



**Mugo v Kariuki (Civil Appeal 30 of 2019)
[2022] KEHC 16666 (KLR) (21 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16666 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CIVIL APPEAL 30 OF 2019
CM KARIUKI, J
DECEMBER 21, 2022**

BETWEEN

SAMUEL WACHIRA MUGO APPELLANT

AND

RICHARD MWAURA KARIUKI RESPONDENT

(Being an appeal against the Judgment of Honourable S. N. Mwangi Senior Resident Magistrate at Chief Magistrate, Nyabururu delivered on 9th July, 2019 in Nyabururu CMCC 53 of 2015)

JUDGMENT

1. The appeal arises from a claim filed by the respondent seeking general damages for false arrest unlawfully detention and imprisonment and malicious prosecution. Respondent/defendant entered appearance and filed defence denying the claim.
2. The case was later heard and respondent was awarded Kshs 600,000/= as general damages for malicious, prosecution Kshs 300,000 for false imprisonment and costs.
3. The appellant lodged instant appeal setting out nine (9) grounds of appeal as follows;
 - a. That the trial magistrate erred and misdirected herself in failing to consider the evidence presented by the appellant.
 - b. The trial magistrate erred and misdirected herself in holding that the respondent had established his case to the required standards.
 - c. The trial magistrate erred and misdirected herself in holding that the complainant by the appellant to the police was actuated by malice.



- d. The trial magistrate erred and misdirected herself in failing to consider that the ruling by the magistrate acquitting the respondent in the criminal case never addressed the complainant of malicious damage to the appellant's property.
 - e. The trial magistrate erred and misdirected herself in holding that the appellant's complainant to the police was a civil claim yet a criminal offence of malicious damage to property had been established and the appellant was entitled to pursue either of the two causes of action.
 - f. The trial magistrate erred and misdirected herself in failing to consider the documents produced by the appellant to prove ownership of the land on which the complaint of malicious damage to property was based.
 - g. That the trial magistrate failed to consider that the respondent had not established all the essential ingredients of a claim of malicious prosecution.
 - h. The trial magistrate erred and misdirected herself in entering judgement against the appellant jointly and severally and for failing to apportion the damages thereof to the culpable parties.
 - i. The trial magistrate erred and misdirected herself in holding that the prosecution was instituted without reasonable and probable cause.
4. From respondent submissions on the grounds of the appeal sets out issues for determination as follows:
- i. Whether the learned trial magistrate correctly applied her mind to the evidence presented by the parties herein thus concluding the respondent had established his case to the required standards.
 - ii. Whether the trial learned trail magistrate correctly directed herself in awarding damages
 - iii. Who should bear cost of this appeal.
5. The parties were directed to canvass appeal via submissions.

Appellant's Case And Submissions.

6. The genesis of the claim by the respondent in the lower court was that he had been acquitted in criminal case number 951 of 2012 where he had been charged with assault causing actual bodily harm and malicious damage to property.
7. In the said criminal case whose proceedings were produced as exhibit in the lower court the appellant gave his testimony that he was the owner of plot No F which was equally being claimed by the respondent herein. He testified that he received a report from his watchman that his property had been damaged at night and that the persons who perpetrated the act had been positively identified. Further that at the time of the property being damaged the watchman was assaulted. A report was made to the police by the 2nd defendant in the lower court case.
8. The police visited the scene and confirmed that here was damage to the property and even took photographs of the damaged property which were produced in the said criminal case by the investigating officer one, PC Samuel Kankano.



