



**Masitsa & another v Munialo & 4 others (Civil Appeal 19 of 2020)
[2022] KEHC 13368 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13368 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 19 OF 2020
PJO OTIENO, J
SEPTEMBER 22, 2022**

BETWEEN

SOLOMON MASITSA 1ST APPELLANT

NELLY WALWANDA 2ND APPELLANT

AND

JACOB MUNIALO 1ST RESPONDENT

SAUL MUMASI 2ND RESPONDENT

DAVID INJENDI 3RD RESPONDENT

SILVANUS LUBONGA 4TH RESPONDENT

KENNEDY WALWANDA 5TH RESPONDENT

*(Being an appeal from the Judgment of Hon E. Malesi, SRM, in Kakamega
CM's Court Civils Suit No. 20 of 2019 delivered on 18th February 2020)*

JUDGMENT

1. Before the trial court was a suit based on the torts of false imprisonment and malicious prosecution and seeking general damages, aggravated and exemplary damages.
2. The fact pleaded by the respondents, as plaintiff then, were that they were arrested and arraigned in court at Butali and charged with the offence of malicious damage to property and stealing on the basis of a complaint lodged by the appellants. The trial having commenced in the year 2015 proceeded and terminated on the February 7, 2018 with the acquittal of all respondents of all the charges.
3. Having been acquitted the respondents filed the suit aforesaid and obtained a judgment now challenged in this appeal. The particulars pleaded to demonstrate malice and unreasonableness on the



decision to report and charge were that the police failed to conduct proper investigations on the alleged offences which investigations would have shown that there was never reasonable or probable cause to prefer any charges because the house was indeed pulled down, belonged to one Moses, a brother to 1st respondent, and was pulled down in observance of a cultural rite commonly referred to as *emikoye* as the final rites to the deceased. To the respondents, the house belonged to the brother of the 1st respondent who was also a father to the appellants.

4. The appellants, as defendants at trial, resisted the claim by the statement of defence in which all the allegations in the plaintiff, save for the description for parties, were denied together with particulars of malice. There was an alternative plea that if the respondents were indeed arrested and charged, then, there was reasonable belief that they had committed a cognizable offence under the law and therefore that the actions of the appellants and the Attorney General were within the law. The defense concluded that the respondents were not entitled to any damages or indeed any remedy against the appellants.
5. In accordance with the rules, both sides filed witness statements, lists and copies of documents which statements were adopted as evidence in chief and documents produced as exhibits. It is noted that only the 1st and 2nd respondents gave evidence for themselves and on behalf of the others in support of the plaintiffs' case while in the defence evidence was given by the appellants. The Attorney General did not call any witness.
6. The gist of the evidence converged at the point that the house belonging to one Moses Walwanda, a brother to the 5th respondent and father to the appellants, was indeed pulled down by the respondents. The point of departure was whether the respondents had the right to do so in law on the basis of a cultural practice known as *emikoye*.
7. The other common ground was that the appellants admitted having made a report to the police but maintained that they did so reasonably as responsible citizens who believed that a crime had been committed but without any malice or ill-will and that the decision to arrest, charge and prosecute was at the behest of the prosecution and not with them as reportees.
8. After taking the evidence of the four witnesses, and being guided by the decision in the criminal trial, the court isolated four issues for determination being:-
 1. Was the prosecution instituted by the defendants or by someone for whose acts they are responsible;
 2. Whether the prosecution terminated in the plaintiff's favour
 3. Whether the prosecution was instituted without reasonable and probable cause; and
 4. Whether the prosecution of the plaintiffs was actuated by malice.
9. The court resolved the 1st two issues in the affirmative noting that there was no contest on them, then resolved the 3rd and 4th issues in the following items:-

In my considered view, the central point the police ought to have considered was the alleged 'emikoye' rites. From the evidence tendered by the plaintiff's, I am persuaded of the existence of such rites among the Tachoni people. Infact, it was conceded by the investigating officer in the criminal case that the house was demolished when the said rites were being performed. Might this explain why the investigating officer in the criminal case compiled an inquiry file and forwarded the same to the office of the Director Of Public Prosecutions with directions being issued that the charges be preferred against the plaintiff?



Cultural norms have a respectful position in our society and the courts will be ready to uphold the same as long as they are not shown to be inconsistent with the constitution and repugnant to justice and morality. The failure by the police to take into consideration the cultural reasoning behind the demolition of the house which was established belonged not to the 2nd defendant or the 3rd defendant makes me return a finding that the prosecution was without reasonable and probable cause.

I will adopt the reasoning of the court in the criminal case in dismissing the second charge of theft and therefore find the same to have been without reasonable and probable cause.

10. Persuaded by the above finding and given the circumstances of this case where the police failed to appreciate and consider the relevance of the 'emikoye' rites that in itself was malicious.

Issues analysis and determination

11. The appeal was directed to be canvassed by way of written submissions pursuant to which directions all sides files their respective submissions. In the submissions, by the Attorney General, not made party to the appeal, it is contended that the judgement was erroneous and needs to be disturbed for reasons including the allegations that there was never proof to the requisite standards. I consider those submission to support the appeal and that the Attorney General having been a party ought to have been made a party in this appeal.

