



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL CASE 646 OF 2003**

**JANE MURUGI KARANU ::: APPLICANT**

**VERSUS**

**GABRIEL GIKONYO NDIRANGU ::: RESPONDENT**

**JUDGMENT**

The Respondent to this appeal Gabriel Gikonyo Ndirangu filed suit against one Jane Mwangi Karani and the Attorney General vide a Plaint dated 18<sup>th</sup> December, 2000 and filed on 20<sup>th</sup> December 2000.

The cause of action arose from a malicious and false report made by the 1<sup>st</sup> Defendant sometime in September, 1999, the Plaintiff was unlawfully arrested harassed and maliciously prosecuted in a criminal case NO. 3706 of 1999 Thika where in he was eventually acquitted under Section 210 of the Criminal Procedure Code. That the Plaintiff further suffered loss in the time expended in attending, Court, hiring an Advocate, was profoundly embarrassed and suffered mental agony due to the aforesaid unwarranted proceedings and he claims compensation from the defendants for all the foregoing in consequence thereof the Plaintiff claims special damages to the tune of Kshs.60,000.00, general damages for malicious report, unlawful imprisonment and malicious prosecution, costs, interest on (a) (b) (c).

The first defendant filed a defence dated 28/2/2001 and filed the same date. In it she denied that the report she made was false and or malicious and she denied paragraph 5 of the plaint.

The second defendant filed a defence dated 25<sup>th</sup> day of January 2001 and filed on 1.2.2001. In it the second defendant denied any wrongs perpetrated by the Kenya Police as alleged in paragraph 3 of the Plaint or at all, denied that the Plaintiff was unlawfully arrested, harassed and maliciously prosecuted as alleged in paragraph 4 of the Plaint or at all denied that the Plaintiff was acquitted as alleged in paragraph 4 of the Plaint or at all, he is a stranger to the plaintiffs allegations made in paragraph 4 to the effect that the report by the first defendant was malicious or false as alleged in paragraph 4 of the Plaint and no admission was made of the same. Denied the contents of paragraph 5 in toto and in particular that the plaintiff had suffered any loss, embarrassed and or suffered any mental agony. Denied that there were any unwarranted proceedings against the Plaintiff, denied particulars of special damage.

In the alternative and without prejudice to the foregoing averred that if the plaintiff was arrested and prosecuted the same was done for a reasonable and justifiable cause as a result of a report duly made by the first defendant and a reasonable suspicion of the Plaintiff having committed a crime. Denied the

Plaintiffs entitlement to a claim of damages.

In the alternative that the Plaintiff had not complied with the mandatory provisions of the Civil Procedure Rules made under Section 81 of the Civil Procedure Rules Cap.21 and a preliminary objection would be raised to that effect at an appropriate time.

Further and in the alternative averred that the Plaintiffs suit against him was time bared by virtue of the public Authorities Limitations Act cap.39 which shall be the subject of a preliminary objection on a point of law. Further that the said plaintiff is non-suited by virtue of the said mandatory provisions of Section 13A of the Government Proceedings Act Cap.40 Laws of Kenya, that the Plaintiffs suit is fatally and incurably defective. On the basis of the foregoing averments the 2<sup>nd</sup> defendant prayed for the suit against him to be dismissed with costs.

The Plaintiff gave evidence. The 1<sup>st</sup> defendant was barred from giving evidence because it had been noted that her defence was irregularly on record. Where as the 2<sup>nd</sup> defendant was not in court to give evidence.

The learned trial magistrate assessed evidence and made findings at page 3 of the judgment at line 16 from the bottom which I reproduce here as *“he has proved the requirements of the tort of malicious prosecutions which are:-*

- (1) That the first defendant was the complainant in that case.*
- (2) He was arrested and charged.*
- (3) He was acquitted*
- (4) The last requirement is that the charge was actuated by malice.*

*The Plaintiff has explained his relationship with the first defendant and his mother and the other partners in the shop. He has explained his disagreement with the Plaintiff immediately prior to his arrest and the Court cannot fail to see the link between these two incidences, since this subsequent prosecution did not succeed then it must have been actuated by malice. He blames the second defendant for not investigating the case well and confining him in cells. The Court can reach no other conclusion other than the investigation were indeed incompetent if any were done. I find that the plaintiff has proved his case on a balance of probability and enter judgment for him”*

