

40. In the case of *Abubaker Simba v Stephen N.Wambari* [1994] eKLR the court stated as follows on the issue of a reasonable and probable cause;

“The plaintiff must prove that the setting of the law in motion by the inspector was without reasonable and probable cause....if the inspector believed what the witnesses told him then he was justified in acting as he did and I am satisfied the plaintiff has not established that he did not believe them or alternatively that he proceeded recklessly and indifferently as to whether there were genuine grounds of prosecuting the plaintiff or not”

41. I find that the plaintiff has proved the tort of malicious prosecution to the required standard.

42. On the issue as to whether the Defendants are liable for false imprisonment I find that the fact that the plaintiff remained in custody for seven years was his own choice. He did not ask for bond and he cannot blame the defendants for his incarceration.

43. The plaintiff submitted that he was unable to raise the bond terms and I find that the defendants were not to blame for the plaintiff’s predicament.



44. However, I find that the defendants admitted liability for 14 days the plaintiff was held in custody without a court order and I find that the Defendants are liable for false imprisonment for that period only and not for the seven years the plaintiff remained in remand.
45. On the issue as to whether the defendants have a valid defence to the plaintiff's claim, I find that the answer is in the negative for reasons that the Defendants did not have reasonable and probable cause to arrest the plaintiff and charge him with a serious offence of murder knowing very well that the only evidence they had against the plaintiff was that he had contact with the deceased's phone two days after the deceased had died.
46. The Defendants were under pressure to charge the plaintiff and this is contrary to the constitutional mandate of the 1<sup>st</sup> Defendant as enshrined in Article 157 of the *constitution*.
47. On the issue as to whether the plaintiff is entitled to the remedies he is seeking against the defendants, I find that the answer is in the affirmative.
48. I award the plaintiff general damages of Kshs. 5,000,000 for malicious prosecution and Kshs. 500,000 for false imprisonment for the period he was detained without a court order.
49. The plaintiff is not entitled to exemplary and punitive damages since the general damages awarded are adequate.
50. I accordingly enter judgment in favour of the plaintiff against the Defendants jointly and severally in the sum of Kshs. 5,500,000 plus costs of this suit and interest from the date of this judgment until payment in full.

Orders to issue accordingly.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS  
7<sup>TH</sup> DAY OF AUGUST, 2023.**

**A. N. ONGERI**

**JUDGE**

