Mogaka v Attorney General (Civil Appeal E172 of 2024)
[2025] KEHC 3798 (KLR) (7 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3798 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E172 OF 2024

DKN MAGARE, J

MARCH 7, 2025

BETWEEN

BERNARD NYAMANYA MOGAKA ..... APPELLANT

AND

ATTORNEY GENERAL ..... RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment and decree of lower court delivered on 4.9.2024 by Hon. P.K Mutai, SRM in Kisii CMCC No. E929 of 2021. The Appellant was the Plaintiff in the lower court. The court made the decision to dismiss the suit for failure to join the Director of the Public Prosecutions in a claim for malicious prosecution. The court relied on the case of Obat v Masinde & 2 others; Masinde (Appellant); Obat & 2 others (Respondent) ((By Cross - Appeal)) [2024] KEHC 79 (KLR). The Appellant made cannon fodder of this decision. The lower court was bound by a decision of this court. Nevertheless, the Appellant wanted the court to ignore the said decision. The gist of the said decision was as hereunder:

    26. Therefore, regardless of the nature of the complaint lodged with the police, the evidence gathered during the investigations and the recommendations made by the police, the Director always has the final word on whether to charge a suspect or not. The only challenge to such power is the manner in which the power is exercised by the Director. That is the province of Article 157(11) of the *Constitution*.

    27. Returning to the case at hand, a perusal of the Plaint shows that Emily did not enjoin the Director of Public Prosecutions as a party in the suit. Instead, it was only the Hon. Attorney General who was made a party pursuant to the provisions of Article 156 of the *Constitution*. Therefore, Emily did not see the need to bring the entity, that was satisfied that a criminal offence had been sufficiently demonstrated against her and made the decision to have her charged in the proceedings alleged to have been malicious, to Court.

28. Further, it is the Director of Public Prosecutions who prosecuted the criminal case before the Chief Magistrates Court in Kitale to its conclusion. Again, Emily did not find any fault in that party...

34. Deriving from the above, and in view of the finding that, a suit seeking damages for malicious prosecution that does not enjoin the Director of Public Prosecutions as a party cannot legally stand, the suit was a non-starter and, the main appeal subject of this judgment, must succeed. On the other hand, the Cross-Appeal must fail.

2. The Appellant filed this appeal and preferred the following grounds in the memorandum of appeal.

   a. The trial court erred in law and fact in not considering the pleadings and evidence tendered by the Appellant.

   b. The trial court erred in law and fact in ignoring persuasive and binding authorities.

   c. The trial court erred in law and fact in suo moto, raising the issue of not suing the Director of Public Prosecutions.

   d. The trial court erred in law and fact in failing to appreciate that the decision in Obat v Masinde & 2 Others (2024) eKLR had been superseded by other appellate court decisions.

3. In the plaint dated 13.9.2021, the Appellant sought general damages and special damages of Ksh. 57,310/= for malicious prosecution and false imprisonment.

4. The claim arose from averments that the Appellant was arrested by agents of the Respondent who locked him up for 2 weeks on allegations of stealing by servant contrary to Section 268(1) as read with Section 280 of the *Penal Code*. It was pleaded that the arrest was malicious and not based on any reasonable offence. The Appellant was acquitted under Section 215 of the *Criminal Procedure Code*.

5. The Respondent entered appearance and filed a defence dated 19.11.2021 denying the allegation in the plaint.

Evidence

6. The Appellant testified as PW1. He was a Clerical Officer at DCIO Kisii. He used to receive revenue. On cross-examination, he testified that he sued the Attorney General on behalf of the DCIO. He used to receive revenue for good conduct applicants. He was interdicted for loss of money. He was charged on 3.5.2016. The police investigated him. He was acquitted. He suffered mental distress and was put on physiotherapy.

7. DW1 was No. 112850 PC Marian Munene of DCI. According to her, the money lost in the hands of the Appellant was not accounted for. It was subjected to forensic examination, which confirmed that the signatures in the receipt books were made by the Appellant. Therefore, there was reasonable suspicion.

Submissions

8. The Appellant filed submissions dated 16.12.2024. It was submitted that the lower court raised nonjoinder of DPP at the tail end of proceedings.

