



REPUBLIC OF KENYA



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**Devish v Maina & another (Civil Appeal 211 of 2023)
[2025] KEHC 12552 (KLR) (9 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12552 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 211 OF 2023
RC RUTTO, J
SEPTEMBER 9, 2025**

BETWEEN

PATEL LANJI DEVISH APPELLANT

AND

HANNAH WANGECHI MAINA 1ST RESPONDENT

THE HON ATTORNEY GENERAL 2ND RESPONDENT

*(Being an appeal from the Judgment delivered by Hon. S.
Atambo (CM) on 4th July 2023 in Thika CMCC No. 603 of 2019)*

JUDGMENT

1. This is an appeal against the judgment of Hon. S. Atambo (CM) delivered on 4th July 2023 in Thika CMCC No. 603 of 2020. In the trial court, the 1st Respondent sued the Appellant and the 2nd Respondent for false arrest and imprisonment, malicious prosecution, and defamation, as set out in the Plaint dated 30th September 2019. She sought general damages together with the costs of the suit.
2. The 1st Respondent alleged that on or about 1st February 2016, she was arrested by police officers following a complaint by the appellant who claimed that she had stolen livestock, namely one sheep and its kid, from him. She further alleged that she was held in detained and subsequently charged in Thika Criminal Case No. 696 of 2016 with the offence of stealing stock valued at Kshs.7,000/=, contrary to Section 278 of the Penal Code.. She claimed that both the appellant and the 2nd respondent acted maliciously by branding her a criminal despite knowing the allegations were false, and that the complaint was made with ulterior motives to cause her suffering in custody, even after she made pleas to settle the matter out of court.
3. In his defence dated 23rd October 2019, the appellant denied all the allegations and claims made by the Plaintiff. He further indicated that he would raise a preliminary objection at the earliest opportunity



on the grounds that the suit was defective, misconceived, vexatious, and an abuse of the court process. The 2nd Respondent, in his defence, denied the allegations by the 1st Respondent and stated that if the 1st Respondent was ever arrested, it was only after the police had conducted credible investigations and acted in accordance with their statutory duty based on a valid complaint. The 2nd Respondent therefore prayed that the 1st Respondent's suit be dismissed with costs.

4. After hearing the parties, the trial court awarded the 1st Respondent Kshs.400,000/= as general damages together with costs and interest on the suit.
5. Aggrieved by the judgment delivered on 4th July 2023, the Appellant filed this appeal on the following grounds that the Learned Magistrate erred in fact and in law when it failed to appreciate that the onus of proving that the Appellant acted without reasonable and probable cause and maliciously is on the 1st Respondent as the Appellant is not required to give particulars of reasonable and probable cause; when it failed to appreciate that whether the question of reasonable or probable cause existed or not the same is not to be determined subjectively; when it failed to appreciate that the Appellant's role on the trial was to give evidence in support of the Criminal complaint which he did honestly and in good faith otherwise the 2nd Respondent was wholly liable for the prosecution of the criminal case; misguided itself when it held that the case had been proved on a balance of probabilities against the Appellant whereas all the ingredients of the cause of action for malicious prosecution had not been met and or otherwise proven; when it wrongfully excluded evidence leading to travesty of justice; when it wrongfully and selectively included evidence thus leading to a miscarriage of justice; when it failed to ascertain that demeanor of the 1st Respondent was one of acquiescence to conversation and or handling lost goods otherwise making her culpable to the complaint of stealing; misdirecting itself owing to insufficient evidence and in effect made a verdict that has caused a miscarriage of justice; when it made verdict based on stand-alone evidence without corroboration as required by law.
6. The appeal was canvassed through written submissions. The Appellant's submissions are dated 15th March 2025, while the 1st Respondent's submissions are dated 20th August 2024. It is noted that the 2nd Respondent did not participate in the appeal, proceedings, as there was no attendance, representation, or filing of submissions on its part.