On the basis of that reasoning, the learned trial magistrate at page 4 of the judgment stated as follows:-

- (a)** Loss of business at Kshs.1,500.00 per day for 10 days, Kshs.15,000.00.
- (b)** Advocates costs Khs 40,000.00
- (c)** On general damages, considered the fact that the plaintiff was placed in the cells for 10 hours and had to undergo a trial in criminal case number 3706 of 1999. The court awarded Kshs 100,000/- against the defendants jointly and severally.

The appellant became aggrieved with that judgment and appealed to this Court citing 5 grounds of appeal namely that the learned trial magistrate erred:

- (1).** In law and procedure in striking out the defence of the appellant.
- (2).** In law in not hearing the defendant in her defence.

**(3).** In law in proceeding ex parte to hear the Plaintiff.

**(4).** Failure to put into consideration the challenge done by way of cross examination the evidence of the plaintiff.

**(5).** In law in conclusion that acquittal in criminal proceedings is by itself evidence of the prosecution being malicious. On that account prayed for the appeal to be allowed, set aside, the lower court judgment and substitute it with a dismissal of the suit.

In his oral submissions in Court Counsel for the appellant reiterated the grounds of appeal and then stressed the following points.

**1)** No general damages can be awarded against the appellant based on malicious prosecution when the said particulars of malice are not pleaded as it is required by the provisions of order 6 rule 8 Civil Procedure Rules.

**2)** It is their stand that the plaintiff respondent never testified as to what facts constitute malice as it is on record that the appellant reported that she had been assaulted and she had a P3. Police did their investigations and had him prosecuted but he was acquitted.

**3)** It was wrong for the learned trial magistrate to hold that acquittal in a criminal trial is proof of malice as a basis of liability in a civil proceeding.

**4)** They maintain that police is independent and if they fail to secure a conviction in any proceedings the complainant cannot be blamed for that.

**5)** The appellant was denied a hearing on her defence because it had been filed after interlocutory judgment had been entered against her. It was wrong for the Court to ignore it as it had not been moved by way of chamber summons under order 6 rule 12,13 to have the same struck out. This is evidence of a mistrial on that ground the court is urged to allow the appeal.

In response Counsel for the respondent submitted that they are in total agreement with the judgment of the lower court because:

**(1)** The defence was dismissed under order 9A rule 5 after interlocutory judgment had been entered. It had not even been served on the plaintiff and so it was rightly dismissed.

**(2)** It is their stand that the learned trial magistrate rightly found that particulars of malice had been proved as he found that they had established that:-

**(i)** The complainant had made a complaint

**(ii)** The respondent was arrested and prosecuted

**(iii)** Police officers never investigated the case.

**(iv)** The respondent was acquitted of the charges of assault.

**(3)** Complaint against the appellants defence is belated as they should have appealed against the dismissal order. It is their stand that the appeal was filed as an after thought as it was filed after taxation. It is the respondents who filed the record of appeal and are the ones who have been moving for disposal. The belated move is just meant to delay the course of justice.

On that account the court was urged not to allow the appeal.

In reply to the respondents submissions, Counsel for the appellant urged the Court to note that it had

not been denied that:-

- (a) The plaint has no particulars of malice in built in it
- (b) It is not denied that particulars of malice have to be pleaded.
- (c) Omission to investigate by the police should not be visited on to the appellant.
- (d) The respondent can proceed against the Attorney General who has not appealed against the lower court decision.

The court has given due consideration to arguments from both sides and it has arrived at the conclusion that the attack on the appeal is both on the technical front and the merit front. The technical front arises because of issues raised by the appellant concerning:-

- (i) Failure to plead particulars of malice and its effects on the entire proceedings.
- (ii) Failure to procedurally terminate the appellants defence and its effects on the entire proceedings.
- (iii) Failure to appreciate the fact that the respondent was required to prove his case to the required standard, acquittal in the criminal proceedings not withstanding.

