



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 138 OF 2014**

**SAMUEL OMWENGA ONDORA.....APPELLANT**

**VERSUS**

**DANIEL GOR.....1<sup>ST</sup> RESPONDENT**

**JOYCE ODHIAMBO GOR.....2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

*(Being an Appeal from the Judgment of the Resident Magistrate Honourable S. Olando in Eldoret Chief Magistrate's Court Case No. 259 of 2011, dated 3<sup>rd</sup> November, 2014)*

**JUDGMENT**

The appellant filed the appeal being dissatisfied with the decision of the trial court in CMCC No. 259 of 2011. The cause of action was a suit for malicious prosecution arising from a criminal case. The suit in the lower court was dismissed with costs.

**APPELLANT'S CASE**

The appellant filed submissions on 25<sup>th</sup> July 2019. The appeal is based on 8 grounds. He cited the case of *Mbowa vs East Mengo District Administration (1972) EA 352* as an authority on the ingredients of the tort of malicious prosecution.

The appellant submitted that his arrest, arraignment and prosecution in a criminal court was malicious. The 1<sup>st</sup> and 2<sup>nd</sup> respondents set the law into motion by making an unreasonable, improbable and unsubstantiated complaint against the appellant to the police. The police with undue influence and instigation from the respondents arrested the appellant and subjected him to harassment, public ridicule and shame.

The appellant was charged separately based on complaints made on the same day. No evidence was tendered showing how the decision to arrest and charge the appellant was arrived at and the trial magistrate erred in failing to find that there was no reasonable cause leading to prosecution of the appellant.

He relied on the case of *Thomas Mboya Oluoch & another v Lucy Muthoni Stephen & another (2005) eKLR* and submitted that the trial magistrate misdirected himself in finding that the appellant was under obligation to call a witness to give credence to his case that the respondents acted without probable cause. He could not have called the investigating officer as the officer was instrumental in actuating malicious prosecution against the appellant.

He submitted that the trial court failed to consider the evidence which was to the effect that the prosecution was actuated by malice. The respondents failure to adduce any evidence to challenge the appellant's evidence means the evidence against them is uncontroverted and that the appellant was able to attain the standard of proof on a balance of probability. He referred to page 90 of the record of appeal with regards to evidence adduced as proof of malicious prosecution.

**3<sup>RD</sup> RESPONDENT'S CASE**

The 3<sup>rd</sup> respondent filed submissions on 22<sup>nd</sup> October 2019.

It submitted that the trial court laid down the principles in which a case of malicious prosecution will be successful. That;

- a) The plaintiff must show that the prosecution was instituted by the defendant
- b) The plaintiff must show that the prosecution terminated in his favour
- c) The plaintiff must demonstrate that the prosecution was instituted without reasonable and probable cause
- d) He must show that the prosecution was actuated by malice

It was upon the appellant to prove all the four of the principles on a balance of probability and he failed. He failed to show that there was no reasonable and probable cause on the part of the prosecution. The trial magistrate found that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were entitled to make the complaint to the police and further found that the police had reasonable and probable cause to suspect that the plaintiff had committed the offence. There is no proof that there was improper motive in instituting the case.

The respondents relied on the case of *Stephen Gachau Githaiga & another v Attorney General [2015] EKL*R on the fact that to prosecute does not make one per se tortious but that only in situations where the prosecutor acted dishonestly and unreasonable and that must be proved by the plaintiff.

The trial court found that there was a probable cause to prosecute and the respondent urged this court to find the same.

#### ISSUES FOR DETERMINATION

- a) Whether the prosecution of the appellant was malicious.

The principles for one to establish a successful case for malicious prosecution were given in the case of *Stephen Gachau Githaiga & another v Attorney General [2015] eKLR* where Mativo J held;

*Malicious prosecution is an intentional tort designed to provide redress for losses flowing from an unjustified prosecution. Under the first element of the test for malicious prosecution, the plaintiff must prove that the prosecution at issue was initiated by the defendant. This element identifies the proper target of the suit, as it is only those who were actively instrumental in setting the law in motion that may be held accountable for any damage that results.*

*The second element of the tort demands evidence that the prosecution terminated in the plaintiff's favour. This requirement precludes a collateral attack on a conviction properly rendered by a criminal court, and thus avoids conflict between civil and criminal justice. The favourable termination requirement may be satisfied no matter the route by which the proceedings conclude in the plaintiff's favour, whether it be an acquittal, a discharge at a preliminary hearing, a withdrawal, or a stay.*

*The third element which must be proven by a plaintiff — absence of reasonable and probable cause to commence or continue the prosecution — further delineates the scope of potential plaintiffs. As a matter of policy, if reasonable and probable cause existed at the time the prosecutor commenced or continued the criminal proceeding in question, the proceeding must be taken to have been properly instituted, regardless of the fact that it ultimately terminated in favour of the accused.*

*Finally, the initiation of criminal proceedings in the absence of reasonable and probable grounds does not itself suffice to ground a plaintiff's case for malicious prosecution, regardless of whether the defendant is a private or public actor. Malicious prosecution, as the label implies, is an intentional tort that requires proof that the defendant's conduct in setting the criminal process in motion was fueled by malice.*

*The malice requirement is the key to striking the balance that the tort was designed to maintain: between society's interest in the effective administration of criminal justice and the need to compensate individuals who have been wrongly prosecuted for a primary purpose other than that of carrying the law into effect.*

In summary, the key elements are;

- a) Prosecution was at the instance of the defendant.
- b) The criminal case was terminated in his favour.
- c) The defendant had no reasonable cause to prosecute him.
- d) The prosecution was actuated by malice.

In *Mbowa v East Meno Administration [1972] 1 EA 352 (CAK)* the court held;

*It seems to me that the plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must "unite" in order to create or establish a cause of action.*

***If the plaintiff does not prove them he would fail in his action.***

It is undisputed that the appellant proved the 1<sup>st</sup> and 2<sup>nd</sup> principles that are required to establish malicious prosecution. However, he failed to prove that there was no probable and reasonable cause to prosecute him. There was a fight and from the judgment in the criminal case it can be seen that the complainants went and made a report on the same. The parties fought in a public place and therefore there was probable cause for the prosecution of the appellant. Given that there was probable cause to prosecute, based on the fight and the reports made it is apparent that there was no malice. The appellant did not provide evidence of malice.

In the premises the appeal fails with costs to the respondents.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 27<sup>th</sup> day of November, 2019**

In the presence of:

Mrs. Nderitu holding brief for Mr. Chepkwony for the appellant

Mrs. Lung'u for the Attorney General for the respondent

1<sup>st</sup> and 2<sup>nd</sup> Respondent in person (absent)

Ms Abigael – Court assistant