Appellant's submissions

7. In his submissions the Appellant grouped and addressed Grounds 1 and 2 together, Grounds 3 and 4 together, Grounds 5, 6, 8, and 9 jointly, and finally Ground 7 independently.
8. On Grounds 1 and 2, the Appellant relied on the case of *Simba v Wambar* to define what constitutes reasonable and probable cause. He urged that the burden of proving that he acted without reasonable and probable cause rests solely with the 1st Respondent. However, the trial court erroneously shifted the burden onto him. He further submitted that the determination of whether reasonable and probable cause existed should be made objectively and not subjectively, as the learned trial court did.
9. Regarding Grounds 3 and 4, the Appellant placed reliance on the decisions in *Murunga v Attorney General* [1979] eKLR, *Robert Okeri Ombeka v Central Bank of Kenya* [2016] eKLR, *National Oil Corporation v John Mwangi Kaguenyu & 2 others* [2019] eKLR, and *Gicharu v Safaricom Limited & 3 others* (2024) in submitting that he had no role in the prosecution of the criminal case, as that responsibility lies with the 2nd respondent. He argued that his involvement was limited to reporting the alleged theft and providing testimony in support of the complaint, which he did in good faith. He maintained that he should not be liable for the actions of the 2nd Respondent in prosecuting the matter and that, the 2nd Respondent should bear sole responsibility for the alleged malicious prosecution.



10. On Grounds 5, 6, 8, and 9, the Appellant submitted that the trial court wrongfully excluded evidence that could have influenced the outcome of the case. In addition, the Appellant contended that the trial court relied on evidence that had not been properly tendered before it in arriving at its decision. According to him the trial court misdirected itself by basing its findings on insufficient and uncorroborated evidence, which led to a miscarriage of justice.
11. Regarding Ground 7, the Appellant relied on Section 55(2) of the *Evidence Act*, which allows the character of a person to be considered in civil cases where it may affect the amount of damages awarded. He argued that the trial court failed to consider the 1st Respondent's demeanor during the proceedings, which, in his view, showed acquiescence to conversations regarding the handling of stolen goods. He urged that, applying the reasonable man test, such character and demeanor would render the 1st Respondent culpable in relation to the complaint of theft.
12. In conclusion, the Appellant prayed that the appeal be allowed in its entirety, and that the judgment of the trial court be set aside.

1st Respondent's Submissions

13. The 1st Respondent commenced her submissions by outlining the background of the case and emphasizing on this Court's mandate to re-evaluate analyse the evidence presented and draw its own conclusion. She cited the case of *Mursal & Another v Manese* (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022) (Judgment).
14. The 1st Respondent identified two issues for determination: (i) whether all the ingredients of the tort of malicious prosecution were met and proved, and (ii) whether the judgment of the Learned Magistrate amounted to a miscarriage of justice.
15. On the first issue, the 1st Respondent submitted that in order to establish a claim for malicious prosecution, it must be shown that: (a) the prosecution was instituted by the defendant or by someone for whose acts he is responsible; (b) the prosecution was instituted without reasonable and probable cause; (c) the prosecution was actuated by malice; and (d) the prosecution was terminated in the plaintiff's favor.
16. With regards to the second element, whether the prosecution was instituted without reasonable and probable cause, the 1st Respondent argued that the prosecution failed to prove her guilt beyond reasonable doubt. She contended that she provided a truthful and convincing explanation of the circumstances leading to the presence of the sheep and its kid in her home. According to her, she acted as a good neighbor by sheltering the animals overnight with the intention of returning them to the owner the following morning, as their homes were separated by a crocodile-infested river. She further argued that a reasonable person in the same situation would have taken similar action rather than driving the animals away, knowing they would likely be devoured by the crocodiles.
17. The 1st Respondent contended that the Appellant had no justification for insisting on subjecting her to criminal proceedings when the matter could have been resolved amicably out of court. She emphasized that the circumstances were straightforward and understandable, the sheep had wandered into her compound at night, and she chose to keep them safe until morning to return it to its owner.
18. On whether the prosecution was actuated by malice, the 1st Respondent maintained that she had demonstrated to the satisfaction of the trial court that the Appellant had no genuine basis for initiating criminal proceedings against her. She stated that despite her pleas to settle the matter amicably, the



Appellant was adamant and insisted on prosecution. She relied on *Chrispine Otieno Caleb v Attorney General* [2014] eKLR, to submit that the police acted maliciously by failing to conduct proper investigations to ascertain whether the allegations were true and whether the circumstances warranted prosecution. She argued that a proper investigation would have revealed that she had not stolen the sheep, and consequently, there would have been no justification for prosecution.