Where as on the merit side it was argued that the claim had not been proved on a balance of probability and the respondent should not have been awarded both the special and general damages as awarded.

There is no dispute that the Respondent's claim to the lower court is based on damages arising from malicious prosecution. It is not disputed that indeed the appellant alleged that she had been assaulted by the respondent. The matter was reported to the police, the respondent was arrested, prosecuted but acquitted of criminal charges. There is no dispute that armed with the acquittal, he moved to the lower court and filed suit for special and general damages. It is the result of those proceedings that have led to this appeal which appeal is being contested both on the technical front and the merit front. The Court will proceed to assess the argument on the technical front first followed by that on merit.

As regards particulars of malice the court was referred to the provisions of Section 81 of the Civil Procedure Act. It provides

*“ 81(1)There shall be rules committee consisting of two judges of the High Court, two judges of the Court of Appeal, the Attorney General and two Advocates, one to be nominated by the Law Society of Kenya and the other by the Mombasa Law Society which shall have power to make rules not inconsistent with the Act and subject thereto to provide for any matters relating to the procedure of Civil Courts”. It is in pursuance of this provision that order VI rule 8 of the Civil Procedure Rules was promulgated. The portion relevant to subject of inquiry herein is order VI rule 8(1) which states “subject to sub-rule (2) every pleading shall contain the necessary particulars of any claim, defence or other matter pleadings including, without prejudice to the generality of the foregoing.*

*(b) where a party pleading alleges any condition of the mind of any person whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies”.*

*(2) The court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or a statement of the nature of the case on which he relies and the order may be made on such terms as the court thinks fit”*

From the foregoing provisions, it is clear that it is a requirement under Order VI rule 8 (1) (b) that particulars of malice be provided. Order V1 rule 8 does not provide for a default clause on failure. In fact it envisages a situation where a party may fail to plead particulars as required by the provisions of the

law and that is why the rules committee slotted in a safety valve through sub rule (1) where by the defendant can apply to the opposite party to supply particulars. The appellant had that opportunity which they did not utilize and so they cannot be heard to complain on appeal. Also lack of a default clause accounts for the presence of Order VI rule 12 which provides: “no technical objection may be raised to any pleading on the ground of want of form”

Failure to plead particulars of malice is a plea of want of form, which cannot be employed to fault the proceedings on the lower court. It therefore follows that in order to fault the claim it has to be on its merits which the Court will turn to at a later stage of the assessment.

Turning to the appellants defence, it is clear that from the record, the 1<sup>st</sup> defendant who is the appellant entered appearance on 1.2.2001. On 11.1.02 a Mr. Gathoga for the Plaintiff/Respondent made the following representation.

*“This is to point out to the Court that the defence of the first defendant is irregularly on the Court record as it has not been served on us. It was obtained after interlocutory judgment was entered against the first defendant”* then a Mr. Kamiru for the 1<sup>st</sup> defendant/appellant stated *“if the defence is on record and has been paid for and received then it is valid”*. Then the court said Ruling “I note that the defence was filed after interlocutory judgment was obtained against the first defendant. It has not been served in court. Is therefore not valid. It is irregular”

There after the matter proceeded and towards the end of the plaintiff’s evidence on page 11 of the record the following was found.

*“Gathoga: Close of the plaintiff’s case.*

*Kamiru: We wait the Courts directions in the matter.*

*Order: Ruling on 11.2.03 for directions.*

11.2.03

*Mr. Macharia for Gathoga for plaintiff – present*

*Mr. Ndichu for Gathoga*

*Court: The court ruled on 11.11.02 that the defendant’s defence was irregular. At the close of the plaintiff’s case it meant that the 1st defendant cannot give any defence in the matter. Since the 2<sup>nd</sup> defendant is not present to give the defence, I will reserve the case for judgment”.*

The appellant has attacked this to be un procedural, alleging that the plaintiff should have complied with the provisions of order VI rule 12 and 13. Failure to so comply meant that the first defendant’s defence remained on record and the lower court’s failure to allow the first defendant to testify on it is in effect a mistrial. From what the court set out above it is evidently clear that all that the learned trial magistrate did was to note that the 1<sup>st</sup> defendant’s defence was irregular. There was no order made striking it out either on an oral or formal application or on the Courts own motion.

