



REPUBLIC OF KENYA



KENYA LAW
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**Matata & another v Rono & another (Civil Appeal E034 of 2024)
[2025] KEHC 6852 (KLR) (19 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6852 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E034 OF 2024**

RC RUTTO, J

MAY 19, 2025

BETWEEN

PHILOMENA KATHEU MATATA 1ST APPELLANT

GREEN ALLIANCE LIMITED 2ND APPELLANT

AND

SUZZAINE MWIREBANGA RONO 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

(Being an Appeal from the judgment of the Honorable Derrick K. Kuto (SPM) delivered on 18th January, 2024 in CMCC No. 49 of 2020 at the Chief Magistrate's Courts, Mavoko)

JUDGMENT

1. The genesis of this matter is a criminal case filed against the 1st respondent based on a complaint by the 1st appellant in the Chief Magistrates Court at Mavoko being Criminal Case No. 50 of 2017. In that case the 1st respondent was jointly charged with another with two counts of stealing contrary to section 268(1) as read with section 275 of the [Penal Code](#). In a judgment dated 31st May 2019, the court acquitted the accused persons under section 215 of the [Criminal Procedure Code](#) on grounds that the prosecution failed to prove their case against the accused beyond reasonable doubt. The learned Magistrate further held that the only way the court would have verified the veracity of the prosecution evidence was by reconciling the bank statements, deposit slips and Equity Agent Transaction Register. However, the Equity Agent Transaction Register was not availed. The learned Magistrate found that because this crucial evidence was withheld, it was prejudicial to the prosecution case and concluded that the prosecution failed to prove beyond reasonable doubt the two counts against the accused persons. Consequently, the accused persons were acquitted under section 215 of the [Criminal Procedure Code](#).



2. Following the acquittal, the 1st respondent instituted Civil Case No. 49 of 2020 in the Chief Magistrate's Court at Mavoko vide a Plaint dated 2nd January 2020. She averred that on or about March 2016, the 1st and 2nd appellants maliciously and falsely reported to the police officers at Athi-river Police Station that she had committed the offence of stealing contrary to section 268(1) as read together with section 275 of the *Penal Code*. She sought for: (a) Special damages of Kshs.132,000; (b) General damages for malicious prosecution; (c) Costs of the suit and; (d) Interest on (a), (b) and (c) above.
3. In their Statement of Defence dated 27th February 2020, the 1st and 2nd appellants denied the contents of the Plaint in its entirety and prayed that the 1st respondent's suit filed against them be dismissed with costs.
4. By a judgment dated 18th January 2024, the trial court held that there was no reasonable and probable cause that led to jointly charge the 1st respondent and that malice had been demonstrated on the part of the 1st appellant or the relevant government agencies who failed to conduct a proper investigation to ensure a transaction Register was tabled before court to ascertain whether the 1st respondent was jointly culpable for stealing from the 1st appellant and her company. It was held that failure to produce the Transaction register and other evidence upon freezing the 1st respondent's bank account demonstrated ulterior motives or ill will.
5. As such, the court found that the 1st respondent had proved all the elements of the tort of malicious prosecution. The learned Magistrate concluded by finding that that the 1st and 2nd appellant as well as the 2nd respondent were jointly liable for malicious prosecution and proceeded to award Kshs.1,000,000 as general damages for the 3 years taken to complete the criminal case; special damages of Kshs.132,000 and held that these damages shall carry interest at court rates from the date of delivery of the judgment.
6. Aggrieved by this decision, the appellants lodged this appeal on grounds contained in the Memorandum of Appeal dated 16th February 2024, to wit, THAT:
 - 1.The learned Trial Magistrate erred in law and in fact by finding the appellants and 2nd respondent jointly liable for malicious prosecution.
 - 2.The learned Trial Magistrate erred in law and in fact by failing to find that the appellants were merely exercising their constitutional right in lodging a complaint and naming the suspected offenders at the police station.
 - 3.The learned Trial Magistrate erred in law and in fact by failing to find that the Office of the Director of Public Prosecutions and the Police acted within their constitutional mandate to charge the 1st respondent, independently without any influence from the appellants.
 - 4.The learned Trial Magistrate erred in law and in fact by failing to appreciate the appellants' weighty evidence in totality.
5. The learned Trial Magistrate erred in law and in fact by condemning the appellants to jointly pay general damages of Kes.1,000,000/= with interest with the 2nd respondent.
- 6.The learned Trial Magistrate erred in law and in fact by condemning the appellants to jointly pay special damages of Ksh.132,000/= with interest, with the 2nd respondent.
7. The learned Trial Magistrate erred in law and in fact by failing to consider the appellants submissions upon full trial.
8. The learned Trial Magistrate erred in law and in fact by entering judgment against the appellants.



