National Police Service & 2 others v Nyukuri (Civil Appeal 7 of 2022) [2025] KEHC 6701 (KLR) (20 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6701 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CIVIL APPEAL 7 OF 2022

RK LIMO, J

MAY 20, 2025

BETWEEN

NATIONAL POLICE SERVICE ..... 1ST APPELLANT

DIRECTOR OF PUBLIC PROSECUTION ..... 2ND APPELLANT

ATTORNEY GENERAL ..... 3RD APPELLANT

AND

ARCHBALD WEKESA NYUKURI ..... RESPONDENT

JUDGMENT

1. This is an appeal from the judgment of Hon. C.M. Kesse (PM) delivered on 22/2/22 vide Kitale CMCC No.226 of 2018. In that case the respondent sued the appellant and sought damages for malicious prosecution, unlawful detainment and unlawful arrest.

2. The record of proceedings from the lower court indicates that the appellants filed a defence and called one witness in rebuttal. The trial court evaluated the evidence and found that the respondent had proved his case to the required standard and awarded him Kshs. 2 Million in general damages for unlawful arrest, detention and malicious prosecution.

3. The appellants felt aggrieved and filed this appeal raising the following grounds namely;

    i. That the learned magistrate erred by relying on respondent's submissions and disregarding the appellant's submissions.

    ii. That the learned magistrate erred by holding that the appellants were jointly and severally liable together without any evidence to that effect.

    iii. That the learned magistrate failed to give a well-reasoned judgment on each item pleaded.

    iv. That the magistrate erred by dismissing the appellant's case.

v. That the trial court erred by failing to find that the respondent had not proved his case.

vi. That the trial court erred by awarding damages that were inordinately high leading to miscarriage of justice.

vii. That the trial court used wrong principles in assessing damages.

viii. That the learned magistrate failed to find that the appellants were not liable for unlawful arrest and malicious prosecution.

4. In their written submission dated 14th March 2025 done through Edna Tigoi, Principal State Counsel from the office of the Attorney General, the appellants submit that the element of malicious prosecution was lacking in the respondent's case. They submit that for a claimant to prove a case on malicious prosecution he must satisfy the following criteria;

i. That the prosecution was instituted by the appellant.

ii. That the prosecution terminated in respondent's favour.

iii. That prosecution was instituted without reasonable or probable cause and

iv. That prosecution was actuated by malice.

They rely on the following cases;

i. Kagame & Others –vs- The Attorney General (1969)E.A 643

ii. Fredrick Mwaniki Musee & 4 Others –vs A.G & 2 Others (2019)KE ELRC

5. They submit that they acted on a report and arrested the respondent but they have not stated where the report emanated from.

6. They concede that the prosecution of the respondent ended in his favour after the trial court acquitted him under Section 210 of the *Criminal Procedure Code*. They however contend that an acquittal does not automatically mean or connote malice. They rely on the case of Chrispine Otieno Caleb –vs- Attorney General (2014)eKLR.

7. They submit that they had reasonable and probable cause to arrest the respondent and prefer charges. They contend that the officers who arrested the respondent were on duty and were just discharging their lawful mandate.

8. They point out that the testimony of DW1 demonstrates that they had basis to reasonably suspect that the respondent was found in possession of handcuffs and that is the reason they charged him with the offence of illegal possession of public property (handcuffs). They submit that an offence cognizable in law (*Penal Code*) was committed. They rely on the case of Chelestino Ngochi Ngari –vs- Attorney General & Anor (2022)eKLR where the court observed inter alia that it is not the duty of the police and the prosecutor to ascertain whether there is a defence but whether there is a reasonable and probable cause for a prosecution.

9. They fault the trial court for focusing on the prosecution's failure to call evidence in the criminal trial instead of the material that was available to the prosecutor at the time the respondent was charged.

10. In their view, the respondent did not prove or demonstrate that there was any ill-will or malice/spite by the police officer in prosecuting him.

11. They insist that they had reasonable and probable cause to take the action they did and that because the criminal case was terminated did not confirm that he was innocent.

12. They submit that the element of malice is a crucial ingredient in establishing the tort of malicious prosecution. According to the appellants, the respondent did not establish that the appellants used justice system for some other motive other than pursuing justice having reasonable belief that an offence had been committed.

13. On the award made of Kshs. 2 Million, the appellants contend that the same was inordinate and unwarranted in the circumstances. They submit that the award was based on wrong principles. They urge this court to intervene as per the decision in Butt –vs- Khan (1981) KLR 349.

14. The respondent has opposed this appeal and supported the findings of the trial court. The respondent submits that the trial court relied on the evidence presented to her and analyzed them well.

