



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Melly v Republic (Civil Appeal E018 of 2023)  
[2025] KEHC 1862 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1862 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPSABET  
CIVIL APPEAL E018 OF 2023  
JR KARANJA, J  
FEBRUARY 20, 2025**

**BETWEEN**

**WILLIAM KIPRONO MELLY ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being and appeal by the appellant against the judgment of Hon. S.M. Mookia delivered on the 10th day of July 2023 in the Kapsabet Civil Suit No. 138 of 2018 [Antony Kagundu Ndegwa Vs. Attorney General, William Kiprono Melly, PC Bernard Kirimi and PC Leonard Miti])*

**JUDGMENT**

1. The judgment delivered 10<sup>th</sup> July 2023 by the Chief Magistrate in Kapsabet Civil Suit No. 138 of 2018 pitting the Appellant as one of the four Defendant's and the Respondent as the Plaintiff, attracted this appeal on the basis of the eight [8] grounds set out in the memorandum of appeal dated 24<sup>th</sup> July 2023.
2. The Appellant was aggrieved by the judgment entered in favour of the Respondent and his Co-Defendants jointly and severally for the sum of Kshs. 700,000/- inclusive of costs and interest.  
The appeal proceeded by way of written submissions. Both the Appellant and the Respondent filed their submissions through the Office of the County Attorney, Nandi and Onyinkwa and Company Advocates respectively.
3. The role of this court was to reconsider the evidence and draw its own conclusion having in mind that the trial court had the benefit of seeing and hearing the witnesses.

In the statement of claim [plaint] it was pleaded that on or about the 21<sup>st</sup> July 2019, the Respondent/ Plaintiff was arrested by the Third and Fourth Defendants, both police officers based at the Kabiyet Police Station on suspicion of distributing alcohol within Kaiboi area without a license. The



Respondent was thereafter arraigned in court for the offence of distributing alcohol without a license, Contrary to Section 8[1][b] read with Section 64 of the Nandi County Alcoholic Drinks Act, 2014.

4. At the hearing of the case, evidence was received from several witnesses including the Appellant/ Second Defendant and the two police officers [Defendants three and four].

However, on the 18<sup>th</sup> December 2018, the Respondent/ Accused was acquitted of the charge pursuant to Section 210 of the Criminal Procedure Code. He pleaded and contended that as a result of his arrest and prosecution he was traumatized, mentally anguished and suffered loss and damages. He attributed his ordeal to the Appellant/ Second Defendant and contended that it was him [Appellant] who instigated his arrest by claiming that he [Respondent] was distributing alcohol without license.

5. The Respondent further contended that his arrest, confinement, false imprisonment and prosecution were all actuated by malice on the part of the Appellant and his Co-Defendants in acting dishonestly, arresting an innocent person and failing to perform their duties responsibly thereby subjecting him to a prolonged malicious prosecution after arresting him for other ulterior motives “inter-alia”.
6. The Respondent/ Plaintiff therefore prayed for judgment against the Appellant/ Second Defendant and Co-Defendants for general damages for unlawful arrest and confinement in the Police Cells, false imprisonment and malicious prosecution. In addition, the Plaintiff prayed for special damages in the sum of Kshs. 200,000/- being legal expenses together with costs of the suit and interest.
7. The Appellant/ Second Defendant disputed the Respondent/ Plaintiff’s claim on the basis of the pleadings and averments contained in his statement of defence dated 27<sup>th</sup> January 2020. He therefore prayed for the dismissal of the claim with costs. His defence was generally that the Respondent/ Plaintiff was arrested for distributing alcoholic drinks within the Nandi County without a valid license and was accordingly arraigned in court, but was acquitted Under Section 215 rather than Section 210 of the Criminal Procedure Code.
8. The Appellant’s contention was that the Respondent’s acquittal was not proof of his innocence, but a mere failure of the prosecution to prove the case beyond reasonable doubt.

That, he [Appellant] acted as an agent of the Complainant and was not responsible for the investigations as alleged by the Respondent.

That, there was no probable cause of action raised by the Respondent against the Appellant/ Second Defendant.

9. Having given due consideration to the appeal, the supporting grounds and the rival submissions, this court understands that the arrest, prosecution and acquittal of the Respondent/Plaintiff of the offence of distributing alcoholic drinks within the County of Nairobi without a valid license at the alleged instigation of the Appellant/ Second Defendant, was the determinant factor in the Respondent bringing legal action against the Appellant in the Lower Court.
10. It was clearly the belief by the Respondent that the entire process was unlawfully and maliciously undertaken by the Appellant in cahoots with his Co-Defendants, the Third and Fourth Defendants as he was found not guilty by the court and acquitted.

Basically, the Respondent’s action was an action in the tort of malicious prosecution and the law in relation thereto was well settled by the Eastern African Court of Appeal in the case of Mbowa Vs. East Meno District Administration [1972] EA 352



11. It was stated in that case that: -

“the tort 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 occurs as a result of abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion 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 it suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the Plaintiff or a person arrests 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 Defendant 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 improper and wrongful, that is, with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose, and
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”.

12. The court went further to state that: -

“the Plaintiff in order to succeed, has to prove that the four essentials or requirements of malicious prosecution set out above, have been fulfilled and that he has suffered damage. In other words, the four requirement must “unite” in order to create or establish a cause of action. If the Plaintiff does not prove them he would fail in the action.”