19. On the second issue, whether the judgment of the trial court amounted to a miscarriage of justice, the 1st Respondent submitted that the judgment was delivered after an exhaustive hearing and consideration of all parties' submissions. She asserted that the judgment was anchored on relevant and comparative authorities cited by the trial court and that the award of general damages was appropriate and proportionate compensation for the harm and societal stigma she suffered.
20. The 1st Respondent therefore urged this Court to uphold the judgment of the trial court and award her the costs of this appeal.

Analysis and Determination

21. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. The foregoing duty was succinctly stated by 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).
22. After a review of the record of appeal and the written submissions from both the Appellant's and 1st Respondent's, the main issue for determination is; Whether the 1st Respondent successfully proved the tort of malicious prosecution against the Appellant and 2nd Respondent.
23. The evidence on record, confirms that the 1st Respondent was charged and prosecuted with the offence of stealing stock contrary to Section 278 of the Penal Code. According to the 1st Respondent, the incident arose when a sheep and its kid strayed into her compound in the evening. Her home and that of the Appellant were separated by a river infested with crocodiles, which made it dangerous to cross at night. She claimed she kept the animals overnight with the intention of returning them to the owner the following morning. She maintains that she did not steal the animals and acted as a good neighbour in safeguarding them. She claims that after the close of the prosecution's case, she was acquitted under Section 215 of the Criminal Procedure Code for lack of evidence.
24. The trial court found that the 1st Respondent had proved that the prosecution was instituted by the appellant and the 2nd Respondent without a reasonable and probable cause. In its judgment the trial court observed;

“Faced with the situation at hand and the reasoning of the criminal court's judgment as Plaintiff was being acquitted, it was doubtful the Plaintiff stole the sheep and its kid and as clearly noted by 1st Defendant in cross examination, his land and that of the Plaintiff are separated by a river, which he did not deny or avail contrary evidence that it was infested with crocodiles. Had the sheep and the kid belonged to the Plaintiff and they were in his home, could he have taken them in the evening across the same crocodile infested river? The court clearly stated that the prosecution had not proved beyond any shadow of doubt that the plaintiff knew the sheep was stolen hence her acquittal. I thus find the police did only rely on the report and evidence of 1st Defendant, being the complainant in the criminal case,



failed to conduct thorough investigations hence they acted maliciously and or unreasonably in arresting, detaining and charging the Plaintiff.”

25. Based on this reasoning, the trial court concluded that the 1st Respondent had proven her case on a balance of probability as against the Defendants and was entitled to the relief sought.
26. In order to prove malicious prosecution, one must demonstrate that;
 - i. That the prosecution was instituted by the appellant.
 - ii. That the prosecution terminated in the respondent’s favour.
 - iii. That the prosecution was instituted without reasonable and probable cause.
 - iv. That the prosecution was actuated by malice.
27. It is not in dispute that the Appellant lodged a complaint to the police alleging that his sheep and its kid had been stolen and were found in the 1st Respondent’s compound. Similarly, it is undisputed that the criminal proceeding terminated in favour of the 1st Respondent. However, the Appellant however denies that the prosecution was instituted without reasonable and probable cause and was actuated by malice.
28. “Reasonable and probable cause” was discussed in *Kagane & Others vs Attorney General & Another* (1969) EA 643 where the court held that;

“Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed...Excluding cases where the basis for the prosecution is alleged to be wholly fabricated by the prosecutor, in which the sole issue is whether the case for the prosecution was fabricated or not. The question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of objective test. That is to say, to constitute reasonable and probable cause the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material consisted of facts discovered by the prosecutor or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty. If and in so far as that material is based on information, the information must be reasonably credible, such that an ordinary reasonable prudent and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for prosecution...If it is shown to the satisfaction of the judge that a reasonable prudent and cautious man would not have been satisfied that there was a proper case to put before the court, then absence of reasonable and probable cause has been established. If on the other hand the judge considers that prima facie there was enough evidence to justify a belief in an ordinary reasonable prudent and cautious man that the accused was probably guilty then although this would amount to what I call primary reasonable and probable cause the judge may have to consider the further question as to whether the prosecutor himself did not believe in the probable guilt of the accused, and this is obviously a matter which is to be judged by a subjective test. This subjective test should only be applied where there is some evidence that the prosecutor himself did not honestly believe in the truth of the prosecution. In as much as this subjective test only comes into operation when there were circumstances in the knowledge of the



