



REPUBLIC OF KENYA



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**New Nyanza Wholesalers Limited v Wanyama (Civil Appeal
E113 of 2022) [2025] KEHC 2945 (KLR) (10 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2945 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E113 OF 2022
PJO OTIENO, J
MARCH 10, 2025**

BETWEEN

NEW NYANZA WHOLESALERS LIMITED APPELLANT

AND

JAMES NGAMIA WANYAMA RESPONDENT

*(Being an appeal from the Judgment and Decree of Hon. R.N.Akee (RM)
in Kakamega CMCC No. 56 OF 2019 delivered on 14th June, 2022)*

JUDGMENT

Background of the Appeal

1. By way of an undated plaint filed in court on 19th March, 2019, the respondent moved the trial court for damages for a cause of action he described as wrong information, malicious prosecution, wrongful arrest and detention, refund of advocate's fees of Kshs 37,000/- plus demand letter fees of Kshs 10,000/- and costs of the suit plus interest on damages and costs.
2. The respondent's case was That on or about the 30th day of June, 2013 he was arrested and held at the police cells in Kakamega following a report made by the appellant. The respondent was thereafter arraigned in court on 01.07.2013 and charged with the offence of stealing by servant contrary to section 281 of the *Penal Code* vide Kakamega CM Criminal Case No. 1263 of 2013 and was acquitted on 02.09.2016. The respondent faulted the prosecution saying it was instigated by false information by the appellant and further condemned the police for failing to conduct proper investigations therefore occasioning him great disrepute, mental anguish and loss.
3. In a statement of defence dated 02.04.2019, the appellant refuted the claims by the respondent, pleaded That it indeed lost some money and asserted That the respondent's suit was incompetent and bad in law. There was equally a statement of defense filed by the then 2nd defendant, the Attorney General, which asserted That the respondent was arrested and charged pursuant to a complaint, That mere



- acquittal is not is not an automatic accrual of cause of action for malicious prosecution then raised a defence That the suit was time barred under Public Authority limitation Act. It was then contended That the suit was fatally defective and raised no cause of action.
4. The trial court in a judgment delivered on 14.06.2022 found That the respondent was entitled to general damages because he was taken through criminal proceedings That were terminated in his favour. The court found the appellant liable and awarded him general damages in the sum of Kshs. 500,000/-, special damages in the sum of Kshs. 18,000/-, costs of the suit from the date of filing and interest from the date of judgment.
 5. Aggrieved by the decision of the trial court, the appellant lodged a memorandum of appeal dated 26.01.2022 seeking orders to have the decision of the trial court set aside and That the appeal be allowed with costs. The appeal faults on the following grounds; -
 - a. That the learned trial magistrate erred when she found in favour of the respondent without regard That the suit was filed out of time without leave hence occasioning a miscarriage of justice.
 - b. That the learned trial magistrate erred in law and fact when she failed to find That the suit was filed in total disregard to the provisions of section 13A of the *Government Proceedings Act* Chapter 40 Laws of Kenya hence occasioning a miscarriage of justice.
 - c. That the learned trial magistrate erred when she failed to find That the respondent had not proved together the four ingredients of malicious prosecution.
 - d. That the learned magistrate's judgment is poorly reasoned and falls short of the provisions of Order 21 Rule 4 of the Civil Procedure Rules 2010 hence occasioning a miscarriage of justice.
 - e. That the judgment contravenes the provisions of Order 21 Rule 1 of the Civil Procedure Rules 2010 hence occasioning a miscarriage of justice.
 - f. That the award of general damages of Kshs. 500,000/= was excessive.
 - g. That the learned trial magistrate erred in law and fact when she awarded special damages of Kshs. 18,000/= without regard That the respondent had not pleaded for special damages in his suit, hence occasioning a miscarriage of justice.
 - h. That the learned trial magistrate failed to analyze the testimony and submission before her and ended up arriving at a wrong decision hence occasioning a miscarriage of justice.
 6. The appeal was canvassed by way of written submissions which the court has benefitted from reading and shall give due consideration in this decision.

Appellant's Submissions

7. The appellant begins by submitting That the suit was filed out of time for the reason That whereas the respondent was acquitted in Kakamega Criminal Case No. 1263 of 2013 on 23.09.2016, Kakamega CMCC No. 56 of 2019 was instituted on 19.03.2019 a period of more than 3 years after the acquittal contrary to the provisions of section 3(1) of the *Public Authorities Limitation Act*, CAP 39 Laws of Kenya, limiting the period of bring action against public authorities to 12 months from the date an action in tort occurred.
8. The appellant contends That this issue was raised by the Honourable Attorney general who was the 2nd defendant but the trial magistrate failed to address the same. The appellant refers the court to the decision in Julius Mathu Mairuki v Attorney General & another [2019] eKLR for the proposition



