



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL APPEAL NO. 69 OF 2018**

**WALTER AMIMO .....APPELLANT**

**VERSUS**

**EUNICE ATIENO .....1<sup>ST</sup> RESPONDENT**

**PC MUSWAGI .....2<sup>ND</sup> RESPONDENT**

**OCS USENGE POLICE STATION ..... 3<sup>RD</sup> RESPONDENT**

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

**PERMANENT SECRETARY**

**IN-CHARGE OF INTERNAL SECURITY .....5<sup>TH</sup> RESPONDENT**

**HON. ATTORNEY GENERAL .....6<sup>TH</sup> RESPONDENT**

**JUDGMENT**

The Appellant, **WALTER AMIMO**, had sued the six Respondents, seeking compensation for malicious prosecution.

1. The 1<sup>st</sup> Respondent, **EUNICE ATIENO** is said to have “*maliciously brought trumped up charges of sexual assault*” against the Appellant.
2. The 2<sup>nd</sup> Respondent **P.C. MUSWAGI**, is said to have “*maliciously charged the plaintiff with an offence of sexual assault.*”
3. The 3<sup>rd</sup> Respondent, the **O.C.S. USENGE POLICE STATION**, is said to have maliciously directed P.C. Muswagi to arrest and finally shoot the Appellant, on the basis of perilous rumors which were not investigated.
4. The 4<sup>th</sup> Respondent, the **INSPECTOR GENERAL OF POLICE**, is said to have failed to adequately advise, investigate and instruct P.C. Muswagi and the O.C.S Usenge Police Station against bringing trumped up charges.
5. The 5<sup>th</sup> Respondent, the **PERMANENT SECRETARY IN-CHARGE OF INTERNAL SECURITY**, together with the 6<sup>th</sup> Respondent, the **HON. ATTORNEY GENERAL**, were also said to have failed to adequately advise, investigate and instruct P.C. Muswagi and the O.C.S. Usenge Polic Station against bringing trumped up charges against the Appellant.
6. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents were also said to have maliciously prosecuted the Appellant.
7. Following the alleged malicious prosecution, the Appellant was acquitted by the learned trial magistrate.
8. At the time when he was being arrested, the Appellant asserted that he was shot on his left foot and on his thigh; and that it was PC Muswagi who inflicted the gun-shot injuries upon him.
9. As a result of the gun-shot, the Appellant asserted that he suffered grievous injuries, both physically and psychologically.

10. Following his acquittal by the trial court, the Appellant lodged a claim for compensation.
11. In the civil case, the learned trial magistrate held that there had been reasonable and probable cause to warrant the prosecution which had been mounted against the Appellant in the criminal case.
12. Secondly, the trial court held that the Defendants (who are the Respondents herein) were not actuated by malice.
13. The trial court found that the Appellant not only failed to plead the element of Malice in the Plaintiff, but also that the Appellant led no the evidence and also made no submissions to back the contention of malice on the part of the Respondents herein.
14. On the question of the claim for Kshs 6,000/= on the account of Special Damages, the learned trial magistrate held that the Plaintiff did not contain a claim for special damages arising from the injury sustained by the Appellant. It was the view of the trial court that the Appellant's claim for Special Damages was in respect to Malicious Prosecution. Therefore, once that claim was dismissed, the trial court could not award the sum claimed, in respect to the injuries sustained by the Appellant.
15. Furthermore, the trial court noted that there was no receipt produced by the Appellant to prove that he paid the sum of Kshs 6,000/= or any other amount.
16. The Appellant was dissatisfied with the judgment and he lodged this appeal. He set out 2 grounds of appeal, as follows;
  - “1. The Learned Trial Magistrate erred in law and fact by failing to appreciate the reliefs sought vide the Plaintiff dated 29<sup>th</sup> November 2013, filed on 21<sup>st</sup> February 2014, seeking general damages for Malicious Prosecution, Special Damages of Kshs 6,000/= and costs against the Respondents.***
  - 2. The Learned Trial Magistrate erred in fact and law in failing to give credence to the evidence before him as a whole, and instead dismissed the suit.”***
17. When canvassing the appeal the Appellant submitted that the Respondents' conduct, of setting in motion the criminal process, was fueled by malice.
18. He noted that the learned trial magistrate made an express finding that the criminal proceedings were instituted by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
19. Secondly, he submitted that there was no reasonable or probable cause to warrant the start of or to continue his prosecution. In that respect, the Appellant pointed out that the Respondents neither caught him in the act nor explained the reasons which led them to go and arrest the Appellant.
20. As far as the Appellant was concerned, there had been no complaint before he was shot and arrested.
21. Therefore, the Appellant submitted that the criminal proceedings against him were based on unsubstantiated and frivolous allegations.
22. In his view, that was the reason why the prosecution failed to produce key evidence, such as the Medical evidence that could have proved that the 1<sup>st</sup> Respondent had been raped by the Appellant.
23. On the one hand, the Appellant appreciated the fact that the trial court had held that there were numerous inconsistencies in the prosecution case, which therefore led to his acquittal.
24. However, on the other hand, the Appellant faulted the trial court for misdirecting itself when it held that the prosecution had reasonable and probable cause to prosecute the Appellant.
25. In answer to the appeal, the Respondents submitted that the facts which were at their disposal at the time the decision was made to prosecute the Appellant, were a proper foundation of a reasonable and probable cause for the prosecution.
26. The Respondents pointed out that none other than the Appellant had made a confession to the police. In the light of the said confession, the Respondents submitted they were satisfied that the Appellant was probably guilty of the offence.
27. On the issue of Malice, the Respondents submitted that the Appellant never led evidence to prove any ill-will or improper motive on the part of the Respondents.
28. As far as the Respondents were concerned, their actions were not actualized by malice or spite against the Appellant.
29. The Respondents conceded that the criminal proceedings against the Appellant had been terminated in his favour. However, the Respondents submitted that the acquittal had no link to any spite or ill-will on the part of the prosecution.
30. In determining the appeal, I am obliged to re-evaluate all the evidence on record, and to draw my own conclusions. And while drawing my said conclusions, I must remind myself that I did not have the benefit of observing the witnesses when they were testifying.