15. He submits that he proved all the essentials of tort of malicious prosecution pointing out how he was arrested on 29/12/2016 and locked up at Kitale police station on false allegations that he was in possession of handcuffs. He submits that he was locked up for 5 days before being arraigned. He contends that he stood trial from 3/1/2017 to 4/9/2017 when he was acquitted under Section 210 of the *Criminal Procedure Code* which shows he established the two essential elements in malicious prosecution i.e. the fact that the appellants instituted his prosecution and that the prosecution ended in his favour.

16. On whether there was a reasonable and probable cause to arrest and charge him, the respondent submits that the test to be used is whether the facts known to the prosecutor would have satisfied a prudent and cautious man that the respondent was probably guilty of the offence. He relies on Kasio Matuku & Kenya Post Office Savings Bank –vs- James Kipkemboi Cheruiyot and the A.G (Citations not given) and Murunga –vs- Attorney General (1979) KLR.

17. The respondent insists he was able to prove that the appellants were culpable of the following;

    i. Falsely and knowingly misrepresenting that the respondent was in possession of police handcuffs.

    ii. Acting recklessly and unreasonably in arresting, detaining, charging and prosecuting the respondent without conducting proper investigations.

    iii. Detaining the respondent in police cells for 4 days when there was no evidence to support the allegations against him.

    iv. Denying the respondent police bond he was entitled to.

    v. Failing to render an apology even after the respondent was acquitted.

18. The respondent points out that the prosecution never availed any witness in the criminal trial despite being granted several adjournments. He submits that all the witnesses were police officers from Kitale police station and therefore had no excuse of not turning up in court to testify which showed that they had no evidence against him. He relies on the case of Shadrack Mwanzia Kivuku –vs- A.G & Anor (2017)eKLR where the court inferred malice on the part of the prosecution when it failed to avail witnesses.

19. He submits that there was malice in his prosecution because of lack probable cause. He relies on Robert Okeri Ombeka –vs- Central Bank of Kenya (2017)eKLR & Jediel Nyaga –vs- Silas Mucheke (C.A NO.59 of 1987 Nyeri (UR).

20. On quantum of damages, the respondent submits that he had prayed for Kshs.8 Million but the trial court only awarded Kshs.2 Million which he says was reasonable and asks this court not to interfere.

21. This court has considered this appeal and the response made. I have laid out in summary both the appellants' and the respondent's positions in this matter. This is a first appellate court and my role is to re-evaluate the evidence tendered and draw own conclusion with a view to determining whether the trial court reached a correct verdict.

22. This matter relates to a tort of unlawful arrest, detention and malicious prosecution.

23. It is now well settled that in a case of malicious prosecution, plaintiff must establish and prove the following elements;

    i. Show that the prosecution was instituted by the defendant or by someone for whose acts it is responsible.

    ii. That the prosecution was terminated or ended in the plaintiff's favour.

    iii. That the prosecution was instituted without reasonable and probable cause.

    iv. That prosecution was actuated by malice.

24. In cases of unlawful arrest and detention, the plaintiff must demonstrate the following;

    i. That the arrest and detention was effected without reasonable or probable cause.

    ii. That the arrest and detention was actuated by malice/bad faith.

    iii. That the detention was beyond the constitutional timelines for one to be presented to court and with no reasonable explanation for non-compliance.

25. The issue raised in this appeal is fairly simple and the same is whether the respondent established and proved his case to the required standard with respect to the above cited ingredients for malicious prosecution.

26. It is not disputed that the respondent was arrested on allegations of being in possession of police property without authority contrary to section 101(1) (a) of the *National Police Service Act*. It is not disputed that the respondent was charged and prosecuted for the said offence vide Kitale CMCC Criminal Case No.17 of 2017 from 3/1/2017 to 4/9/2017 when the case was terminated under Section 210 of the *Criminal Procedure Code* after the 2nd appellant could not tender any evidence for lack of witnesses.

27. The record from the criminal trial shows that the 2nd appellant had attempted to withdraw the case earlier for being unable to supply the respondent with witness statements to help him prepare for his defence as dictated by law but the court declined to have the case withdrawn under Section 87(a) of the *Criminal Procedure Code* the 2nd appellant applied for adjournment and the same was granted. On 4/9/2017 the 2nd appellant applied for adjournment citing lack of witnesses. The application for adjournment was strenuously opposed and the trial court declined to adjourn the matter and since the prosecution had no witnesses it closed its case.

