



**Junior & another v Attorney General & 2 others (Civil Appeal
4 of 2019) [2024] KEHC 37 (KLR) (11 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 37 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL 4 OF 2019
GMA DULU, J
JANUARY 11, 2024**

BETWEEN

ROBERT MATOLO JUNIOR 1ST APPELLANT

CHRISTOPHER MWENDWA KIOKO 2ND APPELLANT

AND

THE HON ATTORNEY GENERAL 1ST RESPONDENT

DAMARIS MUENI NZUSYO 2ND RESPONDENT

MORRIS MATOLO NZUSYO 3RD RESPONDENT

*(From the judgment in Civil Case No. 165 of 2011 delivered on 24th
December 2018 at Makueni Law Court by Hon. Ruguru N.(SRM)*

JUDGMENT

1. In a judgment delivered on December 24, 2018, the trial Magistrate concluded as follows:-

“In the result, I find for the injuries sustained an award of Kshs 80,000/= adequate compensation. However, there was no proof of special damages and the same is not awarded. On the issue of costs in the counter claim, the 3rd defendant did not produce a demand letter to show that he put the plaintiff’s on notice of the impending suit. Costs are therefore not awarded of the counter claim but award interest. I also award interest to the 3rd defendant on general damages.”

2. Dissatisfied with the judgment and award of the trial court the two appellants who were the plaintiff’s in the trial court have come to this court on appeal through counsel on Makau & Mulei Advocates on the following grounds:-



1. The learned trial Magistrate erred in law and fact and misdirected herself by failing to find and hold that the appellants were acquitted for lack of evidence to support the charges preferred against them.
 2. The learned trial Magistrate erred in law and fact and misdirected herself by failing to find and hold that the charges against the appellants were baseless and actuated by malice as there was no evidence to support the said charges.
 3. The learned trial Magistrate erred in law and fact and misdirected herself in failing to find and hold that the judgment in the criminal trial stated that the facts pointed to a charge of affray and not assault.
 4. The learned trial Magistrate erred in law and fact and misdirected herself by failing to find and hold that there was therefore clear bias and malice on the part of the prosecutor in opting to charge only the appellants and not the 3rd respondent as well.
 5. The learned trial Magistrate erred in law and in fact and misdirected herself by failing to find that there was no reasonable or probable cause to charge the appellants with the offence of assault.
 6. The learned trial Magistrate erred in law and fact and misdirected herself in finding that the appellants 100% liable for the injuries suffered by the 3rd respondent in a case the court reasonably to be affray.
 7. The learned trial Magistrate erred in law and fact and misdirected herself in awarding the 3rd respondent damages for assault.
 8. The learned trial Magistrate erred in law and fact and misdirected herself in failing to find and hold that the 3rd respondent contributed to the occasion of his injuries and was thus liable for the same.
 9. The learned trial Magistrate erred in law and fact and misdirected herself in dismissing the appellants claim for damages for malicious prosecution as well as special damages despite the same having been proved.
3. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by O.N. Makau & Mulei Advocates for the appellants, the Attorney General for the 1st respondent, and Manthi Masika & Company Advocates for the 2nd and 3rd respondents. All parties relied on decided court cases.
 4. This being a first appeal, I have to be guided by the principle stated in the case of *Selle =Versus= Associated Motor Boat Company Ltd* (1986) EA 123 that the appeal is like:

“...a retrial and the principles upon which 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.”
 5. In the present case, the claim of the appellants in the plaint was for malicious prosecution to which the 2nd and 3rd defendants Damaris Mueni Nzyuko and Morris Matolo Nzyuko filed a defence and counter claim, alleging that they were unlawfully assaulted by the appellants. The trial court dismissed the claim of the appellants for malicious prosecution but allowed the counter claim of the 3rd respondent for assault and awarded him damages, giving rise to the present appeal.



