



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL APPEAL NO.19 OF 2011**

**KENYA POWER & LIGHTING COMPANY LIMITED.....APPELLANT**

**VERSUS**

**TOM JUMA KIBANGA.....1<sup>ST</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

*(An Appeal from Judgment in Kisii CM Civil Case No.312 of 2009 by*

*Hon. Kimtai K.T -SRM dated 1<sup>st</sup> September, 2010)*

**JUDGMENT**

The 1<sup>st</sup> respondent herein **Tom Juma Kibanga** was the Plaintiff in Civil Suit No.312 of 2009. In his plaint dated **19<sup>th</sup> May 2009** he prayed for judgment to be entered against the defendant now appellant in the following terms:

- a. **General and Special damages.**
- b. **Costs of the suit**
- c. **Interest at court rates.**

The cause of action was captured from paragraph 4 of the plaint where the 1<sup>st</sup> respondent/plaintiff stated that following a complaint by agents, servants or employees of the appellant/1<sup>st</sup> defendant to Kisii Police Station alleging that the plaintiff had fraudulently obstructed electrical energy derived from an electrical power line belonging to the appellant, the complaint led to the arrest and arraignment in court of the 1<sup>st</sup> respondent charged with the offence of **Fraudulent Appropriation of Power contrary to Section 293 of the Penal Code** in CM Court at Kisii Criminal Case No.1528 of 2005. However, the 1<sup>st</sup> respondent was found innocent and acquitted under **Section 210 of the criminal Procedure Code** on 19<sup>th</sup> May 2008.

Following the unsuccessful criminal prosecution of the plaintiff he contended that the said report made to the police station and his prosecution was malicious and defamatory. The particulars of malice were particularized as follows:

1. ***Making a false complaint to the police station.***
2. ***Failing to conduct adequate investigations to form a basis for charging the plaintiff.***
3. ***Adducing false and inconsistent evidence in court.***

4. *Calling witnesses who apparently did not witness the plaintiff commit an offence as alleged.*
5. *Persisting to prosecute the plaintiff even when it was clear from the onset that he had not committed any offence.*
6. *Fabricating charges against the plaintiff.*
7. *Refusing to bring all witnesses to court.*
8. *Failing to bring the alleged exhibit to court.*
9. *Failing to demonstrate a nexus between the plaintiff and the alleged offence.*

The particulars of defamation were particularized as follows:

- I. **portraying the plaintiff as a criminal**
- II. **Portraying the plaintiff as a person bereft of morals.**

The 1<sup>st</sup> defendant herein Kenya Power & Lighting Company Limited in their defence denied the above allegations by the plaintiff but instead contended that the complaint was made at the Kisii Police station in good faith and that the police conducted independent investigations and preferred charges against the plaintiff having satisfied themselves that a prima facie case had been established.

The 2<sup>nd</sup> defendant herein the Honourable Attorney General in their statements of defence contended that the plaintiffs alleged acquittal did not give rise to any cause of action against the defendant and was not proof of malicious prosecution.

The matter then proceeded to formal proof.

PW1 was the plaintiff Tom Juma Kibanga. He told the court that on 22<sup>nd</sup> July 2005 at around 1:30 p.m., he visited his friend at his shop near Kisii stadium. That the said workshop belonged to one Okoth but on not finding him at the shop, he instead opted to wait for him. While he waited, some officers from the 1<sup>st</sup> defendant's company appeared and proceeded to a metre board post that was near the workshop and then they approached him. They then ordered him to accompany them to the police station. At the police station he told the court that he was harassed and put in the cells as the 1<sup>st</sup> defendant's agents accused him of being a thief. That he remained in the police cells for one night and the following day the police released him on a cash bail of Ksh.500/= to return on 2<sup>nd</sup> August 2005.

Afterwards he was charged with **fraudulent appropriation of power** in Criminal Case No.1528 of 2005. He denied the charges, the 1<sup>st</sup> defendant called one witness who testified partly and was later stood down when he could not produce his evidence. Eventually the case was dismissed for lack of evidence. He produced the proceedings and rulings in Criminal Case No.1528 of 2005 as Exhibit 1. He contended that the said charges were malicious because he neither committed the crime nor was he a resident of Kisii. He also produced a statutory notice he sent to the 2<sup>nd</sup> defendant by registered post as P. Exhibit 2 and certificate of postage as P. Exhibit 3. Furthermore, that the 2<sup>nd</sup> defendant replied vide a letter dated 13<sup>th</sup> June 2008 which he produced as P. Exhibit 4 and also produced a receipt representing the payment he made to his counsel after representing him in the criminal case No.1528 of 2005 Ksh.15000/=. He also produced 3 receipts dated 2<sup>nd</sup> August 2005 for Ksh.15000/=: 12<sup>th</sup> August 2007 Ksh.40,000 and 17<sup>th</sup> May 2008 Ksh.20,000/= as exhibit 5 (a), (b) and (c) respectively.

