



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**  
**CIVIL APPEAL NO. 14 OF 2013**

**FRANCIS MULINGE IKOTHO.....APPELLANT**

**VERSUS**

**ATTORNEY GENERAL .....RESPONDENT**

*(From the decision in Mwingi SRM Civil Case No. 45 of 2008 delivered on 7/08/2013 H. M. Nyaberi Ag. SPM)*

**JUDGMENT**

The appellant through an amended plaint dated 10th April 2008 sued the Attorney General, the respondent. He asked for general damages for malicious prosecution and false imprisonment. He also asked for exmporary punitive of damages for the blatant violation of his rights. Lastly, he asked for costs and interest.

In the plaint he stated that he was arrested from his home on 24th December 2002. That he was detained at Migwani Police Station and was not presented to the court until 4th February 2003, a total of 43 days, when he was arraigned before the Senior Resident Magistrate at Mwingi for committal proceedings. That on 15th August 2003, he was discharged following the repeal of the law on committal proceedings. He was however rearrested immediately detained and charged at the Machakos High Court on 11th November 2003 in High Court Criminal case No. 38 of 2003. He claimed that on 18th of May 2007 he was acquitted of the charge as the state failed to establish a prima facie case against him. He thus claimed the reliefs already mentioned above.

The defendant filed a defence on 29th May 2008. They denied the allegations in the plaint. They contended that the defendant was detained pursuant to a probable cause for the commission of a criminal offence punishable by law. They contended that the prosecution of the appellant was regular, procedural and reasonable. They denied the allegation of false imprisonment.

After a full trial, the suit of the appellant against the respondent was dismissed by the trial court with costs. Dissatisfied with the decision of the trial court, the appellant brought this appeal on eight grounds as follows:-

1. That the learned trial magistrate erred in law and fact in failing to find that the State through the police, restrained the appellant and denied him of his freedom of movement or liberty for 82 days.
2. The trial magistrate erred in law and fact in failing to find that the respondent did not lead any evidence to justify the said detention of the appellant.
3. The trial magistrate erred in law and in fact in failing to find that the appellant's evidence was uncontroverted by the respondent.
4. The trial magistrate decision is against the weight of the evidence tendered by the appellant.
5. The trial magistrate erred and failed to consider the case and address the evidence in support.
6. The trial magistrate decision was based on the wrong principles.

7. The trial magistrate erred in law and fact in failing to find that the fact of false imprisonment had been proved by the appellant against the respondent.
8. The trial magistrate erred in law and fact in basing his decisions on irrelevant and extraneous matters.

The appeal herein proceeded by way of filing written submissions. The appellant's counsel Musyoka and Muigai filed their written submissions on 10th February 2015. The respondent's counsel, the Attorney General, filed their written submissions on 17th December 2014. Counsel who appeared in court at the hearing, that is Mr. Kinaro for the appellant and Mr. Soita for the respondent, relied on the written submissions filed. I have perused and considered both sets of written submissions and authorities cited.

This appeal arose from a case of malicious prosecution and false imprisonment. As a first appellate court I am duty bound to re-evaluate the evidence on record and come to my own conclusions and inferences. See the case of ***Selle Vs. Associated Boat Co. Ltd [1968] EA 123***. I have re-evaluated the evidence on record.

It is proper for me to start by stating what constitutes the tort of malicious prosecution. In the book Clerk and Lindsell on torts 18th Edition at page 823, the essentials of the tort of malicious prosecution are listed as follows-

***“in an action of malicious prosecution the claimant must show first that he was prosecuted by the defendant, that is to say, that the law was set in motion against him on a criminal charge, secondly that the prosecution was determined in his favour, and thirdly that it was without reasonable or probable cause; fourthly that it was malicious. The onus of proving everyone of this is on the claimant. Evidence of malice of whatever degree cannot be invoked to dispense with or diminish the need to establish separately each of the first three elements of the torts.***

False imprisonment is also defined in the same publication. It is stated under page 687 that the tort of false imprisonment is established by proof of (1) the fact of imprisonment and (2) that imprisonment. Imprisonment is complete deprivation of liberty for any time, however short, without lawful cause.

At the hearing of the case, the appellant testified in person. He did not call any other witness. He stated that he was arrested by the Assistant Chief John Dobo Mathwa on the ground that Ben Nzabia had been assaulted. He was arrested with somebody else and they were arraigned in the Mwingi court in criminal case 2 of 2003. He learnt later that the other suspect died. Nobody testified in Mwingi the case but he was discharged on 11th November 2003 only to be arraigned again for murder at the High Court in Machakos wherein he was acquitted on no case to answer on 18th May 2007. He was cross examined at length on his evidence. He then closed his case.

The respondent called one witness Inspector Chris Likonyi DW1 the Deputy OCS of Migwani Police Station. He stated that he was not the investigating officer, as the investigating officer had died. That the appellant was brought to the station by the Assistant Chief of Nzawa Sub Location on 24th December 2002 and booked in the OB. It was his evidence that there was a complainant that, together with others, the appellant had assaulted one Nzabia who had been injured and was admitted in hospital. He produced an extract of the Occurrence Book.

When being cross examined, counsel for the respondent objected to some questions because the counsel for the appellant was asking questions which could only be answered by the investigating officer who had died by then. The trial court in its ruling upheld the objection and as such the defence case was also closed.

The trial court thereafter delivered a judgment dismissing the suit of the appellant with costs. Did the appellant establish on the balance of probabilities that he was maliciously prosecuted? See the case of ***Kirugi & another Vs. Kabiya & 3 others [1978] KLR 347***. From the evidence on record the chief or assistant chief is the one who reported the appellant to the police. He was not joined as a party to the

proceedings. No evidence was tendered to indicate that the assistant chief was malicious or that he had no good reason to report the appellant to the police. It cannot thus be said that the police or Attorney General maliciously prosecuted the appellant. As such I find that malicious prosecution was not proved against the respondent. The case of ***Leonard Ataro Peter Ajara Vs. Attorney General [2008] eKLR*** relied upon by the appellant counsel is distinguishable.

The other claim was with regard to false imprisonment. Though in the plaint there was a pleading listing the number of days on which the appellant was kept in custody for a long period, the appellant did not tender any evidence to support those allegations. The pleadings as they stood were mere allegations. They remain allegations unless evidence is tendered to support them. In the absence of any evidence tendered by the appellant to support the allegation of prolonged detention in police custody contrary to the law, it cannot be said that the appellant proved false imprisonment on the balance of probabilities before the trial court.

In my view the appellant failed to prove on the balance of probabilities the two elements of his claim which he brought against the Attorney General. He failed to prove either malicious prosecution or false imprisonment. As such I am of the view that the learned trial magistrate was correct in dismissing the case of the appellant. I thus find no merits in the appeal and dismiss the same.

As for costs, since the respondent is the Attorney General I am of the view that each party will bear their respective costs of this appeal. It is so ordered.

**Dated and delivered at Garissa this 28th day of April, 2015**

**GEORGE DULU**

**JUDGE**