



Mshimba v Talent Works & Rights Enforcement Ltd & another (Civil Case 535 of 2013) [2022] KEHC 15838 (KLR) (Civ) (29 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15838 (KLR)

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

**CIVIL
CIVIL CASE 535 OF 2013**

**JK SERGON, J
NOVEMBER 29, 2022**

BETWEEN

ETHEL MSHIMBA PLAINTIFF

AND

TALENT WORKS & RIGHTS ENFORCEMENT LTD 1ST DEFENDANT

ATTORNEY GENERAL 2ND DEFENDANT

JUDGMENT

1. The plaintiff in the present instance filed the plaint dated December 23, 2013 and sought for judgment against the 1st and 2nd defendants in the following manner:
 - a. Special damages:

Legal costs for defence in Kibera Criminal Case No 2052 of 2010 (R v Ethel Mshimba, Kshs 30,000/= and Kshs 1,380/= expenses for typed proceedings therefore a total of Kshs 31,380/=
 - b. Loss of income and business opportunity for illegal confiscating of the plaintiff's business equipment for three years, a sum of Kshs 500,000/=
 - c. General damages for unlawful arrest, detention and malicious prosecution.
 - d. Punitive damages.
 - e. Compensation under Article 23(3) of the *Constitution*.
 - f. Costs of the suit.
 - g. Interest on items (a)-(f) above at court rates.



2. The plaintiff pleaded in the plaint that she was at all material times engaged in the business of carrying out copy-typing and computer bureau at her business premises namely Radica Computer Services (“the business premises”) situated at Nairobi West area in Nairobi.
3. The plaintiff pleaded in the plaint that sometime on or about the April 23, 2010 while she was in the lawful engagement of her business, the 1st defendant’s agent, one Paul Otieno Juma, while in the company of police officers from Langata Police Station, raided the business premises and accused the plaintiff of committing various offences, before seizing her business equipment.
4. It is pleaded in the plaint that the plaintiff was subsequently arrested and charged with four (4) counts of the offence of infringing on the copyrights of various artists represented by the 1st defendant, before being acquitted under Section 210 of the [Criminal Procedure Code](#) on February 5, 2013.
5. It is also pleaded in the plaint that as a result of her arrest and prosecution, the plaintiff lost business and suffered mental anguish.
6. According to the plaintiff, her arrest; charge and prosecution was therefore malicious and wrongful, and hence both the 1st and 2nd defendants ought to be held liable under the tort of malicious prosecution.
7. Upon service of summons, the 1st and 2nd defendants entered appearance and put in their statements of defence separately to deny the averments made in the plaint.
8. At the hearing of the suit, the plaintiffs testified whereas the defendants’ respective cases were closed for want of attendance.
9. The plaintiff on her part adopted her signed witness statement as evidence and stated that on the material date, a representative of the 1st defendant raided the business premises while in the company of police officers and accused her of infringing on the copyrights of the 1st defendant’s agents, before carrying items away from the business premises.
10. The plaintiff further stated that she had told the police officers that she had committed no illegal act but that she was eventually arrested and arraigned at Kibera Law Courts where she faced criminal charges of infringement of copyrights under the Copyrights Act.
11. It is the testimony by the plaintiff that she was remanded at Langata Women’s Prison before being released on cash bail in the sum of Kshs 60,000/=.
12. It is also the testimony by the plaintiff that the prosecution witness who testified was not part of the group that raided the business premises and that the charge preferred against her were not at all supported by evidence.
13. The plaintiff gave evidence that the criminal case prolonged for years but that she was finally acquitted following close of the prosecution case.
14. The plaintiff gave evidence that as a result of the malicious prosecution against her, she suffered mental anguish and lost business opportunities, in addition to incurring various costs.
15. In cross-examination, the plaintiff stated that she faulted the 1st defendant for being the one who had her arrested and that her computer and related equipment were confiscated prior to her arrest.
16. The plaintiff further stated that during the pendency of the criminal proceedings, she attended court 25 times and that as a result of the prosecution, her reputation greatly suffered.



17. In re-examination, the plaintiff testified that she did not possess any pornographic material in her computer prior to the arrest.
18. Upon close of the hearing, the parties were directed to put in their respective submissions. However, the record shows that at the time of writing this judgment, only the submissions by the plaintiff were availed for this court's consideration.
19. The plaintiff submits that in the absence of any evidence by the defendants to support their pleadings, it is only proper for this court to enter a finding of liability against the defendants jointly and severally, citing the case of *Mary Njeri Murigi v Peter Macharia & another* [2016] eKLR where the court held that:
- “In addition, pleadings, answers in cross examination and or submissions do not amount to evidence or defence. It therefore follows that however well-choreographed the submissions are and however serious the cross examination was and however fervent and vehement the statement of defence is, are not evidence.”
20. On damages, the plaintiff contends that she is entitled to special damages in the sums of Kshs 31,380/= and Kshs 500,000/= for expenses incurred and loss of business, respectively.
21. The plaintiff also proposes an award in the sum of Kshs 5,000,000/= on general damages for unlawful arrest, detention and malicious prosecution, citing the case of *Odembo & 7 others v Attorney General* [2022] eKLR where this court awarded the sum of Kshs 2,000,000/= under this head.
22. I have considered the plaintiff's submissions alongside the authorities relied upon and the evidence tendered at the trial.
23. The key issues for determination therefore are as follows:
- i. Whether the plaintiff has made a case for malicious prosecution against the defendants; and
 - ii. Whether the plaintiff is entitled to the reliefs sought.
24. In respect to the first issue above, the term ‘malicious prosecution’ was well defined by the court in *Stephen Gachau Gitthaiga & another v Attorney General* [2015] eKLR thus:
- “Malicious prosecution is an action for damages brought by one against whom a civil suit or criminal proceeding has been unsuccessfully commenced without Probable Cause and for a purpose other than that of bringing the alleged offender to justice...Malicious prosecution is an intentional tort designed to provide redress for losses flowing from an unjustified prosecution.”
25. Further to the foregoing, the elements to be established for a claim of malicious prosecution succeed were articulated in the case of *Kagane v Attorney General* (1969) EA 643 as cited by the court in *Kenya Power & Lighting Co Ltd v Maurice Otieno Odeyo & 2 others* [2017] eKLR as hereunder:
- a) The plaintiff must show that the prosecution was instituted by the defendant; or by someone for whose acts he is responsible;
 - b) That the prosecution terminated in the plaintiff's favour;
 - c) That the prosecution was instituted without reasonable and probable cause; and
 - d) That the prosecution was actuated by malice.”