28. Looking at the proceedings from the criminal trial court which was tendered in evidence in the lower court in the civil matter, the subject of this appeal, it is evident that the prosecution of the respondent from the word go was characterized by missteps which infringed on the constitutional rights of the respondent. The reasons for my findings are as follows;

i. An accused person under Article 50(i) is entitled to be supplied with the statements upon which the prosecution intends to rely on. The respondent from when the plea was taken on 3/1/2017 applied for witness statements but the same were never supplied till the matter was terminated on 4/9/2017. The respondent throughout trial was kept in the dark on what the evidence entailed.

ii. The 1st respondent was arrested on 29/12/2016 and arraigned on 3/1/2017.

I have checked at the calendar of 2016 and 2017 and it shows that 29th December 2016 fell on a Thursday. Article 49(1)(f) provides that an accused person should be brought or taken to court 24 hours after arrest unless the 24 hour period ends outside ordinary court hours or a day that is not an ordinary court day. 31st December 2016 was a Saturday and 2nd January 2017 was a Monday. The appellants were obligated to produce the respondent on 30/12/2016- which was a Friday or 2/1/2017 which was a Monday. They failed to produce him and no reasons were given at all to explain the delay.

29. The inference deduced from the missteps by the appellants in respecting the rights of the respondent is malice. The appellants at the trial in the civil matter did not offer any defence to the respondent's claim on unlawful detention. In this appeal, no attempts were made to give any explanation at all as to why the respondent was not produced in court within 24 hours or at the very best granted police bond. The action by the appellants reeked of malice. There is no other hypothesis that can be drawn from their action other than malice.

30. I have also looked at the charge sheet presented at the criminal trial and it is clear that the handcuffs allegedly found in possession of the respondent was not serialized. The 1st appellant never supplied those particulars probably because the charges were tramped up and lacked any probable cause. When pressed during cross-examination the investigating officer CPL Erick Bausolo (DW1) stated;

> " The handcuff was never serialized. I do not have them in court...."

The question posed is if it is true that the respondent was found in possession of handcuffs as alleged, then where did it disappear to? Why not tender them to prove that the police acted in good faith in arresting the respondent and locking him up. The police officers who arrested him were all from Kitale police station. What was so difficult to avail them? The reason given that the police file was missing in my view was too lame and a cover up. That is why the criminal court was not persuaded.

31. The trial court in my view evaluated the evidence placed before it well and reached the correct verdict that all the elements of malicious prosecution as per the decision in Murunga –vs- Attorney General (1979) 139 were proved. I have re-evaluated the evidence as I have highlighted above and have reached the same inevitable conclusion.

32. I am not persuaded by the appellant's contention that their submission at the trial court were not considered. The trial court considered submissions from the appellants but found that they had not given sufficient reasons to explain circumstances leading to the respondent's prosecution. The allegations made by the appellants were unsubstantiated. They did not show probable cause for the arrest and prosecution. They did not tender the handcuffs allegedly found on the respondent to prove "probable cause" or reasonable basis to suspect that the respondent had committed a crime.

33. This court finds that contrary to the appellants' contentions, the respondent's case at the trial court was proved to the required standard and the trial court was properly guided to find so.

34. On quantum, it is well established that an award on damages is a discretionary matter for a trial court taking into consideration all relevant factors, an appellate court would normally unlikely interfere

unless it is established that the trial court's award is either too high or inordinately low or that the trial court failed to take into consideration a relevant factor and instead considered extraneous matters.

35. In this matter the trial court considered a decision in Daniel Njuguna –vs- Barclays Bank of Kenya Ltd & Anor (2010) where a similar award had been given and awarded Kshs.2 Million as general damages. I find that the award was moderate and fair given the circumstances. It is undenied that the respondent was locked over a period most people were celebrating the ushering of a New Year. It is not lost that he was arrested a few days before the event of the New Year which might explain the fact that the police officers who were said to have been on patrol might have arrested the respondent for other ulterior motive other than being connected with commission of an offence. As a matter of fact the officers should consider themselves lucky that they were not sued individually so as to take personal responsibility instead of pushing the burden of paying damages to the public for something that should not have happened. The police should at all times work within their mandate and the law because this is a Country where the rule of law is cherished.

    In short this court finds not merit in this appeal. The same is dismissed with costs to the respondent.

DELIVERED, DATED AND SIGNED AT KITALE THIS 20TH DAY OF MAY, 2025.

HON JUSTICE R.K. LIMO

KITALE HIGH COURT

Judgment delivered in open court

In the presence of;

Ms Jerubet holding brief for Tigoi for Appellant

Teti for Respondent – absent

Duke/Chemosop- Court assistants