9. Upon hearing all the prosecution witnesses the trial magistrate acquitted the respondent under section 210 and in a very brief ruling attacked the credibility of Joseph Nyachiro Makori who was the complainant in the charge of assault.
10. In the said ruling which we invite the court to critically examine the charge relating to malicious damage to property was never addressed.
11. The trial court did not make any reference as to whether the report of malicious damage to property as claimed by the appellant was a false report. Neither did it address the claim that there was damage to a permanent structure on the plot belonging to the appellant herein. From the said ruling it cannot be said and or ascertained that the appellant in making a report for malicious damage to property was a false report which was actuated by malice.
12. In her judgment the trial magistrate stated that the respondent's arrest and arraignment was probably unreasonable for the reason that the magistrate in the criminal case stated that PW1 admitted to an existing injury and that this attacked his credibility as a witness to be truthful.
13. Further the trial magistrate further stated at page 10 of her judgment and which is captured in page 82 of the record of appeal that this was a land dispute which the investigating officer ought to have discovered during his investigating.
14. We submit that the trial magistrate erred in holding that the prosecution of the respondent was actuated by malice. From the very start there were two complainants in the criminal case that culminated in the instant proceeding.
15. The appellant's complaint in the criminal trial was that of malicious damage to property. While there were rival claims relating to the property by both the appellant and the respondent what was complained about was malicious damage to property. The appellant did testify in the criminal case where he produced documents of ownership of the property where the damage to his permanent structure was done.
16. The police officer who was investigating the case also testified to the effect that he went to the scene and established that there was indeed damage to the buildings and even took photographs which were produced in the criminal trial as exhibits and which can be ascertained from the proceedings in the criminal trial which from part of the original record of this case having been produced as exhibit 1 as captured at the record of appeal at page 38.
17. The magistrate in the criminal trial while acquitting the respondent never made any findings as to the charge and complaint by the appellant herein relating to malicious damage to property. Indeed, from the very brief ruling that he made he never addressed the evidence tendered by the appellant as well as all the other prosecution witnesses apart from PW1.
18. The appellant had produced documents of ownership of the plot and went ahead to provide evidence through other prosecution witness that the said plot belonged to him and that actual damage had occurred to the structures that he had erected thereon.
19. To that extent the appellant was entitled to lodge a complaint to the police and had reasonable and probable cause to mount the prosecution.
20. We thus submit that the trial magistrate erred in holding that merely because the respondent was acquitted there was no reasonable nor probable cause to prosecute him. The respondent had been positively identified at the scene of the incident by other witnesses.



21. The appellant was justified in making a complaint to the police as it was true and correct that his property had been destroyed.
22. It should be noted that the trial magistrate in the criminal case never made any adverse findings as against the appellant relating to his complaint of malicious damage to property.
23. That the appellant has established all the grounds set out in the memorandum of appeal and the appeal should be allowed to the effect that all the findings thereof as made against the appellant be set aside with costs to the appellant.
24. That as the claim for the respondent in the lower court involved several limbs and several defendants and with the findings thereof that were made like general damages for malicious prosecution, false imprisonment and others if the court was correct in its findings, then it ought to have apportioned the awards to the culpable parties. It is submitted that, the entire findings were in error as the prosecution of the respondent and in particular as relates to the complaint of malicious damage to property by the appellant was not actuated by malice and was thus justified.

Respondent Case And Submissions

25. It is not in dispute that the appellant herein instituted the criminal proceedings in Nyahururu criminal case No 951 of 2012 in respect of count 1 where he was the complainant where the accused was charged with the offence of malicious damage of property contrary to section 339(1) of the *Penal Code*, particulars being that on the night of 20/May 21, 2012 at Olkalou plot No F in Olkalou township, Nyandarua county together with others not before court willfully and unlawfully demolished a stone-built stone roofed with six iron sheet valued at Kshs 80,000/= belonging to one Samuel Wachira Mugo.
26. The appellant was cited as the complainant in the charge sheet and he did not deny making the report to the police that led to the respondent's arrest and arraignment in court. The respondent was acquitted on September 8, 2014 under section 210 of the *Criminal Procedure Code* and a copy of the ruling acquitting him is missing from the record of appeal same as the charge sheet although both were produced as exhibits before the lower court.
27. The respondent filed a suit seeking for damages for malicious prosecution against both complainants in the criminal case, the investigating officer and the AG and the appeal herein relates to the 1st complainant only. Issues number 1 and 2 are therefore settled.
28. On issues number 3 and 4, the criminal charges were actuated by malice on the part of the appellant and there was absence of probable and reasonable cause.
29. The case of *Kagane v Attorney General* [1969] EA 643
30. Although the appellant maintained that the respondent had indeed damaged his house no evidence in form of photographs or a valuation report from a qualified valuer was produced both in the criminal case and the civil case in proof of such damage. Even if the appellant is to blame the police for failing to prosecute the criminal case to the required standards, he did not remedy the situation in the civil case as he was unable to demonstrate that his building was indeed damaged to at least justify the respondent's arrest noting that the respondent denied committing the offence. Failure to adduce such crucial evidence left the inference that the allegations were false and malicious.
31. The appellant admitted before the lower court that the very same day that the claims that his house was demolished, he received a call from the CID Nyahururu summoning him to Nyahururu Police Station and on his arrival at the station, he found the respondent who had lodged a formal complaint against him on ownership of the plot where the house is said to have been damaged. This was the one



the May 21, 2012. If the respondent had committed a crime in the night of 20/May 21, 2012, why was he not arrested while at the CID offices?