Herein, the Respondent apart from invoking the tort of malicious prosecution to claim damages from the Appellant, also claimed damages for false imprisonment which in itself is a separate cause of action from malicious prosecution as was held by the Court of Appeal in *Egbema Vs. West Nile Administration* [1972] EA 60, where it was stated that: -

“false imprisonment and malicious prosecution are separate causes of action: a Plaintiff may succeed on one and fail on the other. If he established one case, than he is entitled to an award of damages or that issue”.

13. In *Clerk and Lindsell on Torts* 18<sup>th</sup> Edition at page 823, the essential of the Tort of malicious prosecution are summarized 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 notion 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 every one of this is on the Claimant”.



14. The Supreme Court of Canada in *Nelles Vs. Ontario* [1989]2SCR 170 stated that: -

“.....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 person or public actor. Malicious prosecution, as that 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”.

15. The Respondent/Plaintiff was therefore expected and obligated in law to prove each and every one of the four essentials or elements of malicious prosecution in order to succeed in his claim against the Appellant/ Second Defendant and indeed, the rest of the Defendants.

Cases are decided on actual evidence that is tendered before the court. Therefore, a Plaintiff is under a duty to present evidence to prove his claim. Such proof cannot be supplied by the pleadings or the submissions. [See, *Douglas Odhiambo Apel Vs. Emmanuel Omolo Khasim Vs. Telkom Kenya Limited CA No. 115 of 2006*].

16. In his evidence before the trial court, the Respondent [PW1] stated that he was an alcohol seller and that on the 21<sup>st</sup> July 2018 he was falsely arraigned in court on a wrongful charge for which he was acquitted after a full hearing. In Cross-Examination, the Respondent agreed that the police normally arrested law breakers and that his arrest by the police upon a report made to them was not an issue. He also agreed that charges were preferred against him and were read to him in court.

17. However, the Respondent alleged that during the process of his arrest and prosecution the Appellant acted dishonestly as he was the person who gave a false report that he was selling alcohol, yet he was not. He contended that he ought not have been arrested as he was innocent, but in re-examination he stated that he had not previously known the Appellant and that his base was in Baringo where he had a license for wines and spirits. He admitted that he was arrested by police officers from Kabiyet Police Station and did not at the time have any license.

18. The proceedings and judgment of the relevant Criminal Case No. 2884 of 2018 were produced before the trial court by Kipruto Kibet [PW2], a court Administrator at the Kapsabet Law Court.

The concluding paragraphs of the judgment state as follows: -

“I find that there is no consistent and sufficient evidence to proof that the Accused was indeed distributing the alcohol which he admits he was in possession, and as confirmed by prosecution’s witnesses it was not unlawful as it was not illicit liquor.

The charge is therefore not proved beyond the standard of beyond reasonable doubt. The charge is dismissed pursuant to Section 215 of the *Criminal Procedure Code* and Accused is acquitted”.

19. Contrary to what was pleaded by the Respondent, he was actually acquitted under Section 215 *Criminal Procedure Code* rather than Section 210 *Criminal Procedure Code* after a full hearing of the criminal case and from the proceedings it was evidence that the Respondent was arrested and charged on credible suspicion that he was distributing alcoholic drinks rather than selling alcoholic drinks



within the county of Nandi and not Baringo without a valid license Contrary to the Nandi County *Alcoholic Drinks Control Act* of 2014.

20. In his testimony before the trial court, the Appellant [DW1] stated that he was a ward administrator within Nandi County and that he received information that there was a person selling alcohol without a license. He pursued the information by meeting the said person and posing as a prospective buyer of the alcohol. He identified the person to be the Respondent and after confirming that he was a seller of alcohol without a license he reported the matter to the police.
21. The Appellant contended without dispute from the Respondent that the Respondent was in possession of alcoholic drinks in his vehicle and that the drinks were exhibited in the criminal court. The Appellant indicated that the complaint against the Respondent was investigated by the police after which he was arraigned in court for distributing alcoholic drinks without a license.
22. PC Benard Kirimi [DW2] confirmed that the Appellant made the necessary report to the police and that investigation were carried out before the Respondent was arraigned in court. He further confirmed that the Respondent was charged with distributing alcoholic drinks without a valid license.
23. From the evidence it was clear that no dispute arose with regard to the arrest of the Respondent upon a complaint made by the appellant who was at the time acting in the course of his duty as an official of the County Government of Nandi.

There was also no dispute that the Respondent was arraigned in court and prosecuted accordingly after which he was acquitted of the charge.

24. Whereas the Respondent was able to show that he was arrested and prosecuted at the instigation of the Appellant, that the law was set in motion against him on a criminal charge and that the prosecution was determined in his favour, he failed to establish and prove by necessary evidence that the entire process was without reasonable or probable cause and that it was actuated by malice on the part of the Appellant.
25. It would follow therefore that the Respondent failed to prove every one of the element or essentials of a malicious prosecution claim or even a claim for false imprisonment.

The trial court was therefore in error in finding that the Appellant/ Second Defendant and indeed all the Defendants were liable to the Respondent for unlawful arrest and malicious prosecution.

The award of general damages in the sum of Kshs. 700,000/- to the Respondent was undeserving and erroneous.

26. In sum, all the eight [8] grounds of appeal are hereby sustained and the opposition thereto by the Respondent overruled.

This appeal was merited and is hereby allowed.

The judgment of the trial court dated 10<sup>th</sup> July 2023 is hereby quashed and/ or set aside and substituted for a judgment dismissing the Respondent's case with costs.

The Appellant shall also have the costs of this appeal.

Ordered accordingly.

**DELIVERED AND DATED THIS 20<sup>TH</sup> DAY OF FEBRUARY, 2025**

**HON. J. R. KARANJAH,**

**JUDGE**