31. At the trial, it is only the Appellant who testified. He adopted his Witness Statement dated 29<sup>th</sup> November 2013 as his evidence-in-chief. Over and above that, the Appellant gave further oral testimony.
32. In his evidence the Appellant said that he was arrested at  
5a.m. outside the gate at Dallas Club, Usenge. He had worked at the disco which had been at that club, and had stepped out at that hour because he was not feeling well.
33. In his written statement, he said that he carries on the business of hiring Public Address Systems, and that on the material night he had been hired to play a disco at Usenge.
34. However, in his oral testimony, the Appellant described himself as a Security Officer, a “*bouncer freelance.*”
35. When he was standing outside Dallas Club, a police vehicle arrived and the police officers inside it arrested the Appellant. There were 3 Officers in the vehicle together with one lady.
36. After driving off with the Appellant for about 100 metres, the police vehicle stopped.
37. According to the Appellant, the police stopped so that they could effect another arrest. However, at that time, the Appellant did not know the reason why the vehicle had stopped. Therefore, when the vehicle stopped, the Appellant got off.
38. It was the evidence of the Appellant that he asked the police why they had arrested him. At that stage, one police officer shot him at his ankle.
39. When the Appellant turned around to look at the officer who had shot him, the said officer shot him again; this time, on the thigh.
40. After he had been injured, the Appellant was taken to Bondo District Hospital. Whilst at the hospital, the Appellant was surprised to hear the police telling the doctors that he (the Appellant) had raped the lady who was with him in the police vehicle.
41. Notwithstanding the denial by the lady, of the allegations that she had been raped by the Appellant, the police officers are said to have had the Appellant charged with the offences of rape, burglary and being in possession of a toy pistol. That is what the Appellant stated in his Witness Statement.
42. The Appellant also said, in the Witness Statement, that the doctors at Bondo District Hospital;  
  
“..... *released the lady because he could not examine someone who had not beenraped.*”
43. However, after the Appellant’s brother had intervened, through the DCIO, Mr. Okuthe, the doctor performed tests on both the girl and the Appellant.
44. It was the testimony of the Appellant, during the trial of the civil case, that the girl always denied having been raped.
45. Following the shooting by the police, the Appellant testified that he was no longer able to fend for himself, because he could not wade through the flood waters of his home area, Kano, as he used to do previously.
46. He also said that he was no longer able to participate in sports, yet prior to the shooting he was an all-rounded sportsman.
47. The Appellant further testified that he could no longer work as a bouncer, because that job required one to stand for long periods of time.
48. To support his claim against the Respondents herein, the Appellant provided the trial court with a certified copy of the record of the proceedings in the case of **REPUBLIC Vs WALTER AKONGO SRMCR CASE NO.1781 OF 2009**, (at Bondo Law Courts).
49. He also provided the trial court with a Medical Report dated 17<sup>th</sup> July 2013, which was signed by **DR. D.O. OLIMA**.
50. From the record of the proceedings of the Criminal Case, it is clear that the Appellant was charged with the offence of **SEXUAL ASSAULT** Contrary to **Section 5 (1) (b)** as read with **Section 5 (2)** of the **Sexual Offences Act**.
51. At the start of the case, the prosecution informed the learned magistrate that the prosecution would call seven witnesses. However, they ultimately called only 2 witnesses.
52. **PW1**, Eunice Atieno, testified that on the material day she attended the disco at Dallas Club.
53. She testified that she left the club at about 4.00am, and that she was accosted by a man whilst she was heading home.
54. The man tore her clothes and threw her down. He then raped her.

