



REPUBLIC OF KENYA



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**Kamanja v Nkatha & another (Civil Appeal E063 of 2021)
[2023] KEHC 26080 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26080 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E063 OF 2021
EM MURIITHI, J
NOVEMBER 30, 2023**

BETWEEN

DANIEL GITUMA KAMANJA APPELLANT

AND

PENINAH NKATHA 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

*(An appeal from the Judgment and Decree of Hon. M. A Odhiambo
(R.M) in Meru CMCC No. 215 of 2018 delivered on 29/4/2021)*

JUDGMENT

1. By a Plaint dated 19/11/2018 the Appellant sued the Respondents seeking special damages of Kshs 40,000/= and general damages for unlawful arrest, illegal detention and malicious prosecution together with costs of the suit and interest. He pleaded that on or about the 23rd March 2016, the 1st Respondent made a false and malicious report to Giaki police station to the effect that he had assaulted her by throwing stones which hit her on the right leg and back. As a result of the said report, he was arrested, detained for one day at the police station and prosecuted in Meru criminal case No. 723/2016 where he was eventually acquitted under section 215 of the Criminal Procedure Code. He averred that if at all the police had properly investigated the said report, they would not have arrested and prosecuted him.
2. The Respondents denied the claim by the distinct defences dated 12/2/2019 and 15/1/2020 respectively.
3. Upon full hearing, the trial court found that the Appellant had not proved his case on a balance of probabilities and dismissed it with costs to the Respondents.



The Appeal

4. On appeal, the Appellant filed his memorandum of appeal on 26/5/2021 raising 11 grounds as follows:
 1. The trial magistrate erred by failing to appreciate the fact that this was a civil case and the standard of prove was on a balance of probability.
 2. The trial magistrate erred in law in failing to appreciate that the conduct of the 2nd respondent of failing to conduct proper investigations were sufficient proof that there was spite and/or ill will and/or malice on the part of the 2nd respondent.
 3. The trial magistrate failed to appreciate the element of spite and/or ill will and/or malice on the part of the 1st respondent. This was portrayed by their dishonesty when tendering their evidence in court which was noted by the trial magistrate in his judgment of Criminal case No. 723 of 2016.
 4. The learned trial magistrate failed to appreciate that the 2nd respondent did not conduct thorough investigations leading to unlawful arrest, illegal detention and malicious prosecution of the appellant.
 5. The trial magistrate erred in law and fact by expecting the appellant to strictly prove whether or not the prosecution was instituted without reasonable cause and whether the prosecution was actuated by malice when the same could clearly be proved from the proceedings and or pleadings.
 6. The trial magistrate erred in misinterpreting the laid down principles to be satisfied and proved by a claimant in a case of malicious prosecution proceedings laid down in the case of Kagame & others v the Attorney General (1969) EA 643.
 7. The trial magistrate erred in disregarding the evidence of the appellant and that of his witnesses.
 8. The trial magistrate erred in disregarding weighty issues raised in the plaintiff 's submissions dated 23.3.2021.
 9. The learned trial magistrate erred in law and fact in holding that the 2nd respondent had not acted maliciously even when the 2nd respondent did not tender evidence to the contrary.
 10. The learned trial magistrate erred in law and fact in holding that the appellant had not proved his case on a balance of probabilities as required by the law.
 11. The entire finding and judgment of the learned magistrate is bad in law and is against the law and against the evidence on record.

Duty of the court

5. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. In doing so, the court must bear in mind that it did not have the advantage of seeing the witnesses testify. (See *Selle v Associated Motor Boat Co. & others* [1968] E.A. 123).

Evidence

6. PW1 Daniel Gituma Kamanja, and the Appellant herein testified that, "I am a farmer. I live in Giaki. I am the plaintiff herein. I sued them for malicious prosecution. I recorded statement dated 24/2/2020



adopt the same as my evidence in chief, I do say it was malicious and false report because the defendant is aware of an ongoing case – a land case. I did not assault her. I was acquitted in the criminal case. I had an advocate on record in the criminal case. I paid him Kshs. 40,000/=. PEXB 1 – Proceedings and Judgment in Cr. 723/16. PEXB 2 – Demand notice. PEXB 3 – Receipt of Kshs. 40,000/=. It was Kathukumi who assaulted her.”