9. Further, he argued that under Order 1 Rule 9 of the Civil Procedure Rules, no suit would be defeated by nonjoinder. They argued that the case of OBAT (supra) was against Order 1 Rule 9. The

Appellant urged this court to set aside the lower court's judgment based on the above submissions. The Respondent did not file submissions.

Analysis

10. This Court has considered the pleadings, evidence, submissions and authorities relied on by the parties in support and opposition to the appeal. The issue that falls for this Court's determination is whether the lower court erred in dismissing the Appellant's suit seeking damages for malicious prosecution. This being a first appeal, the court should re-evaluate the evidence, consider arguments by parties applying the law thereto, and make its own determination of the issues in controversy. Except however, that it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies. In the case of Selle & Another vs. Associated Motor Board Company Ltd. [1968] EA 123, the Court stated as follows:

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal form a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect, in particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

11. The lower court reasoned that the Appellant ought to, as a matter of necessity, join the DPP to the pleadings. Whereas this issue is a preliminary question that determines the case, I will deal with the merit of the case. In discerning the lawfulness of the arrest and malicious prosecution, the elements to be proved in an action for malicious prosecution are well settled. In Mbowa vs. East Mengo District Administration [1972] EA 352 (Sir William Duffus P, Lutta and Mustafa JJA), the court summarized the law as follows:

> " The action for damages for malicious prosecution is part of the common law of England...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 originated in the medieval writ of conspiracy which was aimed against combinations to 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 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 motive, 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...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. 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 the 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 an 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 until the 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. His right to bring the action only accrued 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."

12. The Appellant was acquitted under section 215 of the *Criminal Procedure Code*. The same provides as follows:

> " 215. The court having heard both the complainant and the accused person and their witnesses and evidence shall either convict the accused and pass sentence upon or make an order against him according to law, or shall acquit him"

13. The effect of Section 215 of the CPC was an acquittal after defending oneself. In Stephen Gachau Githaiga & another vs. Attorney General [2015] eKLR where Mativo J (as he then was), stated that a termination of a prosecution would be favourable to a party regardless of the route taken, be it an acquittal, a discharge, a withdrawal or a stay. In that case, the court said:

> " 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."

14. In Paramount Bank Limited vs. Vaqvi Syed Qamara & another [2017] eKLR (Makhandia, Ouko and MÍnoti JJA), stated:

> " The favourable termination requirement of criminal charges may be satisfied in various ways depending on how the proceedings are concluded in favour of the accused person. For instance, by acquittal, a discharge or a withdrawal.

Courts in this jurisdiction have relied, over the years on the following passage from the case of Egbema v. West Nile Administration [1972] EA 60 for the foregoing proposition;

> " For the purposes proof that the criminal proceedings have been determined in the appellant's favour it is enough that the criminal proceedings have been terminated without being brought to a formal end. The fact that no fresh prosecution has been brought, although five years have elapsed since the appellant was discharged, must be considered equivalent to an acquittal, so as to entitle an appellant to bring a suit for malicious prosecution..."

Although the withdrawal of a charge under Section 87 is technically not on acquittal and does not operate as a bar to subsequent proceedings against an accused person on account of the same facts, guided by the foregoing holding, we note in this appeal that five years after the charges were withdrawn on 30th July, 2012, ostensibly pending the arrest of Lawrence Atieno, no fresh charges have been preferred against the 1st respondent. There was no indication whether Lawrence Atieno was ever arrested and charged. The discharge of the respondent, therefore amounted to a termination of the prosecution in his favour.

15. Whereas an acquittal is a termination in favor of the accused; the accused had already been placed with a case to answer. It means, ipso facto, that there was a plausible cause for reporting the crime. Prima facie case means, as per the court of appeal in the case of Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR, to be as hereunder. The Court of Appeal noted that: -

> 4. A prima facie case in a civil application includes but is not confined to a "genuine and arguable case." It is a case in which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right that has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter.

16. In Republic v Owuor (Criminal Case E002 of 2022) [2024] KEHC 3712 (KLR) (16 April 2024) (Ruling), the court, R.E. Aburili, held as follows regarding having a case to answer.