26. It is therefore incumbent upon the plaintiff to establish the presence of the above ingredients collectively in order for her claim to succeed.
27. On the first ingredient, it is not in dispute that the arrest and prosecution of the plaintiff were instigated by the police and the prosecution who represent the State in the criminal process. Furthermore, the law sets out that the Attorney General, being the 2nd defendant in this instance, shall represent the State in civil proceedings. Resultantly, the first principle has been established in respect to the 2nd defendant.
28. Concerning the second ingredient, upon my perusal of copies of the criminal court ruling delivered on February 5, 2013 in Criminal Case No 2052 of 2010 before the Kibera Law Courts, it is evident that the criminal proceedings terminated in favour of the plaintiff by way of an acquittal under Section 210 of the Criminal Procedure Code. There is therefore no contention that this ingredient has been proved.
29. The third ingredient touches on the subject of probable/reasonable cause.
30. I appreciate that the burden of proving the absence of probable cause ultimately lies with the plaintiff. In the case of *Kagane v Attorney General (supra)* the court sought to define what constitutes reasonable or probable cause:

“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...”
31. It therefore follows that relevant material and facts ought to be clearly set out prior to the institution of a criminal case and which material and facts would lead any prudent person; including the police and subsequently, the prosecution; to the belief that the person charged is guilty of the offence.
32. Upon my examination of the evidence tendered, I note that while it is not in dispute that the police arrested and subsequently instigated the prosecution of the plaintiff subsequent to the complaint lodged by the 1st defendant, no evidence was tendered by the 2nd defendant to demonstrate the specific manner in which the investigations were carried out or to show how the decision to arrest and prosecute the plaintiff was arrived at.
33. It is also apparent from the record that neither of the investigating police officers nor the other actual witnesses to the raid were called as prosecution witnesses, and the sole prosecution witness was not present at the scene at all material times.
34. In respect to the 1st defendant, it is clear that its agents/ employees merely lodged a complaint against the plaintiffs but were not involved in the arrest and/or prosecution process.
35. In view of the foregoing circumstances and in the absence of any contrary evidence, I am satisfied that the plaintiff has shown the absence of reasonable and probable cause for her prosecution, as against the 2nd defendant.
36. In close reference to the above is the ingredient of malice. Honourable Mr. Justice Mativo in the case of *Stephen Gachau Githaiga (supra)* correctly articulated that an acquittal in a criminal case does not automatically connote malice; he went further to reason that malice can be determined from the circumstances of the case. The judge ultimately held that in the absence of evidence as to the facts relied upon in the prosecution thereof, there was presence of malice.



37. Upon my examination of the pleadings and evidence on record, I wish to restate my findings above that in the absence of evidence by the 2nd defendant to indicate probable cause in prosecuting the plaintiffs, I am duty bound to conclude that such prosecution was actuated by ill-will and hence, malice.
38. In view of all the foregoing circumstances, I am satisfied that a case for malicious prosecution has been made by the plaintiff as against the 2nd defendant. However, the case against the 1st defendant is hereby dismissed with costs.
39. I now wish to address the second issue on whether or not the plaintiff is entitled to the reliefs sought as hereunder.
- a. General damages for unlawful arrest, detention and malicious prosecution:
40. Under this head, upon taking into consideration the proposition made by the plaintiff coupled with the authority relied upon and which I find to be comparable in the circumstances, I also considered the award of Kshs 2,000,000/= made on general damages for malicious prosecution in the case of *Daniel Njuguna Muchiri v Barclays Bank Of Kenya Ltd & another* [2016] eKLR and the case of *Joseph Wamoto Karani v C. Dorman Limited & another* [2018] eKLR respectively.
41. Taking the above into account as well as the circumstances of the present case and inflation, I find the sum of Kshs 2,000,000/= to be a reasonable award under this head for the plaintiff.
- b. Punitive damages
42. Under this head, I note that the plaintiff did not pray for the same in her submissions, despite including it in her pleadings. I therefore decline to make any award here.
- c. Special damages
43. Upon my consideration of the evidence tendered here, I am inclined to award the sum of Kshs 61,560/= both pleaded and proved as costs having been incurred by the plaintiff in the criminal proceedings.
44. In the absence of any credible evidence to support the prayer for damages for loss of business/income, I decline to make any award for the same.
45. In the end therefore, I hereby enter judgment for the plaintiff and against the 2nd defendant in the following manner:
- i. General damages for
- ii. malicious prosecution Kshs 2,000,000/=
- iii. Special damages Kshs 61,560/=
- Total Kshs 2,061,560/=
- iv. The plaintiff shall also have the costs of the suit plus interest on the general damages at court rates from the date of judgment until payment in full and interest on the special damages from the date of filing suit until payment in full.
- v. The claim for malicious prosecution against the 1st defendant is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 29TH DAY OF NOVEMBER, 2022.

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J K SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the 1st Defendant

..... for the 2nd Defendant