7. The appellants prayed that this appeal be allowed; the Judgment delivered on the 18th January, 2024 be set aside; the costs of the appeal be awarded to the appellants; and for any other orders that this Court deems fit in the circumstances.
8. The appeal was canvassed by way of written submissions. The appellants relied upon submissions dated 31st January 2025. They set out two germane issues for the Court's consideration namely: whether the learned Trial Magistrate erred in law and in fact by failing to find that the 1st and 2nd appellants were merely exercising their constitutional right in lodging a complaint and naming the suspected offenders at the Police Station; and, whether the learned Trial Magistrate erred in law and in fact by finding the three defendants in CMCC No. 49 of 2020 jointly liable for malicious prosecution.
9. On the first issue, they submitted that the 1st respondent did not adduce a shred of evidence to support her wild allegations. That they were merely exercising their constitutional right by lodging a complaint and naming the suspected persons at the police station manned by officers from the National Police Service as established under Article 243 of *the Constitution* of Kenya and the *National Police Service Act* No. 11A of 2011.
10. They submitted that they initiated criminal proceedings against the 1st respondent by making a formal complaint to the police who then conducted their investigations and processed the 1st respondent to be charged by the Director of Public Prosecution.
11. It was submitted that it was undisputed that the 1st and 2nd appellants had lost money while undertaking transactions through Bon Bergers Agencies which is owned and operated by the 1st respondent leading to the lodging of the complaint that amounted to the arrest of the 1st respondent, who was later availed and put to her defence in court.
12. The appellants submitted that the court should note that upon the arrest of the 2nd accused person in CMCC No. 49 of 2020, the 2nd accused person refunded the 1st appellant a total Ksh.200,000.
13. The appellants urged this Court to make a finding that there was no malice actuated by the appellants in lodging the complaint. They reinforce this assertion with the decision in *Republic v The Commissioner of Police & Another e-Parte Michael Monari* (2012) eKLR.
14. It was the appellants' case that their duty ended at the point of lodging the complaint with the police. They contended that anything that happened after making the complaint was not within their sphere of influence. They submitted that they did not have control on how and whether the police conducted the investigations and neither did they have control on the decision to charge which is a prerogative of the Office of the Director of Public Prosecution (ODPP) which is an office established under the provisions of Article 157 of *the Constitution*.
15. They submitted that failure by the prosecution to produce crucial evidence was purely a fault on the part of the prosecution.
16. On the second issue, it was submitted that *the Constitution* of Kenya has placed autonomy on the ODDP with regard to the decision whether or not to prosecute. They contended that they did not in any way influence the decision by the Director of Public Prosecution on whether or not to prosecute.
17. They urged that the Director of Public Prosecution exercises his mandate independently and has discretion to decide whether or not, on the evidence gathered, to charge a person with a criminal offence. They buttressed this assertion with the Court of Appeal decision in *Civil Application No. NAI.31 of 2016 (UR22/2016) Between Dr. Alfred N. Mutua v The Ethics & Anti-Corruption Commission & Others and Samson John Nderitu v The Attorney General* [2010] eKLR.