In simple terms, prima facie means the establishment of a rebuttable presumption that an accused person is guilty of the offence he/she is charged with. In Ramanlal Trambaklal Bhatt v R [1957] E.A 332 at 335, the court stated as follows:

> " Remembering that the legal onus is always on the Prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution's case, the case is merely one in which on full consideration might possible be thought sufficient to sustain a conviction."
>
> This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather, hopes the defence will fill the gaps in the Prosecution case. Nor can we agree that the question ...there is a case to answer depends only on whether there is "some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence." A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence.It may not be easy to define what is meant by a, "prima facie case", but at least it must mean one on which a reasonable, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence."

17. The Appellant did not satisfy a critical element of malicious prosecution. The defendant must have acted maliciously in that he must have acted in instituting criminal proceedings with an improper and

wrongful motive, that is, with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose. In my view, the Respondent acted on reasonable suspicion. DW1's testimony was that the forensic examination confirmed that the Appellant signed the signatures on the impugned receipts.

18. The court's finding in the criminal case was that it was not clear who stole the funds. The evidence by the prosecution and the defence in the criminal case did not rule out a possibility that money was stolen. As it was stolen in the docket that the Appellant worked as a clerical officer; it was not inconsistent with probable suspicion, and I dismiss the assertion that the process was malicious.

19. In the case of James Karuga Kiiru v Joseph Mwamburi and 3 Others (2001) eKLR it was held that:

> " To prosecute a person is not prima facie tortious, but to do so dishonestly or unreasonably is. Malicious prosecution thus differs from wrongful arrest and detention, in that the onus of proving that the prosecutor did not act honestly or reasonably, lies on the person prosecuted."

20. Further, no malice was seen. The case reported was plausible and cannot be said to be unreasonable. There was no evidence of malice. In the case of Phen Gachau Githaiga & Another v Attorney General [2015] eKLR Justice Mativo discussed the tort of malicious prosecution and stated as follows:

> " 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 dam age 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."

21. The third and fourth elements of malicious prosecution were not proved. The tort of unlawful arrest was not proved. The claim in the court below is liable for dismissal. The court erred in finding the claim as proved when not all crucial elements were pleaded and proved. In the case of Dr. Lucas Ndungu Munyua v Royal Media Services Limited & Another (2014) eKLR, it was stated that:

> With respect to malice, the law is clear that the mere fact that a person has been acquitted of the criminal charge does not necessarily connote malice on the part of the prosecutor.

22. The court treated the two torts as one and the same. Without being a private prosecution and citizen's arrest, the Respondent has no role in the arrest and prosecution of the Appellant. In the case of James Karuga Kiiru v Joseph Mwamburi and 3 Others (2001)eKLR the court stated as follows:

> To prosecute a person is not prima facie tortious, but to do so dishonestly or unreasonably is. Malicious prosecution thus differs from wrongful arrest and detention, in that the onus of proving that the prosecutor did not act honestly or reasonably, lies on the person prosecuted.

23. In Samuel Gitonga Ringera v Henry Mutegi Maingi & 2 others [2021] eKLR, PJO Otieno J stated as follows regarding the belief in the guilt of the Accused:

> The law makes it imperative that the belief in the guilt of the accused be founded upon a decision made after due inquiry into and consideration of the facts presented to the respondents. But the reasonable belief need not be based on actual existence of a definite cause, but upon reasonable belief held in good faith in the existence of facts as are perceived by the respondents. The converse is that where there is no basis to believe that the accused is guilty of the accusation and the prosecution is all the same set in motion, there is clear evidence of malice.

24. Based on the above, the appeal is not merited. I dismiss it. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

25. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012 [2014] eKLR, as follows: -

(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public

interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

26. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> " It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

27. Costs follow the event. In this case, the event is dismissal of the appeal. The appeal is dismissed with costs to the Respondent.

Determination

28. In the upshot, I make the following orders:-

    i. The appeal is dismissed with costs to the Respondent.

    ii. File is closed.

DELIVERED, DATED and SIGNED AT NYERI ON THIS 7TH DAY OF MARCH, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Appellant in person

No appearance for the Respondent

Court Assistant – Michael

M. D. KIZITO, J.