- That in a cause for malicious prosecution the time starts to run from the date of acquittal or when an appeal is concluded.
9. The appellant further submits That the respondent failed to prove and plead the ingredients of malicious prosecution; That the prosecution was instituted by the defendant or by someone for whose acts he is responsible; That the prosecution was instituted without reasonable and probable cause; That the prosecution was actuated by malice and was terminated in the plaintiff's favour. The appellant submits That if anything, the respondent on cross-examination by the appellant stated That money got lost between 2012 and 2013 when he was working at New Nyanza Wholesalers Limited, That he used to bank money That he had collected and That his employer had the right to report That money was lost.
 10. The appellant also referred the court to the statement of the respondent where on being cross-examined by the 2nd defendant he stated That money got lost and That a report was made to the police and investigations were commenced. In this regard, it is posited That the statement of the respondent disproves the tort of malicious prosecution.
 11. The case of Kenya Power and Lighting Company Limited v Edward Aliela Musambai & another (2022) eKLR was cited for the proposition That the four elements must unite for a case of malicious prosecution to survive.
 12. The appellant further faults the judgment of the trial court for having been delivered on 14.06.2022 after the court had set 01.12.2021 as the date of delivery. It was contended That the delivery was outside the 60 days period set out in Order 21 Rule 1 of the Civil Procedure Rules. The judgment was equally faulted for failing to meet the format and structure of a judgment as set out in Order 21 Rule 4 of the Civil Procedure Rules which obligates That a judgment contains a concise statement of the case, the points for determination and the reason for such determination.
 13. The appellant concludes by attacking the Kshs. 500,000/- awarded as general damages and asserts That there was no basis upon which it awarded. Even the Kshs 18,000/- awarded as special damages was said to have been improperly awarded because was not specifically pleaded.

Respondent's Submissions

14. The respondent submitted on four fronts. On the first point, whether the suit was filed out of time without the leave of the court, it was submitted That section 3(1) of the Public Authorities Limitation Act Cap 39 Laws of Kenya, relied on by the appellant only affected the 2nd defendant in the main suit, who is not a party in the subject appeal, and not the appellant who is not a government entity and thus does not fall under the realm of the Act.
15. On whether the respondent proved the ingredients of malicious prosecution, the respondent submits That had proper investigations been carried out, the respondent would not have been arrested.
16. On the judgment contravening the provisions of Order 21 rule 1 and rule 4 of the Civil Procedure Rules, the respondent argues That he cannot be punished for something That was out of his control. The respondent concluded his submissions by submitting That the general damages was reasonable and deserved.
17. On its part the Attorney General submitted That the suit against it was statute barred and cited the decision in Francis Njenga v James Muraya & Another [2021] eKLR in which a suit was struck out for having been filed out of time.



18. The attorney General further submitted That for a claimant to succeed on a case of malicious prosecution, he had to prove the four ingredients of the tort¹ and what constitutes each of the ingredients.

Issues For Determination

19. The court has considered the grounds of appeal, the proceedings of the lower court and the submissions by the parties and discerns the issues for determination to be;
- a. Whether the suit whose judgement is appealed against was filed out of time, and only if the same be in the affirmative; whether the suit ought to have been struck out?
 - b. Whether the respondent proved the tort of malicious prosecution?
 - c. Whether the proceedings and judgment of the trial court offended the provisions of order 21 rules 1 and 4 of the Civil Procedure Rules and if yes, whether That vitiated the judgment?
 - d. Whether the damages awarded by the trial court were excessive?
 - e. Whether the special damages awarded by the trial court were pleaded?

Whether the suit appealed against was filed out of time and if only the answer be yes, whether the suit ought to have been struck out?

20. The respondent was charged with the offence of stealing by servant contrary to section 281 of the *Penal Code* in Kakamega Criminal Case No. 1263 of 2013. The trial court in a judgment delivered on 23.09.2016, acquitted the respondent pursuant to section 215 of the Criminal procedure Code. Following his acquittal, the respondent filed the primary suit on 19.03.2019 seeking damages for a cause pleaded as wrong information, malicious prosecution, wrongful arrest and detention. The current appellant was named the 1st defendant while the attorney general was named the 2nd defendant.
21. The 2nd respondent in its submissions brought to the attention of the trial court That the suit was time barred by the *Public Authorities Limitation Act*, and as rightfully submitted by the appellant, the trial court failed to address its mind on this issue.
22. Jurisdiction being everything, the court is bound to first determine whether the trial court had the authority to proceed and make a determination of a case of malicious prosecution without addressing That issue as a threshold issue. To this court, this defense was only available to the Attorney General who pleaded it and submitted on it but who was not made a party in this appeal.
23. While it is undesirable to decide on the rights of a party not before the court, it is sufficient to say That clear a point of law having been pleaded and submissions offered on it, it was an obligation upon the trial court to determine on it one way or the other. That the trial court glossed over it, was a grave error.
24. On That point, the court notes That the trial court was not succinct on who between the two defendants before it was to bear the burden of the judgment. That was another error.
25. Where two or more people are sued, it is important for the court to differentiate their distinct burdens by finding whether the liability and obligation of judgment is joint or several, equal or apportioned differently. That was another error the trial court committed and ended in making the judgment look ambiguous or just ambivalent. Had the trial court given the due and expected approach, it would have found That as far as the Attorney General was concerned, the suit was statute barred and dismissed the