Lastly, he contended that he incurred loss of business as customers ran away; he ultimately closed down his business as he was treated as a thief and his reputation damaged. He thus prayed for compensation for malicious prosecution and damages for reputation.

On cross-examination, he revealed that he had a Jua kali shed at Keroka, he did welding, there was also another welding business at the workshop where the 1<sup>st</sup> defendant agents found him at Kisii owned by Kennedy Okoth (*his friend*). However, he did not inform the 1<sup>st</sup> defendant's agents, that indeed the Jua kali shed at Kisii did not belong to him.

That marked the end of Plaintiff's testimony.

DW1 was Paul Kieni Maina, from Nyahururu. He told the court in relation to this case that he worked with 1<sup>st</sup> defendant as a driver in Kisii and on 22<sup>nd</sup> July 2005 he was at work and the 1<sup>st</sup> defendant had switched off electricity in order to remove old broken electricity poles and erect new ones. At the time, they were outside stadium main gate, Kisii. He was accompanied by one Aronya the team leader and some 10 others. As they were removing the old poles, he noticed some dangling wires from the transformer to the ground about 5 metres away into the ground cabinet. He realized that the wires were not normal. The team leader then called Customer Care Engineer who arrived at the scene immediately. On arriving at the scene and assessing the situation, they decided to call in the police and they then drove their engineer to Police Station Kisii Central and they were given two police officers. He also confirmed that PW1 had in fact told them that the dangling wires and the cabinet on the ground into which they vested were his. The police then supervised the removal of the wires and the said cabinet and decided to arrest PW1 who was later charged.

Lastly, he also confirmed that he was in fact a witness in Criminal Case No.528 of 2005, he appeared in court and testified, but there was one wire missing and he was stood down because of that missing wire as the prosecution prayed for adjournment to the investigating officer to look for it. However, he confirmed that he was never called to testify since then.

On cross-examination he revealed that when they asked some Jua kali operators who owned the box and cabinet where the wires rested they told them that the plaintiff owned them. On re-examination he confirmed that it was actually the plaintiff who took himself to the police station.

DW2 was Lucas Kingora Kinzua a Security Officer with the 1<sup>st</sup> defendant having worked with the 1<sup>st</sup> defendant for 16 years. He told the court that his duties included liaising with the police in protection of 1<sup>st</sup> defendant's property. That in 2006, he received 2 bonds from the police for 2 of 1<sup>st</sup> defendant's workers *i.e.* PW1 and one Aryasa. That he would also ferry the metre box from Kisii Police Station to Kisii Law Courts. He also recalled that one time as DW1 was testifying sometime in 2006 (*in Criminal Case*) he had taken the metre box in issue to court and left for documents.

This marked the close of the defendant's case.

In his judgment the trial magistrate held that the plaintiff had explained to the 1<sup>st</sup> defendant's agents and the police that he ran a welding business at Keroka town and was in Kisii at the time material only to visit with a friend by the name Okoth who allegedly ran the Kisii workshop wherein the plaintiff was found. Thus the trial court held that the police should have investigated this before prosecuting the plaintiff as there was no evidence that they did so. He thus termed their action as rash and unreasonable hence lacked reasonable and probable cause.

The trial court then awarded the plaintiff Ksh.300,000/= and special damages of Ksh.105,000/=. Thus judgment was entered in favour of the plaintiff for Ksh.405,000/=.