The court has scouted through the record and found that on 23.2.2001 a Mr. Karagu for the plaintiff put in a request for judgment against the first defendant who had failed to file defence within the stipulated time. The request is dated the same 23.2.01. The provisions of law under which it is made is not indicated. The first defendant’s defence is dated 28<sup>th</sup> February 2001 and filed on 28<sup>th</sup> February 2001. The Court has made a thorough search but has failed to trace an entry of interlocutory judgment on the record by the Court, Neither was there action taken on the said request for interlocutory judgment. In the absence of action having been taken on the plaintiffs request for interlocutory judgment by minuting it on the record, and then proceeding to have the interlocutory judgment minuted on the record as having been

entered in accordance with the request, it means that the door had not closed for the first defendant to put in her defence. It came in time and forestalled the entry of the interlocutory judgment. It was therefore wrong for the learned trial magistrate to act on a request for interlocutory judgment and purport it to be interlocutory judgment capable of defeating the 1<sup>st</sup> defendant's defence as filed. Therefore it is the finding of this Court that the 1<sup>st</sup> defendant's defence had not been defeated for purposes of existence of an interlocutory judgment as none has been found to exist.

As for failure to serve it on the plaintiff/respondent, indeed no R/S has been traced on the record to that effect. Counsel did not protest at the suggestion that the same had not been served. It meant that the Plaintiff was obligated to move the court formally under Order VI rule 13(1) (c) and (d) as read with 16 Civil Procedure Rules. These provide

*“13(1). At any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that:-*

*(c). It prejudices, embarrass or delay the fair trial of the action or*

*(d). It is otherwise an abuse of the Court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly as the case may be.*

*16. Applications under this order shall be made by summons”.*

It is this Court's finding that a pleading filed but not served is an embarrassing pleading. It required to be struck out, which striking out could only be done if the Court could have been procedurally moved by way of chamber summons. Having not been moved procedurally to have the first defendant's defence struck out, and the said defence not having been struck out, it meant that there was no way the learned trial magistrate could prevent the first defendant from being heard on it and the said learned trial magistrate's action of preventing the 1<sup>st</sup> defendant from being heard on it resulted in the proceedings being left in an embarrassing position which embarrassing position led to a miscarriage of justice to the first defendant and a mistrial of the proceedings.

Having disposed off all the technical points identified, the court, proceeds to consider the merits of the lower court judgment. As per the portions of the judgment set out herein the respondent succeeded in his claim against the appellant because:

- (i)** He had been acquitted of the criminating charge,
- (ii)** The particulars of malice had been established.

On the issue of acquittal, this court agrees with the appellants Counsel that an acquittal perse should not have given the respondent a clean bill of successes. This is because the Court exercising civil jurisdiction was not subordinate to the Court exercising the criminal jurisdiction. The criminal courts decision was not binding on the civil court. The standard of proof in both is different. This being the case, the Court exercising civil jurisdiction was entitled to re-evaluate the evidence on its own and arrive at its on own conclusion as to whether the claim had been satisfied on a balance of probability or not. By opting to go by the acquittal alone and base its findings on liability on it alone, the court exercising the civil jurisdiction abdicated its judicial duty un procedurally and so its decision cannot stand.

As for establishment of malicious prosecution, it is on record that the learned trial magistrate was satisfied because it had been established that:-

- (a)** A report was made by the complainant.
- (b)** The Plaintiff/Respondent was arrested and charged with an offence.
- (c)** No investigations were done.

**(d)** That the said plaintiff/respondent was acquitted of the criminal charges.

As submitted by the appellants Counsel, the Plaintiff/Respondent to demonstrate what was malicious about the complaint which was not demonstrated by the evidence on the record. It therefore follows that even if the plaint failed to be faulted on want of form by virtue of the provisions of Order VI rule 8 (1) (2) and Order VI rule 12 Civil Procedure Rules, that did not exonerate the Plaintiff/Respondent from the requirement of satisfying the ingredients of the claim on two fronts namely:-

**(a)** That the reporting was malicious.

**(b)** That the prosecution was malicious.

These are two fronts, because each was being executed by an entity independent from the other. The appellant acted independently when she decided to report to the police. It was necessary for the respondent to give ingredients of malice in that report. i.e. what was false in that report or what made the report to be unworthy of reporting.