¹ Murunga v Attorney General [1979] KLR 138



- case against it thus leaving the current appellant as the only defendant. In failing to identify the defence of limitation as an issue for determination and in failing to determine the issue, the trial court failed in its duty to the parties and thus invite interference by the court.
26. As against the appellant, the ingredients of the tort of malicious prosecution having brought to the court's attention, it was bound to interrogate if all had been proved. A reading of the judgment shows That the court picked the need to prove That the matter was initiated by the appellant, considered the report to the police as the initiation of the prosecution, considered how the matter terminated and it was propelled by malice, made no definite determination on each of the ingredients but also totally failed to capture the element whether the initiation had a reasonable or probable cause. In identifying the elements of the tort as the trial court did, the court lost its course and was bound to come to an erroneous conclusion.
27. Having reviewed the record filed, the court finds That the trial court was in error on the elements to be proved and to the extent That a crucial element was not taken into account and no definite conclusions of fact were drawn. The court finds the judgment to be vitiated by failure to determine the existence of all the ingredients of the tort and to have thus misapprehended the law and arrived at an obviously erroneous conclusion.
28. As a first appellate court, and upon reevaluation of the pleadings and the evidence led, the court finds That the respondent in his evidence in chief and upon cross examination admitted That the appellant had the right to report. The court further finds That there was no allegation nor proof That the report was accentuated by any ill-will, bad blood or That there was no reasonable basis to ask the police to investigate. That hiatus in the evidence was sufficient to defeat the case. In failing to appreciate That the failure to prove malice was fatal to the case, the trial court failed to appreciate the cornerstone ingredient of the tort and thus came to a wholly erroneous conclusion.
29. For this court, it is a civic duty on every citizen and in fact everybody within the territory of Kenya; to report every suspected infringement of criminal law and it is the duty of the police to investigate and recommend prosecution to the Office of the Director of Public Prosecutions. To this court, merely reporting a suspected crime does not amount to initiation of prosecution. There must be a recommendation by the police and a decision to charge by the Director Public Prosecutions before a prosecution to be said to have been initiated.
30. This was an elementary consideration for the court to take and it failed to take it. It thus failed to consider a relevant matter which failure vitiates its findings before the appellate court. The court thus finds That there was no proof of the tort of malicious prosecution. That finding is reached on the merits even though the court notes further That the particulars of the tort were not set out as is mandatory under Order 2 Rule 10(1)(b) of the Civil Procedure Rules.
31. It is of further note That in his evidence in chief, the respondent was led by the counsel to say;
- “ In the plaint, there is nowhere written malicious prosecution “
32. While That may not be wholly accurate, because prayer (a) has those words, it is important That prayers flow from the pleadings. There was no pleading That the respondent was maliciously prosecuted. There were equally no particulars to disclose the elements of the tort. The pleadings were to That extent slovenly and inelegantly drafted as to deprive the opposite side the fair opportunity to adequately respond to it. It was also the duty of the trial court to interrogate if the cause upon which it was led to award damages was properly pleaded and duty to prove discharged.



33. I have said enough to conclude and find That there was no proof of the tort of malicious prosecution to yield the judgment against the appellant. For That deficiency, the appeal succeeds and the judgment of the trial court is set aside.
34. Having set aside the judgment on liability, no benefit would be derived in interrogating whether the damages awarded were indeed reasonable or excessive.
35. It may only be necessary to point out That a judgment ought to be plain in its words on the purport and effect in terms of the obligations it imposes. In addition to assigning specific burden on multiple parties it concerns, it is also important That where general damages are awarded, the court ought to say for what tort the award is made. In this matter the judgement speaks of monetary compensation which the court doubts to be a cause of action or a head of damages. It does not say on what cause of action. It must not be taken for granted That the introduction of the judgment could have identified the cause of action. Clarity demands That the judgment says on what cause of action and what heads of damage is being awarded and in what sums.
36. The upshot is That the appeal succeeds. The judgment of the trial court is set aside in its entirety with costs to the appellant. If any sums were paid out or deposited as security, let the same be refunded to the appellant within 30 days from today.

DATED, SIGNED AND DELIVERED AT LODWAR THIS 10TH DAY OF MARCH, 2025

PATRICK J O OTIENO

JUDGE