6. The appellants having brought a civil case for malicious prosecution, they were required to prove their case on the balance of probabilities. In this regard they were required to prove each of the four (4) elements of malicious prosecution on the balance of probabilities. The elements of malicious prosecution which were to be proved on the balance of probabilities by the appellants have been stated by courts in several cases including the case of *Music Copyright Society of Kenya =Versus= Tom Odhiambo Ogawul* (2014) eKLR wherein it was restated that in order to succeed in a claim for malicious prosecution a plaintiff must establish that:
 - i. The prosecution was instituted by the defendants.
 - ii. The prosecution was terminated in the plaintiff's favour.
 - iii. The prosecution was instituted without reasonable cause.
 - iv. The prosecution was actuated by malice.
7. At the trial, the appellants called three (3) witnesses. PW1 was Robert Muli Matolo Junior who testified that on January 29, 2009 while walking home at Kola at 6:30p.m he met Morris (3rd respondent) carrying a stick. Robert asked Morris why he insulted his father and Morris did not respond, but descended on him using the stick and injured him and Christopher intervened and separated them.
8. It was his evidence that he proceeded home only to be charged in court next day for assaulting Morris in Criminal Case No. 539 of 2009 which case was dismissed through a ruling delivered by the trial court, and he thus filed the civil case herein.
9. PW2 was Robert Muli Matolo the father of PW1 whose evidence was that on 29th his son (PW1) informed him that he had been assaulted by Morris. He was later informed that his son was charged in court for assault but acquitted under Section 210 of the Penal Code. He stated that both his son and Morris were relatives and were young men.
10. PW3 was Joseph Bosire the Executive Officer at Makueni court who produced the file record and ruling in Makueni Magistrate's Criminal Case No. 539 of 2009, in which Christopher Mwendwa was charged with assault.
11. On their part, the defendants called DW1 Damaris Mueni Nzyuko the mother of Morris, whose evidence was that she recorded a statement with the police that his son Morris was assaulted by Mwendwa and Junior. She was not at the scene however.
12. DW2 was Morris Matolo Nzusyo whose evidence was that he was a cousin of Morris. According to his evidence, on November 29, 2009 he was sent by his mother to the shop to buy salt and at a bridge he met Christopher Mwendwa and Robert Muli Junior who had earlier threatened to beat him. When he approached Junior and Christopher grabbed and beat him.
13. According to him, the assault resulted in bleeding and he reported the incident to police and was issued with P3 form and was treated at Makueni hospital for injuries sustained on both knees, chest and legs.
14. It is thus not in dispute on both sides that a scuffle occurred on the material day between the two young men. It is not in dispute that Morris reported the incident to the police and obtained a P3 form after medical treatment. It is not in dispute that criminal proceedings were instituted by the State against Christopher Mwendwa Kioko for assault causing actual bodily harm. It is not in dispute that the criminal proceedings were concluded through acquittal of Christopher the appellant in a finding of no case to answer.



15. The question is did Christopher prove his claim for malicious prosecution? In my view, from the evidence on record, and the findings in the case to answer ruling in the criminal case, there was proof of malicious prosecution established.
16. It is true that the prosecution was instituted by the State at the instance or on the report made by Morris Matolo. This satisfies the first element. It is also true that the prosecution was terminated in favour of Christopher Mwendwa Kioko on no case to answer, which satisfied the second ingredient of malicious prosecution.
17. With regard to the third element of prosecution without reasonable cause and the fourth element of prosecution actuated by malice, in my view none of these two elements were proved by the appellants. There having occurred a fight, one could not say that any of the parties had no cause to report the incident to the police. It is immaterial who was injured, as sometimes the offender could be more seriously injured.
18. In my view therefore, any of those involved in the fight had a reasonable cause to report the incident to the police as a consequence of which prosecution could be instituted by the State.
19. From the evidence on record also, neither Morris nor the State had malice or baseless ill intention against the appellant in instituting the prosecution herein.
20. I will thus decline to find that the appellants proved malicious prosecution against the respondents.
21. With regard to the finding of the trial court that the respondent had proved a claim of assault against the appellant, in my view from the evidence on record, that finding cannot stand.
22. It is clear from the evidence on record that the alleged incident was a scuffle between young men. One of them reported the incident to the police. The other, after having been acquitted of the criminal charge, instituted these civil proceedings.
23. From the ruling on case to answer which has not been appealed against, the criminal court was clear that there were serious contradictions in the evidence as to what exactly took place, and who did what, and thus the Magistrate merely inferred that the evidence indicated that there was an affray and all involved took part in a fight.
24. There being no believable evidence as to who assaulted who, and at what point in the fight, none of them can be found at fault and penalised to pay damages.
25. I thus set aside the findings of liability of the trial court against the appellant. In that respect alone I allow the appeal.
26. Consequently and for the above reasons, I allow the appeal in part and order as follows:-
 - (i) I uphold the Magistrate's findings that malicious prosecution was not proved.
 - (ii) I set aside the Magistrate's findings that the appellant was liable for assaulting Morris.
 - (iii) I set aside the award of damages for assault.
 - (iv) Each party will bear their respective costs of appeal as well as their respective costs in the Magistrate's civil case.

DATED, SIGNED AND DELIVERED THIS 11TH DAY OF JANUARY, 2024 VIRTUALLY AT VOI.

GEORGE DULU



JUDGE

In the presence of:-

Ms. Nusura – Court Assistant

Ms. Njambini holding brief for 2nd and 3rd Respondent