7. On cross examination by counsel for the 1st Respondent, he stated that, “I was not home on that day. I was not at the scene of crime. I could hear the 1st defendant hauling insults. The incident occurred at Dominic Mwenda’s home. There were stones being pelted. It was Dominic throwing stones. Peninah was the one pelting stones. She was at Dominic Mwenda’s home. I only saw Peninah Nkatha. Kanthunkumi did not throw stones. Both sides were throwing stones. We have a case in regard to the said land. There is a land dispute between Dominic Mwenda and myself. The incident occurred on the said parcel of land. I made a report that Peninah insulted me. I do not have an OB. I do not know if the defendant sustained injuries. I was arrested at my home by police officers. I found 1st defendant at the police station. I was notified as to the warrant for arrest. I was placed on my defence by the court. I also gave my defence. The court noted that there was a land dispute between the parties. The ELC case is still pending. All the cases are as a result of a land dispute. The 1st defendant produced P3 form and hospital documents.”
8. On re-examination, he stated that, “I did not assault her. I do not know who assaulted her. She made a report due to the land dispute. I was not present on that day.”
9. PW2 Zachary Muthaura Gikunda, testified that, “I live in Giaki. I am a power saw operator. I recorded statement dated 24/2/2020 adopt the same as my evidence. Plaintiff was not there. There is a land dispute. It was Kathunkumi throwing stones. Plaintiff did not throw stones. It was Kantunkumi. I was a witness in the criminal case.”
10. On cross examination by counsel for the 1st Respondent, he stated that, “I was on that parcel of land. The land belongs to Daniel Gituma. He was ferrying fine wood. He was in his house at the time. There was a lot of commotion. He did not leave his house. I do not have any interest on the land. I do not know that there is a land dispute. There were stones that were thrown. I saw Kanthunkumi throwing stones. I do not know if the 1st defendant was at scene on that day. I do not know if there was anyone who sustained injuries. The ELC case is yet to be finalized. There were around 10 people on that day. I also testified in the criminal case. The land where I was cutting timber belongs to Gituma. I do not know if the plaintiff made a report at the police station. He had no reason to make a request. He was not at the scene. There were around 10 people. The 10 people were throwing stones at Kanthunkumi. Kathunkumi was by himself. The plaintiff did not throw stones. The plaintiff did not assault anyone.”
11. PW3 Simon Kainga, testified that, “I am a farmer and area Manager Kieru village. Plaintiff and the 1st defendant are known to me. Dominic Mwenda is married to 1st defendant’s son. They are even neighbours. Adopt my statement as part of my evidence.”
12. On cross examination by counsel for the 1st Respondent, he stated that, “I did not witness the said incident. I was informed of the said incident. I am area manager Kieru sub location. Mbeu has 7 sub locations. The plaintiff and defendant (1st) are from Kieru location. There is lower and upper Kieru. They all hail from upper Kieru. I do not know of any land dispute between the parties. I do not know who the land in question belongs to who. Dominic and Peninah are related.”
13. On re-examination, he stated that, “Defendant is married at Kieru. She was born at Muthara.”
14. DW1 Penina Nkatha testified that, “I am a farmer. I live in Kieru sub location. I recorded statement at the Advocates office and signed. Adopt the same as my evidence. Its dated 11/10/2019. The