As for the police deciding to prosecute before carrying out thorough investigations, the court, agrees with the submissions of the appellant's Counsel that the appellant had no control over police actions and cannot be blamed for the shoddy job that the police did. It is correctly submitted that after reporting, it was up to the police to decide whether to prosecute or not to prosecute.

In conclusion the Court makes the following findings.

**(1)** It is correctly submitted by the appellant's Counsel that particulars of malice should have been given as required by the provisions of order VI rule 8 (1) (b) Civil Procedure Rules.

**(2)** However, failure to so particularize is not fatal to the pleading as there is no default clause.

**(3)** The appellant's Counsel could have sought those particulars as per provisions of Order VI rule 8 (2) Civil Procedure Rules.

**(4)** Failure to provide particulars amounts to want of form curable under Order VI rule 12 Civil Procedure Rules.

**(5)** It is on record that the learned trial magistrate did not strike out the appellants defence. He only noted its irregularity. There is no such a thing in the Civil Procedure as faulting a pleading by noting its irregularity. A proper procedure of faulting a pleading is by striking it out. Herein the appellants defence was not struck out.

**(6)** The irregularity was allegedly based on information given to the Court that the appellants defence had been filed after interlocutory judgment had been applied for and entered. This Court perused the court record and only traced a request for interlocutory judgment. But no entry on the same was minuted by the Court. In the absence of such a minuting, the door was left open for the appellant to file her defence. The appellant's defence was therefore not faulted on this point.

**(7)** Having exonerated the appellants defence as in number 6 above leaves the ingredients of it not having been served on to the respondent. Indeed no R/S was traced on record for this, neither did the appellant insist on having effected service. This means that the default fell under the provisions of Order VI rule 13 (1) (c) (d) of the Civil Procedure Rules.

**(8)** Having found that the defeat fell under Order VI rule 12(1) (c) (d) it means that in order to fault it the Plaintiff was obligated to move by way of Chamber Summons under Order VI rule 16 Civil Procedure Rules to have it struck out.

**(9)** As long as the defence was not struck out, the appellant was entitled to be heard on the same.

Failure to hear the appellant on her defence left the proceedings in an embarrassing position leading both to a miscarriage of justice and a mistrial.

**(10)** Turning to the merits of the case the learned trial magistrate was wrong to give the respondent a clean bill of success because of the acquittal in the criminal proceedings as that acquittal was not binding on the civil court. The civil court was entitled to re-evaluate the evidence on its own and then arrive at its own decision as to whether liability had been established on a balance of probability or not. By relying on the conviction as a basis for finding and establishing liability, the learned trial magistrate abdicated his duty to make a determination, thus weakening the decision arrived at.

**(11)** While still on the merits of the decision, it is the finding of this court that failure to provide particulars of malice notwithstanding it was necessary for the learned trial magistrate to demonstrate by evidence on record what was malicious about the reporting. It is the finding of this court that this was not demonstrated.

**(12)** In the absence of proof that the reporting was malicious in itself, the appellant cannot be blamed for the police failure to investigate and come up with evidence to support a conviction.

**(13)** The appellant cannot be blamed for the prosecution unless it can be shown that she pressurized the prosecution after reporting. In the absence of such pressurizing after reporting she cannot be blamed for the independent police action to prosecute on the basis of shoddy evidence.

For the reasons given in No.5,6,7,8,9,10,11,12,13 above the lower courts decision has been faulted. Since the Court has ruled that failure to allow the appellant a chance to be heard on her defence amounted to a miscarriage of justice and mistrial, this is a proper case to remand to the lower court for the appellant to be heard on her defence.

The appellant will have costs of the appeal and the proceedings before the lower court. The re-trial to be conducted on priority basis before a magistrate other than the one who made orders appealed against and the same to be expedited.

**DATED, READ AND DELIVERED AT NAIROBI THIS 7TH DAY OF MARCH 2008.**

**R.N. NAMBUYE**

**JUDGE**