prosecutor capable of amounting to reasonable and probable cause, the subjective test does not arise where the reason alleged as showing absence of reasonable and probable cause is merely the flimsiness of the prosecution case or the inherent unreliability of the information on which the case was based, because this is a matter for the judge alone when applying the objective test of the reasonable prudent and cautious man. Consequently, the subjective test should only be applied where there is some evidence directly tending to show that the prosecutor did not believe in the truth of his case. Such evidence could be afforded by words or letters or conduct on the part of the prosecutor which tended to show that he did not believe in his case, as for example, a failure or reluctance to bring it to trial, a statement that he did not believe in it and, I think possible, an unexplained failure to call an essential witness who provided a basic part of the information upon which the prosecution was based.”

29. Based on the above, reasonable and probable cause requires an honest belief that the accused is probably guilty, based on facts or information that a reasonable, cautious person would consider reliable. The court first applies an objective test; whether a reasonable person, knowing what the accuser knew at the time, would believe there was a legitimate case to prosecute? If the information was credible and strong enough, then reasonable cause exists; if not, it does not. In certain cases, a subjective test may also be applied to assess whether the prosecutor genuinely believed in the case, but only where there is evidence suggesting doubt dishonesty or ulterior motives.
30. In assessing whether there was reasonable and probable cause for the prosecution, the court must apply the objectivity test; would an ordinary, prudent, and cautious person, having the same information as the Appellant at the time, would have believed that the 1st Respondent was probably guilty of theft. From the evidence on record, the 1st Respondent explained and provided a credible explanation; that she kept the sheep and its kid had strayed into her compound in the evening and due to the presence of a a crocodile-infested river, separating her home and the appellant’s she opted to shelter the animals overniting with the intention of returning them safely the next morning. The Appellant did not dispute the existence of this river. Her explanation was plausible and consistent with the circumstances, suggesting that the 1st Respondent acted in good faith. Despite this, the police failed to conduct any further investigation and proceeded solely on the Appellant’s report. In these circumstances, a reasonable and cautious person would not have concluded that the 1st Respondent had committed theft. Accordingly, the prosecution was instituted without reasonable and probable cause.
31. As for malice, it must be demonstrated that the prosecution was driven by an improper motive or intent to cause harm. Malice can be inferred from the conduct of both the Appellant and the police. The trial court correctly inferred malice from the actions of both the Appellant and the police. Despite the 1st respondent’s reasonable explanation and her willingness to resolve the matter amicably, the Appellant insisted on pursuing criminal charges. The police, on their part, acted on the Appellant’s report without conducting any meaningful investigations. Their reliance solely on the Appellant’s complaint, without verifying the facts, supports the finding that both parties acted unreasonably and with malice. The trial court was therefore correct in finding that the Appellant and the 2nd Respondent acted unreasonably and maliciously.
32. Based on the foregoing analysis, it is evident that the 1st Respondent satisfied all the elements required to establish the tort of malicious prosecution. The criminal proceedings were initiated by the Appellant through his complaint, and the 2nd Respondent, acting through its agents, undertook the prosecution without conducting adequate investigations. The circumstances, including the plausible explanation given by the 1st Respondent and the existence of a crocodile-infested river, demonstrate that there was no reasonable and probable cause for instituting the prosecution.



- 33. On liability, the evidence shows that both the Appellant and the 2nd Respondent contributed to the malicious prosecution. The Appellant initiated and persisted with the complaint, while the 2nd Respondent, through its agents failed to investigate and proceeded to charge the 1st Respondent without sufficient basis.
- 34. Consequently, I find no justification to interfere with the decision of the trial court. The appeal lacks merit and is hereby dismissed in its entirety.
- 35. The judgment and decree of the trial court awarding the 1st Respondent Kshs.400,000/= as general damages together with costs and interest is upheld. The Appellant shall bear the costs of this appeal.
- 36. Orders accordingly

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 9TH DAY OF SEPTEMBER 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....Appellant

.....Respondent

Selina Court Assistant