- complainant made at the police station was true. I reported and recorded the same in the OB. I then went to the hospital after the report was made.”
15. On cross examination by counsel for the Appellant, she stated that, “We were not testifying so that he can be imprisoned. I do not know whether she was acquitted or convicted. I am not related to the witnesses. My witness Dominic and Sabina. Dominic is not married to my daughter. The area manager who testified was not from my area. My area manager is Gitonga Kamuti. I was talking the truth in the assault case. I told the police to arrest the plaintiff because he was the one who assaulted me. Plaintiff was with the other man who assaulted me. I did not have any ill intentions. I am not aware of any land dispute between plaintiff and Mwenda. I do not know whether Mwenda had a dispute with plaintiff’s wife and that they have a case together. Mr. Kieti for the 2nd defendant.”
 16. On cross examination by counsel for the 2nd Respondent, she stated that, “I do not know the distance from my home to where I was working. It is a bit far. I only know the plaintiff on that day. I was hit with a stone on the leg and back. I then reported to the police station. When I reported I said it was Daniel Gituma who assaulted me. Sabina carried First Aid on my injured foot. I am the only one who made a report. My witnesses were Dominic Mwenda who is the owner of the land and Sabina. They testified in the criminal case. The plaintiff testified in the criminal case. I met with the police officer several times. When he issued me with a P3 form, when I took back the P3 form. I did not collude with the police officer. I reported and that was it.”
 17. On re-examination, she stated that, “I am not related to Dominic Mwenda. I am from Kieru. The area manager who testified is not my area manager. Daniel Gituma was not known to me before the incident. Daniel Gituma was the one who assaulted me. I know his name because when I made noise some people said that it was Gituma who had assaulted me. Dominic was present when I was being assaulted. I do not have any bad blood with the plaintiff. I told the police that plaintiff has assaulted me. I testified as per what transpired. I did not collude with the police to bring the charges.”
 18. DW2 Sabina Maithekia testified that, “I live in Sothirai. I am a farmer. I recorded my statement at the advocates’ office. Adopt the same as my evidence. It is dated 11/10/2019. I was present.”
 19. On cross examination by counsel for the Appellant, she stated that, “I testified in the criminal case. I do not know whether the plaintiff was acquitted in criminal case. I do not know why 1st defendant has been sued. Dominic Mwenda is known to me. We are not related. I do not know whether he is related to 1st defendant. I saw the plaintiff hit 1st defendant with a stone. That is what I told court in the criminal case. I am not lying. I saw him assault 1st defendant. I do not know whether the sub area testified.”
 20. On re-examination, she stated that, “What I saw is what I told court in the criminal case. I was present when 1st defendant was assaulted. Plaintiff was the one who assaulted her.”
 21. DW3 Dominic Mwenda testified that, “I live in Giaki. I am a farmer. I recorded my statement at my advocate’s office. Adopt the same as my evidence. It is dated 11/9/2019”
 22. On cross examination by counsel for the Appellant, he stated that, “I do not know that the plaintiff was acquitted. 1st defendant told me that plaintiff was acquitted in. I am not married to the 1st defendant’s daughter. The area manager testified. The area manager was paid. I do not have a land dispute with the plaintiff in Meru law court. I had brought a case against the plaintiff’s wife, and she was acquitted. It was a criminal case. She was acquitted. It is not a lie. Kathunkumi who was with the plaintiff was never arrested. The plaintiff’s sister has sold land to me.”
 23. On re-examination, he stated that, “Mr. Kainga was not our area manager. I live in Giaki Sothirai. The area manager who testified was from Mbiu. I am not related to the plaintiff. She was working on my



farm on that day. I do not have any relation with the police. I have a land dispute with the plaintiff. He wants to evict me out of that land. I instituted a case against the plaintiff's wife. I made a report. The cases are not related. The dispute that we have is in relation to the said parcel of land. I did not collude with 1st defendant to initiate the criminal charges. We saw them.”