55. After a short while, the police arrived at the scene.
56. **PW1** testified that the police officers shot the assailant when he was running away, after the police caught him in the act.
57. Apparently, the police officers who first arrived at the scene did not have a vehicle. They only called for a vehicle, which came from the police station, after the assailant of **PW1** had been shot.
58. During cross-examination, **PW1** said that she was able to see the face of her attacker, because there was an electric bulb close to where she was sexually assaulted. The light was coming from the disco, which was still going on at that hour.
59. **PW2**, PC Shadrack Meli, was a police officer who was based at Usenge Police Station.
60. He said that the Police Station was located about 50 metres away from where **PW1** was assaulted.
61. When the police got to the scene, they found the Appellant in the act of sexually molesting the Complainant.
62. **PW2** corroborated the testimony of **PW1** about the fact that the Appellant confronted the officers, holding something that resembled a firearm.
63. It is then that the police shot the Appellant, according to **PW2**.
64. After giving consideration to the evidence, the learned trial magistrate noted as follows;

***“I have gone through the evidence before me.***

***The complainant stated that what the accused did to her was rape. The I.O. also stated that they found the accused having sex with the complainant. It is therefore not clear why the accused was charged with sexual assault and not rape or defilement, as the case may be.”***

65. In any event, no medical evidence was adduced by the prosecution to support the alleged sexual assault upon the Complainant.
66. The failure to produce the medical report, coupled with the inconsistencies in the evidence about the clothing worn by the Appellant, as well as about the actual sequence of events which led to the shooting of the Appellant, caused the trial court to acquit the Appellant.
67. However, the Appellant did not lead any evidence before the court that heard the civil case, to prove that the prosecution had been actuated by malice or spite.
68. If anything, the Complainant testified that the Appellant had raped her.
69. As the police officers who first arrived at the scene of crime are said to have found the Appellant still committing the offence, I share the view expressed by the trial court; that there was reasonable and probable cause to warrant the arrest and prosecution of the Appellant.
70. I further find that the Appellant failed to prove that the Complainant instituted the criminal proceedings against the Appellant.
71. The charge sheet was signed by the Officer-In-Charge of the Usenge Police Station. It is that police officer who is deemed to have made the decision to charge the Appellant.
72. The Appellant did not lead any evidence to show that any of the other Respondents played any role in either having charges preferred against the Appellant or in having the Appellant prosecuted.
73. I also note that whereas the Appellant had alleged that he was charged with the offences of rape, burglary and being in possession of a toy pistol, the evidence he made available to the trial court did not support that contention.
74. It caused me to ask myself whether or not the court could take at face value, what the Appellant had said; and my answer is that the court needed to cautiously examine any such testimony within the wider context of the rest of the evidence that had been provided by the Appellant himself!
75. Having re-evaluated the evidence, I found none that proved the assertions made in the plaint. There was no evidence that Eunice Atieno maliciously brought trumped up charges against the Appellant.
76. There was no evidence that P.C. Muswagi maliciously charged the Plaintiff with the offence of sexual assault.
77. The available evidence shows that P.C. Muswagi shot and injured the Appellant.
78. There was no evidence that the O.C.S. Usenge Police Station had maliciously directed P.C. Muswagi to arrest or to shoot the Appellant.

79. The available evidence appears to show that the Appellant was shot when he confronted the police officers at the scene of crime.
80. There was no evidence of the alleged failure by the Inspector General of Police, or the Permanent Secretary In-Charge of Internal Security, or the Hon. Attorney General to adequately advise the police officers against bringing trumped-up charges against the Appellant.
81. Indeed, there was no proof tendered by the Appellant to show that the charges were trumped up.
82. In **MBOWA V EAST MENGO DISTRICT ADMINISTRATION [1972] E.A. 352**, the Court of Appeal for East Africa held as follows regarding the compensation in a claim for Malicious Prosecution;
- “The damage that is claimed is in respect of reputation but other damages might be claimed, for example, damage to property....”*
83. In this case, the claim was for General Damages for Malicious Prosecution. It therefore follows that the Appellant should have provided evidence to support the loss of his reputation, as a result of the alleged malicious prosecution.
84. He did not lead evidence in that regard. He appears to have alluded to compensation in respect to the expenses he had incurred on medication which were necessary due to the injuries he sustained when he was shot.
85. He also complained of inability to engage in work as a security person or a bouncer, because those tasks required a person to stand for long periods. However, there was no specific claim for compensation in relation to the loss of earning capacity.
86. In the result, even if the Respondents were, or any of them was held liable for the tort of malicious prosecution, the court could not have awarded compensation either for the injuries or for the loss of earning capacity, as the Plaintiff did not have such claims.
87. In conclusion, I find that the Appellant did not discharge the onus of proving that the Respondents were actuated by malice or spite when they had him charged with the offence of sexual assault.
88. Accordingly, the appeal is without merit; it is dismissed.

**DATED, SIGNED and DELIVERED at KISUMU**

This 29<sup>th</sup> day of April 2020

**FRED A. OCHIENG**

**JUDGE**

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