18. It was the appellants' case that the 1st respondent did not raise any evidence of malicious prosecution as she claimed and her allegations are 'hot air'. They urged this Court to be guided by the decision by the Supreme Court of India in R.P. Kapur v State of Punjab AIR 1960 SC 866 which has been cited by the Kenyan Supreme Court in Jirongo Cyrus v Soy Developers Ltd & Others (2019)SC Petition no. 38 of 2019 while dissecting the tort of malicious prosecution.
19. They urged that it would be against public interest and the tenets of Article 10 of *the Constitution* to condemn the appellants to pay damages where they made a complaint to the police upon suspecting an offence was being commissioned. They submitted that by compelling them pay such punitive damages, the Court would be sending a message to the citizens to shun reporting incidents in the fear of being slapped with damages which will defeat the ends of justice. Ultimately, they urged this Court to reverse the finding by the trial court.
20. The 1st respondent relied upon her submissions dated 3rd January 2025. She contended that the learned magistrate considered the essential ingredients of malicious prosecution as outlined in different case law and made a proper finding.
21. It was submitted that the mere fact that the 1st appellant did not produce bank statements and the bank register clearly shows that there was dishonesty on the prosecution which connotes malice.
22. On damages, the 1st respondent urged that the learned magistrate considered the fact that she suffered loss and damages in the 3 years during her trial in Criminal Case No. 50 of 2017 where she had been charged with two counts of stealing. It was the 1st respondent's case that the appellants were actively instrumental in causing the police to take action against her before the trial magistrate.
23. She contended that the appellants failed to produce bank statements and the bank registry which could have been the evidence against the 1st respondent. Therefore, the trial magistrate was correct in holding the appellants and 2nd respondent jointly liable to pay damages. The 1st respondent urged the Court to dismiss the appeal with costs in her favour.

Analysis and determination.

24. This being a first appeal, this Court is mandated to re-evaluate and re-analyze the evidence tendered in the lower court so as to arrive at its own conclusions. (See the Court of Appeal in the case of *Selle v Associated Motor Boat Company Ltd* (1968) EA 123 and *Peters v Sunday Post Limited* [1985] EA 424).
25. Based on this, after analysing the record of appeal, and written submissions from the rival parties, two issues emerge for determination. Firstly, whether the trial court erred in finding that the tort of malicious prosecution was proven to the required standard; and secondly, whether the trial court erred in awarding damages. I shall examine each issue in turn.
26. On the first issue, the appellants fault the trial court for finding them liable for malicious prosecution. The basis of the trial court holding that there was malice was that the prosecution did not establish a probable cause to arrest and jointly charge the 1st respondent; that there was failure by the prosecution to produce the transaction register from the time when the offence was committed. The trial court also noted that the onus to collect the evidence and transaction register was entirely on the prosecution and government agencies at investigation stage and failure to produce crucial transaction register as evidence during criminal proceedings showed malice by the bank, prosecutor and Attorney General.
27. The appellants faulted the trial court holding and submitted that they were exercising their constitutional right in lodging a complaint and naming the suspected offenders at the police station.



They contended that they had no control over the prosecution and on how and whether the police conducted the investigations. On the other hand, the 1st respondent submitted that the trial court correctly found that she was the subject of malicious prosecution.

28. The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. According to Odunga's Digest on Civil Case Law and Procedure, page 5276, the essential ingredients to prove malicious prosecution are as follows:
- a. The criminal proceedings must have been instituted by the defendant.
 - b. The defendant must have acted without reasonable or probable cause.
 - c. The defendant must have acted maliciously.
 - d. The criminal proceedings must have been terminated in the plaintiff's favor.
29. In *Stephen Gachau Githaiga & Another V Attorney General* [2015] eKLR, Justice Mativo rendered himself as follows on malicious prosecution:

“An action for malicious prosecution is the remedy for baseless and malicious litigation. It is not limited to criminal prosecutions but may be brought in response to any baseless and malicious litigation or prosecution, whether criminal or civil. The criminal defendant or civil respondent in a baseless and malicious case may later file this claim in civil court against the parties who took an active role in initiating or encouraging the original case. The defendant in the initial case becomes the plaintiff in the malicious prosecution suit, and the plaintiff or prosecutor in the original case becomes the defendant.

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 damage 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.”