The 1<sup>st</sup> defendant now appellant being dissatisfied with the above judgment and decree has preferred an appeal to this court. In its Memorandum of Appeal dated 4<sup>th</sup> February 2011 the appellant herein Kenya Power & Lighting Company Limited has appealed against the whole judgment and decree on the following grounds:

1. ***The Learned trial Magistrate erred in law and in fact by delivering a judgment more than 4 months after the close of the case contrary to the provisions of the Civil Procedure (revised)***

**Rules.**

2. ***The Learned trial Magistrate erred both in law and in fact by delivering a judgment without issuing the requisite notice to the appellant thereby holding the Appellant fundamental right of Appeal.***
3. ***The Learned trial Magistrate erred in both law and in fact by finding the Appellant liable contrary to the evidence on record.***
4. ***The Learned trial Magistrate erred both in law and in fact by disregarding the Appellant's evidence.***
5. ***The Learned trial Magistrate erred both in law and in fact by disregarding the Appellant's written submission and authorities filed herein.***
6. ***The Learned trial Magistrate erred both in law and in fact by awarding the first respondent a sum of Ksh.405,000/= being General and Special damages was excessive in the circumstances.***
7. ***The Learned trial Magistrate erred both in law and in fact by failing to consider the Appellant's objection to the production of the receipts in support of the first Respondent's claim for special damages.***

When the appeal came before me on 9<sup>th</sup> February 2015 it was agreed that the same be canvassed by way of written submissions. Both parties have all filed their submissions which I have read.

This court in this first appeal has duty and obligation to re-analyze and evaluate the evidence made by court before coming to its independent decision in this appeal.

It is an undisputed fact that the 1<sup>st</sup> respondent action against the appellant is one of malicious prosecution. Therefore court needs to address the question, what is malicious prosecution?

In **Mbowa –vs- East Meng District Administration [1972] P A 362**, the East African Court of Appeal expressed itself as follows:-

**“The action for damages for malicious prosecution is part of the common Law of England....the list of Malicious prosecution is committed where there is no legal reason for instituting Criminal proceedings. The purpose of the prosecution should be personal and spite rather than for the public benefit. It originated in the medieval writ of conspiracy which was aimed against combinations of abuse legal procedure that is; it was aimed at the prevention or restraint of improper legal proceedings....it occurs as a result of the abuse of the minds of Judicial authorities whose responsibility is to administer criminal justice it suggests the existence of malice and the distribution of the truth its essential ingredients are:-**

1. **The criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff and takes him before a judicial authority.**
2. **The defendant must have acted without reasonable or probable cause i.e. there must have been no facts, which on reasonable grounds, the defendants genuinely thought that the criminal proceedings were justified.**
3. **The defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose.**

4. **The criminal proceedings must have been terminated in the plaintiff's favour that is the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge....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 then he would fail in his action. The damage that is claimed is in respect of reputation but other damages might be claimed, for example, damage to property....the damage to the plaintiff results at the stage in criminal proceedings when the plaintiff is acquitted or, if there is an appeal, when his conviction is quashed or set aside. In other words, the damage results at a stage when the criminal proceedings came to an end in his favour, whether finally or not the plaintiff could not possibly succeed without proving that the criminal proceedings terminated in his favour for proving any or all of the first three essentials of malicious prosecution without the fourth which forms part of the cause of action, would not take him very far. He must prove that the court has found him not guilty of the offence charged....The law in action for malicious prosecution has been clearly defined and in so far as the ordinary criminal prosecution is concerned the action does not lie until the plaintiff has been acquitted of the charge in this case the respondent could have brought his action for malicious prosecution ended in his favour. He could not have maintained his action whilst the prosecution was pending nor could he have maintained an action after he had been convicted. It is right to bring the action only accused when he secured his acquittal of the charge on appeal and he then had the right to bring this action for damages....Time must begin to run as from the date when the plaintiff could first successfully maintain an action. The cause of action is not complete until such a time, and in this case this was only after he was acquitted on appeal.”**

In Gilbau v. Attorney General (1990) KLR 13, Prathor J, had this to say:

**“To succeed on a claim for malicious prosecution the plaintiff must first establish that the defendant or his agent set the law invoked against him on a criminal charge. ‘setting the law in motion’ in this context has not the meaning frequently, attributed to it of having a police officer take action, such as effecting arrest. It means being actively instrumental in causing a person with some judicial authority to take action that involves the plaintiff in a criminal charge against another before a magistrate. Secondly he who sets the law in motion must have done so without reasonable and probable cause....The responsibility for setting the law in motion rest entirely on the officer in-charge of the police station. If the said officer believed what the witnesses told him then he was justified in acting as he did and the court is not satisfied that the plaintiff has established that he did not believe them or alternatively, that he proceeded recklessly and differently as to whether there were genuine grounds of prosecuting the plaintiff or not. The court does not consider that the plaintiff has established animus malicious, improper and indirect moves, against the witnesses.”**

And on the duty of the Attorney General in a malicious prosecution case in Douglas Odhiambo Appeal & Another v. Telkom Kenya Limited Nambuye, Ouko and Kiage – JJA quoted P. Kihara Kariuki - J, (as he was then) in HCCC No.2597 of 1998 where the learned Judge stated:

**“The plaintiffs were arrested and charged by police. And the prosecution was undertaken by the Attorney General as the public prosecutor. Telkom Kenya was merely a complainant. The decision he charged and prosecutes the plaintiffs was taken by the police and the Attorney General. Telkom Kenya as a complainant would not have been involved in the process once Telkom Kenya had made a complaint to the police, it was left to the police to investigate the complaint and decide whether or not to charge the plaintiffs.”**

Guided by the above quoted case law, it is an undisputed fact that the 1<sup>st</sup> respondent was charged in court with fraudulently obstructing electrical energy derived from the appellant. According to the evidence of the 1<sup>st</sup> respondent who was the plaintiff, he merely stated that he was visiting his friend at his shop but since he did not find him he decided to wait for him. Afterwards the appellant's agents came to the said

shop and asked him to accompany them at the police station. At the police station he was put in the cells but later released in a bond of Ksh.5000/= as criminal charges against him were initiated by the 2<sup>nd</sup> respondent here. Later, the case against him was terminated for lack of evidence.

However, during cross-examination, the 1<sup>st</sup> respondent admitted that his friend's shop was a welding business in Kisii town and he was therefore found at the said business by the appellant's agents and he did not tell the police that the workshop belonged to his friend Okoth.

Thus without even considering the defendant's evidence the 1<sup>st</sup> respondent's evidence in the lower court brings out the fact that the police acted on a reasonable suspicion after the complain from the appellant that someone had illegally directed power to his shop. The 1<sup>st</sup> respondent was indeed caught in the said shop and he did not inform the police according to his testimony on cross-examination that the shop did not belong to him but his friend Okoth.

Hankins J, in **Hicks vs Fawkner (1878) 8 Q.BD 167** at page 171 defined reasonable and probable cause. He stated:

**“Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full evidence 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 inclusion that the person charged was properly guilty of the crime imputed.”**

This definition was adopted by Pudd J, in **Kagare vs Attorney General & Another (1969) E.A 643** in which the learned judge added that:

**“....it constitute reasonable and probable cause the totality of the material within the knowledge of the prosecutor at the time he instituted. The prosecution, whether the material consisted of the facts discovered by the prosecution or information which has come within him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and calicoes man to the extent of believing that the accused is probably guilty?”**

Thus to my mind once the appellant led the police to the shop which had fraudulently connected power and in finding the 1<sup>st</sup> respondent in the said shop, (the police acted reasonably and with probable cause by arresting him (1<sup>st</sup> respondent) coupled with the fact that the 1<sup>st</sup> respondent did not even bother to inform them that he was not the owner of the said shop. It was also DW2's evidence which was not controverted that even the 1<sup>st</sup> respondent's neighbor informed them that the 1<sup>st</sup> respondent was the proprietor of the said shop.

Therefore, the 1<sup>st</sup> respondent's arrest and consequent prosecution was to my mind based on a reasonable and probable cause that the 1<sup>st</sup> respondent had indeed committed a crime by fraudulently connecting electrical energy to his shop. The fact that the 1<sup>st</sup> respondent's criminal trial did not succeed was not exactly based on the fact that there was malice on the part of the police as criminal trials can collapse for various reasons and in the instant case, the prosecutor's failure to continue with the prosecution of the 1<sup>st</sup> respondent was not the fact that they were done by malice, but the fact that the exhibits needed to continue the process of prosecuting the 1<sup>st</sup> respondent were not being found and the trial court in the said criminal charge was correct in discharging the 1<sup>st</sup> respondent under **Section 210 of the Criminal Procedure Code**. Thus after evaluating the above evidence adduced in the lower court, the trial court did not only disregard the appellant's evidence but also the evidence of the 1<sup>st</sup> respondent who testified that he did not inform the police nor the appellant that he was not the owner of the shop. Hence the 1<sup>st</sup> respondent's arrest and consequential prosecution was not led by malice but by a reasonable and probable cause.

Thus the above appeal by the appellant is allowed, judgment of the lower court is hereby set aside with costs of this appeal to the appellant.

**Dated. Signed and delivered at Kisii this 19<sup>th</sup> day of June, 2015**

**HON. C. B. NAGILLAH**

**JUDGE**

**In the presence of:**

- M/S Nyamwange for Appellant
- M/S Mainga & Co. Advocates (**absent**) for the Respondent
- Samuel Omuga: Court clerk