Submissions

24. The Appellant urges that the 2nd Respondent's failure to arrest and charge one Kathunkumi is proof that there was no reasonable and probable cause for his arrest, and relies on *William Kabogo Gitau v George Thuo & 2 others* (2010) 1 KLR 526, *National Oil Corporation v John Mwangi Kaguenyu & 2 others* (2019) eKLR and *G.B.M Kariuki v Attorney General* (2016) eKLR. He urges that the manner in which he was arrested can be used to infer malice on the part of the 2nd Respondent, and prays for his appeal to be allowed with costs.
25. The 1st Respondent submits that the evidence presented by the prosecution witnesses coupled with the medical evidence proved that she had been injured which was a clear indication that a reasonable and/or probable cause existed to charge the Appellant, and cites *Hicks v Faulkner* (1878) 8 Q.B.D 167. She applauds the trial court for properly finding that the Appellant did not prove that his prosecution was conducted out of spite or ill will. She urges that the mere fact that the Appellant was acquitted does not in itself mean that the prosecution was actuated by malice per se, and cites *Nzoia Sugar Company Ltd v Fungututi* (1988) KLR 399 and *Silvia Kambura v George Kathurima Japhet & 2 Others* (2021) eKLR.
26. The 2nd Respondent adjures the court to be guided by *Abok James Odera T/A A.J Odera & Associates v Patrick Machira T/A Machira & Co. Advocates* (2013) eKLR and *Mbogo & Anor v Shah* (1968) EA in the exercise of its appellate jurisdiction. It urges that the Appellant failed to prove his case on a balance of probabilities, and cites *Evans Nyakwana v Cleophas Bwana Ongaro* (2015) eKLR, *William Kabogo Gitau v George Thuo & 2 Others* (2010) 1KLR and *Palace Investment Ltd v Geoffrey Kairuki Mwenda & Another* (2015) eKLR. It faults the Appellant for failing to prove the essential ingredients of malicious prosecution as set out in *John Ndeto Kyalo v Kenya Tea Development Authority & Another* (2005) eKLR, *Kasio Matuku & Kenya Post Office Savings Bank v James Kipkemboi Cheruiyot; Inspector General of Police & Attorney General (Interested Parties)* (2019) eKLR, *Mbowa v East Menjo District Administration* (1972) EA 352, *Stephen Gachau Githaiga & Another v Attorney General* (2015) eKLR and *James Karuga Kiiru v Joseph Mwamburi & 2 Others* (2001) eKLR. It urges that the police and the prosecution acted in honest belief that the facts available at the time constituted an offence and a reasonable person could have concluded that the Appellant was guilty of such an offence.

Analysis and Determination

27. From the grounds of appeal, the issue for determination is whether or not the elements of malicious prosecution were established to justify the dismissal of the Appellant's case.
28. The elements of malicious prosecution have been listed by the court (E. Cotran J) in *George Masinde Murunga v The Attorney General* (1979) eKLR as follows: “As to malicious prosecution the plaintiff must prove four things: (1) that the prosecution was instituted by Inspector Ouma (there is no dispute as to this); (2) that the prosecution terminated in the plaintiffs' favour (there is also no dispute as to this); (3) that the prosecution was instituted without reasonable and probable cause; and (4) that it was actuated by malice.”
29. The Appellant proved the first two elements that there was a prosecution against him which was terminated in his favour. The existence of those two elements is also conceded by the Respondents.



The real thrust of the Appeal is whether the said prosecution was instituted without reasonable or probable cause and whether the same was actuated by malice.

30. The test on whether a case was instituted with a reasonable and/or probable cause was also laid out by the Court of Appeal in *Kagane & Other v The Attorney General & Another* (1969) EA 643, as follows:

“...the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of an objective test. That is to say, to constitute reasonable and probable cause, 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 so far as that material is based upon 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.”

31. After the 1st Respondent had made an assault report at the police station, the police officers commenced their investigations which culminated in the arrest and charging of the Appellant. The prosecution arraigned 6 witnesses in support of the assault charges against the Appellant. The totality of the evidence led by the prosecution witnesses was that the 1st Respondent had indeed been assaulted. What followed was the Appellant’s acquittal on the grounds the 1st Respondent was related to some of her witnesses and that there was bad blood between the parties which was fueled by a land dispute.
32. This court finds that there was indeed a reasonable and/or probable cause to charge the Appellant. Acquittal alone is not per se proof of lack of reasonable and/or probable cause to charge a person.
33. Malice connotes the use of justice processes for some other motive other than the sincere desire of bringing the Appellant to justice upon a reasonable belief that he is guilty. Can the prosecution herein be said to have been actuated by malice? The answer is in the negative. The Appellant was properly arraigned in court after thorough investigations. After a prima facie case had been established against him, he was duly put on his defence when he testified and called 2 other witnesses. At the end of it all, the trial criminal court acquitted him under section 215 of the Criminal Procedure Code.
34. This court finds that there was no malice whatsoever in the institution of the criminal proceedings against the Appellant.
35. This court finds that the trial court properly analyzed the evidence before it before dismissing the Appellant’s case.

Orders

36. Accordingly, for the reasons set out above, the Court finds that the appeal is without merit and it is dismissed.
37. The respondent shall have the costs of the appeal.

Order accordingly.

DATED AND DELIVERED THIS 30TH DAY OF NOVEMBER 2023.

EDWARD M. MURIITHI

JUDGE