32. The appellant further confirmed that the matter was referred to the then Town Clerk Atwoli for resolution and they indeed met on May 31, 2012 at Olkalou outside a hotel and it is at this point that the respondent was arrested for the offence allegedly committed on 20/21/5/2012 and he locked up at Olkalou Police Station. This evidence is found in pages 57,58, and 59 of the ROA.
33. The appellant admitted that although he claims to have reported the offence in the morning of May 21, 2012, the OB number in the charge sheet was OB No 20/31/5/2012 which indicated that the offence was booked in the OB on the May 31, 2012 the very same day that the parties met Atwoli the Town Clerk and when the respondent was arrested. The land dispute and the aforesaid narration clearly connote malice on the part of the appellant and confirms the respondent's evidence that the reason behind his arrest and arraignment in court was to silence him on his quest for the claim of the land.
34. The court in acquitting the respondent on the falsified charges of assault by the appellant's watchman charged in count 2 observed that the injuries the watchman is said to have suffered were indeed inflicted before the date of the alleged assault a fact that was confirmed by the watchman in court and this leads to the only conclusion that the charges were fabricated under the machinations of the appellant.
35. Urge the court to find that the case was indeed proved to the required standards and not to interfere with the lower court's findings as the appellant failed to demonstrate that this house was damaged, the respondent damaged the house and that he had no malice in reporting.
36. The respondent was awarded a modest Kshs 930,500/= which was by all standards reasonable and it has not been demonstrated that learned trial magistrate took into consideration irrelevant factors, failed to take into account relevant factors and that the amount is inordinately high.
37. It is trite law that award of cost is discretionary and follow event pursuant to section 27 of the Civil Procedure Act. We thus pray for the same to be awarded to the respondent herein.

Issues Analysis And Determination

38. After going through the record, I find the issues are; whether the ingredients of malicious prosecution were established on balance of probabilities, if above in affirmative, whether the awards were inordinately high to warrant this court intervention, and the order as to costs.
39. As regards the duty of the first appellate court, in case of Gitobu Imanyara & 2 others v Attorney General [2016] e KLR, the Court of Appeal stated that;

“ [A]n 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 conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”
40. It is trite law that for malicious prosecution to be proven there are four elements that must be proven as was held in Mbowa v East Menjo District Administration [1972] EA 352;
 - (a). The plaintiff must show that prosecution was instituted by the defendant, or by someone for whose acts he is responsible;
 - (b). That the prosecution terminated in the plaintiff's favor;



- (c). That the prosecution was instituted without reasonable and probable cause;
- (d). That the prosecution was actuated by malice.
41. Kenyan courts have adopted the position setting out the criteria in resolving issues relating to malicious prosecution as follows, in the case of *Murunga v Attorney General*: -
- i. The plaintiff must show that prosecution was instituted by the defendant or by; someone for whose acts he is responsible;
 - ii. That the prosecution terminated in the plaintiff's favour;
 - iii. That the prosecution was instituted without reasonable and probable cause;
 - iv. That the prosecution was actuated by malice.
42. With regard to what constitutes reasonable and probable cause (to justify prosecution), the test was laid down by Rudd, J. in *Kagane and others v The Attorney General & another* [1969] EA 643 (at 646) and informed by the decision of Hawkins, J. in *Hicks v Faulkner*, (1878) 8 QBD 167(at 171) thus:
- 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.
- Justice Rudd thus remarked (at 647): Consequently, the subjective test should only be applied where there is some evidence directly tending to show that the prosecutor did not believe 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.
43. The High Court was guided by the above cases in finding for the plaintiffs in a claim for damages for false imprisonment and malicious prosecution in the case of *Thomas Mboya Oluoch & another v Lucy Muthoni Stephen & another* [2005] eKLR. In that suit, the plaintiffs, who had earlier been charged with assault, convicted and sentenced to imprisonment managed to successfully appeal against their conviction and sentence but not before serving 28 days of the imprisonment. The assault charges had been brought pursuant to a report made by the first defendant and the conviction and sentence followed. The High Court found both the first defendant and the second defendant (the Attorney General) liable for false imprisonment and malicious prosecution. Prosecution in the sense of the tort of malicious prosecution is defined as setting the law in motion. And 'the law is only set in motion by an appeal to some person clothed with judicial authority in regard to the matter in question, and to be liable for malicious prosecution a person must at least be actively instrumental in so setting the law in motion'.
44. It is imperative to note that the plaintiff needs to provide sufficient evidence to warrant grant of general and special damages, if at all. In the case of *Douglas Odhiambo Apel & another Telkom Kenya Ltd & 2 others* [2006] eKLR, the plaintiffs sued Telkom Kenya Ltd, the Commissioner of Police and the Attorney General for false imprisonment and malicious prosecution. On the complaint of Telkom