30. Guided by the foregoing, I note that indeed, the 1st respondent was arrested because of a complaint made by the appellants. Thereafter, the prosecution concluded in favour of the 1st respondent, in other words, the 1st respondent was acquitted under section 215 of the criminal Procedure Code on grounds that the threshold beyond reasonable doubt was not met.
31. On probable cause to commence the prosecution, it is worth noting that the 1st respondent is the proprietor of Bon Berger (K) Agencies and had employed the 2nd accused in the criminal cause. Bon Berger (K) Agencies was enrolled with Equity Branch as its agent and was affiliated to Equity Bank Kitengela Branch. The 1st appellant was the director and manager of the 2nd appellant Green Alliance Limited and they deposited money at Equity Bank in the 1st appellant’s personal account and the 2nd appellant’s account through the Bon Berger (K) agency.
32. I note that it was not disputed that the 1st appellant on 26th November 2016, went to withdraw Kshs.300,000 from her account. She realized that her account balance was Kshs.40,000. Anxious about this anomaly she visited Equity bank's Kitengela Branch and found out that Kshs. 340,000 could not be accounted for. On the same day, she reported the matter to Athi River Police Station and the 2nd accused in that matter was arrested. The 2nd accused refunded Kshs.200,000 on the same day.
33. The 1st respondent then engaged an auditor who confirmed that Kshs.539,500 was missing. The appellants made a complaint to the police which culminated in the arrest and prosecution of the 1st respondent and the 2nd accused. The prosecution of the 1st respondent and the 2nd accused led to the accused persons being placed on their defence and later being acquitted.
34. It is my finding that, the appellants had legitimate grounds to file the complaint. The 1st appellant believed that the 1st respondent had misappropriated funds and had an auditor’s report indicating missing monies amounting to Ksh 539,500. Notably, the trial court did not conclude that the appellants lacked a valid claim. In fact, the prosecution successfully established a case, leading to the accused persons being placed on their defense, with the 1st respondent providing a sworn statement.
35. Moreover, the criminal trial court determined that the accused persons did not dispute the authenticity of the questioned deposits. The learned Magistrate found that the primary issue in contention was whether the accused persons jointly stole from the 1st appellant’s account and her company’s funds through the fraudulent issuance of duplicate receipts. Consequently, this court finds that the appellants had reasonable and probable cause to lodge the complaint, as did the prosecution in initiating the criminal proceedings. The trigger of the appellants to report at the police was a discovery that their monies were missing from their bank account at Equity Bank yet they had been depositing with Bon Berger (K) Agency, an agent of the Bank. It was never disputed that the 1st respondent is the proprietor of Bon Berger (K) Agency and that the 2nd accused was an employee. Hence, the appellants were never motivated by malice against the 1st Respondent. Infact the appellants’ grievance was buttressed when, from evidence one record, the 2nd accused person in the criminal case, paid back a sum of Kshs.200,000. I find no malice on the part of the appellants.
36. In addition, I note that there is nothing in evidence to show that the appellants failed to present any evidence required from them by the prosecution.
37. I must state that the criminal trial court did fault the prosecutor and investigative agencies for failing to conduct a proper investigation to ensure that the requisite evidence was tabled before court to ascertain



whether the 1st respondent and others jointly stole from the appellants. This notwithstanding, I am of the view that in the circumstances of this case, reasonable and probable cause existed at the time the complaint was made and prosecution commenced the matter. The 1st respondent was arrested on the basis of a justifiable cause.

38. Further on the element of malice, I must point out that the mere fact of an acquittal does not automatically establish malice. As was held by the Court of Appeal in *James Karuga Kiiru vs. Joseph Mwamburi and 3 Others* Nrb C.A No. 171 of 2000;

“(B) Malicious Prosecution. 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.”

39. I am also mindful that malice can either be express or can be gathered from the circumstances surrounding the prosecution. In the present case, unfortunately, the 1st respondent did not discharged this onus as there is nothing to show that the prosecutor did not act honestly and reasonably. The 1st respondent did not shown that her arrest was directed by improper and indirect motive rather than a genuine pursuit of justice on the part of the appellants and the prosecution. It follows that malice has not been proved.

40. Consequently, based on all the above, the trial court erred in finding that the elements for the tort of malicious prosecution had been proved by the 1st respondent on a balance of probabilities while she had not fulfilled the essential ingredients to prove malicious prosecution being malice, lack of reasonable and probable cause. Subsequently, the trial court erred in awarding damages. This appeal must therefore succeed.

41. The upshot is that the appeal dated 16th February 2024 is allowed, the judgment delivered on 18th January, 2024 is hereby set aside and given the nature of this appeal each party shall bear its costs.

41. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 19TH DAY OF MAY, 2025.

RHODA RUTTO

JUDGE