12. I have had the benefit to read all submissions and the record of appeal filed and I discern the substantive issues for determination to be:-

1. Whether the case has proved to the requisite standards based on the evidence adduced.
2. Whether the trial court erred in failing to apply the applicable principles of law.

13. As said before, the fact of report by the appellant to the police and the ensuing trial and its determination in favour of the respondents are not in dispute but admitted. In fact, even an appeal filed against the acquittal was equally dismissed when the appellate court found and held:-

' From the charge, the property that was destroyed was said to belong to one Nelly Walwanda and Solomon Masitsa but in the evidence, the house belonged to Nelly's parents who were since deceased. When I asked for proof of ownership either directly or by way of letters of administration since the property belonged to the deceased, it was not forthcoming.

In the circumstances, the charges could not stand on that basis the respondents ought to have been charged with the offence of intermeddling contrary to section 45(1) of the Law of Succession Act (Chapter 120 of the Laws of Kenya) and I would venture to say that had this been done, they would have met the full force of the law. I will say no more.'

14. When it is common ground that the property belonging to the deceased and occupied by the 2nd appellant was destroyed and property therein lost, could it have been unreasonable for the appellants to make a report to the police? Can it be, in honesty, said that there was no possible cause to make the complaint? I answer both question in the negative. I find and hold that it is the duty of every citizen to fight crime by reporting suspected criminal conduct of the police and that destruction of property is a cognizable offence. The appellants were merely answering to the civic duty and it was not for them to decide whether to charge and which offence to prefer. That was squarely in the realm of prosecutorial discretion. A person who reports to the police a suspected crime only assume liability when it is proved that he acted without probable cause or when propelled by malice.



15. In the excerpt of the judgement of the High Court in the criminal appeal reproduced above, I read the court say that there could have been an offence of intermeddling contrary to section 45(1) of the [Law of Succession Act](#). That to me is a finding of a court of concurrent jurisdiction that there had been probable and reasonable cause. It reinforces the court's finding that there was indeed a reasonable and probable cause to believe that an offence had been committed and therefore report made to the police. Accordingly, it is the finding of this court that, the trial court ran into an error when it relied on the findings of the criminal court dismissing the charge and acquitting the respondents when it held and found that there was no reasonable nor probable cause to make the report. Acquittal alone is not proof of all ingredients of the torts of false arrest, imprisonment and malicious prosecution.
16. In [Robert Okeri Ombaka -vs- Central Bank of Kenya \[2015\] eKLR](#), the Court of Appeal set the ingredients of the torts and the onus of proof upon the plaintiff in the following words:-

' In this appeal there is no evidence that the respondent made a 'false' report or that the it was actuated by 'malice', or that his prosecution was brought 'without reasonable or probable cause'. That a suspect was acquitted of a criminal case is not a ground for filing a civil suit to claim damages for malicious prosecution or false imprisonment. Evidence of spite, ill will, lack of reasonable and probable cause must be established.'
17. However, having reported the complaint to the police, the police then had the duty to make a decision to charge based on investigation revealing all relevant facts and forming a honest belief that an offence has been disclosed and that the facts would persuade the court into finding a case to consider conviction upon,
18. Here the evidence led by the prosecution at the trial indeed convinced the court that a prima facie case had been disclosed. That is the reason the plaintiffs were called upon to defend themselves. In the court's view, a prima facie case cannot be revealed where there is no material pointing towards the guilt of the accused at the commencement of investigations and trial. In fact, by definition, a prima facie case is that upon which the court may reach a conviction even where no additional evidence is led. In other words a prima facie case is a rebuttable presumption that the accused is guilty of offence charged. See [Republic vs Abdi Ibrahim Oul \[2013\] eKLR](#).
19. I therefore find that even the decision to charge and prosecute was guided upon probable and reasonable cause and belief on the fact that the property claimed by the appellants, as beneficial owners, had been destroyed.
20. I do find that the acquittal of the respondents was not that they were being falsely framed by the appellants and prosecution but rather that the charge preferred was an improper one regard being had to the ownership of the property. That was a technical determination that does not negate the fact an offence had in fact been committed.
21. Lastly, it was important to prove malice against the respondents and or the prosecution. In the evidence led, even though particulars of malice were set out, no evidence was led to the prove malice.
22. That the respondents were alleging compliance with traditions and customs was not a justification to destroy a house of a deceased person. The place of customary law is well defined when juxtaposed against the statute. The customary law as a source of law doesn't override a statute, here the [Law of Succession Act](#). In the circumstances and face of the evidence led, there was no justification of a brother to the deceased to gang up with others to destroy the home of a deceased at night and without consultation and concurrence of the deceased's children, the appellants.



23. The conclusion that follows from the foregoing is that the trial court erred in finding that the prosecution was initiated bereft of reasonable and probable cause and that the same was accentuated by malice. It follows that the appeal is well merited. It is allowed and the costs thereof awarded to the appellants.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 22ND DAY OF SEPTEMBER 2022.

PATRICK JO OTIENO

JUDGE

In the presence of:

Ms Nafuye for the Respondents

Mr Athunga for the Appellants

Court Assistant: Kulubi/Mukabwa