- Kenya, the plaintiffs had been arrested by the police and charged. The plaintiffs were finally acquitted and discharged, hence the suit.
45. Although the plaintiffs succeeded, the court held that they had not provided evidence to support general and special damages, and they were each awarded nominal damages of Kshs 100. In the case of *Thomas Mboya Oluoch & another v Lucy Muthoni Stephen & another* (Supra), failure by the police to conduct further investigations into a report made to them before proceeding to prosecute was one of the grounds relied upon by the plaintiff to prove malicious prosecution.
 46. The test for (and definition of) reasonable and probable cause in *Hicks v Faulkner* (supra) requires ‘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 guilty of the crime imputed’ on the part of the prosecutor (that is, the person who sets the law in motion against the accused).
 47. The appellant is relying on reasonable cause as his justification for reporting the matter to the police. However, one has to take a look at the facts of the case to determine whether there was a substantial reason to report the matter to the police and have the plaintiff arrested and charged.
 48. Although the appellant maintained that the respondent had indeed damaged his house no evidence in form of photographs or a valuation report from a qualified valuer was produced both in the criminal case and the civil case in proof of such damage.
 49. Even if the appellant is to blame the police for failing to prosecute the criminal case to the required standards, he did not remedy the situation in the civil case as he was unable to demonstrate that his building was indeed damaged to at least justify the respondent’s arrest noting that the respondent denied committing the offence. Failure to adduce such crucial evidence left the inference that the allegations were false and malicious.
 50. The appellant admitted before the lower court that the very same day that the claims that his house was demolished, he received a call from the CID Nyahururu summoning him to Nyahururu Police Station and on his arrival at the station, he found the respondent who had lodged a formal complaint against him on ownership of the plot where the house is said to have been damaged. This was on the May 21, 2012. If the respondent had committed a crime in the night of 20/May 21, 2012, why was he not arrested while at the CID offices?
 51. The appellant further confirmed that the matter was referred to the then Town Clerk Atwoli for resolution and they indeed met on May 31, 2012 at Olkalou outside a hotel and it is at this point that the respondent was arrested for the offence allegedly committed on 20/21/5/2012 and he was locked up at Olkalou Police Station.
 52. The appellant admitted that although he claims to have reported the offence in the morning of May 21, 2012, the OB number in the charge sheet was OB No 20/31/5/2012 which indicated that the offence was booked in the OB on the May 31, 2012 the very same day that the parties met Atwoli the Town Clerk and when the respondent was arrested. The land dispute and the aforesaid narration clearly connotes malice on the part of the appellant and confirms the respondent’s evidence that the reason behind his arrest and arraignment in court was to silence him on his quest for the claim of the land.
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before the date of the alleged assault a fact that was confirmed by the watchman in court and this leads to the only conclusion that the charges were fabricated under the machinations of the appellant.

54. In *Nzoia Sugar Company Ltd v Funguti* {1988} KLR 399, the Court of Appeal held;
- “Acquittal per se 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. The mental element of ill will or improper motive cannot be found in an artificial person like the appellant but there must be evidence of spite in one of its servants that can be attributed to the company.”
55. In *Thomas Mutsotso Bisembe v Commissioner of Police & another* [2013] eKLR the Court relied on the case of *James Karuga Kiiru v Joseph Mwamburi & 3 others*, Nrb CA No 171 of 2000 where it was held:
- “..... to prosecute a person is not prima facie tortuous, but to do so dishonestly or unreasonably is the burden of proving that the prosecutor did not act honestly or reasonably being on the person prosecuted. Malice, however, can either be express or can be gathered from the circumstances surrounding the prosecution. A prosecution can either be mounted based on an offence committed in the presence of law enforcement officers or by way of a complaint lodged by a person to the said officers or agencies. However, the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence.”
56. The question as to what amounts to proof on a balance of probabilities was the subject of discourse in *William Kabogo Gitau v George Thuo & 2 others* [2010] 1 KLR 526 where Kimaru J stated: -
- “In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”
57. Thus, the four ingredients of malicious prosecution were established. As to the measure of the damages awarded, it is trite law that an appellate court ought not to interfere with a trial court’s assessment of damages unless it is persuaded that the award was made on the wrong principles of law or that the same is either inordinately high or inordinately low as to make an entirely erroneous estimate of the damages. See *Butt v Khan* [1981] KLR 349 where it was held: -
- “An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.”
58. On damages, the court rely on the case *Attorney General v Peter Kirimi Mbogo & another* [2021] eKLR where it was held, “court considers that the three causes of action of unlawful arrest, wrongful imprisonment and malicious prosecution are all parts of the same unlawful transaction and there is an element of overlapping compensation”
- i. Thus, the award of Kshs 300,000 for false imprisonment is set aside and retains Kshs 600,000 for general damages for both malicious prosecution and false imprisonment.



ii. Thus, the appeal succeeds to that extent with no orders as to costs in the appeal.

Dated, Signed and Delivered at NYAHURURU this 21st day of December 2022.

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CHARLES KARIUKI

JUDGE

