



Obat v Masinde & 2 others; Masinde (Appellant); Obat & 2 others (Respondent) (By Cross - Appeal) (Civil Appeal 8 of 2019) [2024] KEHC 79 (KLR) (17 January 2024) (Judgment)

Neutral citation: [2024] KEHC 79 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL APPEAL 8 OF 2019
AC MRIMA, J
JANUARY 17, 2024**

BETWEEN

ERICK PATRICK ODERO OBAT APPELLANT

AND

EMILY KAGGIA MASINDE 1ST RESPONDENT

**THE INSPECTOR GENERAL OF NATIONAL POLICE
SERVICE 2ND RESPONDENT**

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

AND

EMILY KAGGIA MASINDE APPELLANT

AND

ERICK PATRICK ODERO OBAT RESPONDENT

**THE INSPECTOR GENERAL OF NATIONAL POLICE
SERVICE RESPONDENT**

THE HON. ATTORNEY GENERAL RESPONDENT

BY CROSS - APPEAL

*(Being an Appeal and a Cross - Appeal from the judgment and decree
by Hon. P. K. Mutai (Senior Resident Magistrate) in Kitale Chief
Magistrate's Court Civil Suit No. 353 of 2015 delivered on 6th March, 2019)*



JUDGMENT

Introduction and Background:

1. This judgment is in respect to the Appeal and the Cross-Appeal in this matter. The main appeal was preferred by Erick Patrick Odero Obat whereas the Cross-Appeal was instituted by Emily Kaggia Masinde.
2. The two were among the parties in Kitale Chief Magistrates Court Civil Suit No. 353 of 2015 *Emily Kaggia Masinde vs. Erick Patrick Odero Obat & 2 Others* (hereinafter referred to as 'the suit'). The suit related to a tort of malicious prosecution.
3. The suit was fully heard and allowed against Erick Patrick Odero Obat vide a judgment rendered on 6th March 2019. He was decreed to pay Emily Kaggia Masinde the sum of Kshs. 200,000/= with costs and interest. The two other Defendants in the suit (The Inspector General of National Police Service and The Hon. Attorney General respectively) were discharged having not been found liable.
4. Both Erick Patrick Odero Obat (hereinafter referred to as 'Obat') and Emily Kaggia Masinde (hereinafter referred to as 'Emily') were aggrieved by the judgment. Erick Patrick Odero Obat filed the main appeal and Emily Kaggia Masinde filed a Cross-Appeal.

The Appeal and the Cross-Appeal:

5. Obat filed a Memorandum of Appeal dated 4th April 2019 in which he challenged the judgment on 8 grounds. He prayed that the impugned judgment be set-aside or alternatively, liability be apportioned between him and the other Defendants. He also prayed for costs of the appeal.
6. Emily on her part filed her Memorandum of Appeal dated 28th June 2022 in which she challenged the judgment on the aspect of quantum. She prayed that the damages awarded by the trial Court be set-aside and this Court do re-assess appropriate and enhanced damages. She also prayed for costs.
7. On the directions of this Court, the appeals were heard by way of written submissions. Obat and Emily duly complied. Both filed separate submissions on the Appeal and the Cross-Appeal.
8. The rest of the Respondents seem not to have filed their submissions.

Analysis:

9. This Court has duly considered the entire record and the parties' submissions as well as the decisions referred to.
10. The High Court, as the first appellate Court, is enjoined to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of *Selle & Ano. v Associated Motor Boat Co. Ltd* (1968) EA 123).
11. This Court, nevertheless, appreciates the settled principle that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni -versus- Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga v Kiruga & Another* (1988) KLR 348).
12. Bearing the above in mind, this Court has come up with the following issues for determination: -



- (i) Whether the tort of malicious prosecution was proved.
 - (ii) Whether the remedies made were appropriate.
13. The above issues will be addressed in seriatim.

a. Whether the Tort of Malicious Prosecution Was Proved:

14. The Plaintiff in the suit was dated 25th November 2015. It was pleaded inter alia that Obat was responsible for the malicious prosecution of Emily since he did not have any reasonable or probable cause for launching the prosecutions. Several particulars of malice against Obat were given in paragraph 10 of the Plaintiff.
15. Further, in paragraph 11 of the Plaintiff, Emily pleaded that the police, as agents of the 2nd Defendant, maliciously and without any reasonable and probable cause launched the prosecution against her. She also gave the particulars thereto.
16. In the end, Emily sought the following reliefs against the Defendants jointly and severally: -
- (a) General and exemplary damages for malicious prosecution.
 - (b) Costs of the suit and interests thereon until payment in full.
 - (c) Any other relief that this Honourable Court may deem just and fit to grant.
17. For an action based on the tort of malicious prosecution to succeed, four conditions must be demonstrated. Those conditions have, over time, been restated in various decisions including *Murunga v The Attorney General* (1979) KLR 138 and *Kagane v Attorney General* (1969) EA 643.
18. The conditions are as follows: -
- (a) The plaintiff must show that the prosecution was instituted by the defendant; or by someone for whose acts he is responsible;
 - (b) That the prosecution terminated in the plaintiff's favour.
 - (c) That the prosecution was instituted without reasonable and probable cause.
 - (d) That the prosecution was actuated by malice.
19. In discussing the tort of malicious prosecution, Odunga, J (as he then was) in *Chrispine Otieno Caleb v Attorney General* (2014) eKLR rendered himself as under: -
32. The law surrounding the tort of malicious prosecution is well settled in this country. In *Mbowa v East Menjo District Administration* [1972] EA 352, the East African Court of Appeal expressed itself as follows:

“The action for damages for malicious prosecution is part of the common law of England...The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than for the public benefit. It originated in the medieval writ of conspiracy which was aimed against combinations to abuse legal procedure, that is, it was aimed at the prevention or restraint of improper legal proceedings...It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion of the truth. Its essential ingredients are:



- (1) (1) the criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority;
- (2) the defendant must have acted without reasonable or probable cause i.e. there must have been no facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified;
- (3) the defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose; and
- (4) the criminal proceedings must have been terminated in the plaintiff's favour, that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge...The plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must "unite" in order to create or establish a cause of action. If the plaintiff does not prove them he would fail in his action. The damage that is claimed is in respect of reputation but other damages might be claimed, for example, damage to property ... The damage to the plaintiff results at the stage in the criminal proceedings when the plaintiff is acquitted or, if there is an appeal, when his conviction is quashed or set aside. In other words, the damage results at a stage when the criminal proceedings came to an end in his favour, whether finally or not. The plaintiff could not possibly succeed without proving that the criminal proceedings terminated in his favour, for proving any or all of the first three essentials of malicious prosecution without the fourth which forms part of the cause of action, would not take him very far. He must prove that the court has found him not guilty of the offence charged... The law in an action for malicious prosecution has been clearly defined and in so far as the ordinary criminal prosecution is concerned the action does not lie until the plaintiff has been acquitted of the charge. In this case the respondent could have brought his action for malicious prosecution until the prosecution ended in his favour. He could not have maintained his action whilst the prosecution was pending nor could he have maintained an action after he had been convicted. His right to bring the action only accrued when he secured his acquittal of the charge on appeal, and he then had the right to bring this action for damages...Time must begin to run as from the date when the plaintiff could first successfully maintain an action. The cause of action is not



complete until such a time, and in this case this was only after he was acquitted on appeal”.

33. In *Egbema v West Nile Administration* [1972] EA 60, the same Court held:

“False imprisonment and malicious prosecution are separate causes of action; a plaintiff may succeed on one and fail on the other. If he established one cause of action, then he is entitled to an award of damages on that issue ... For the purposes proof that the criminal proceedings have been determined in the appellant’s favour it is enough that the criminal proceedings have been terminated without being brought to a formal end. The fact that no fresh prosecution has been brought, although five years have elapsed since the appellant was discharged, must be considered equivalent to an acquittal, so as to entitle an appellant to bring a suit for malicious prosecution... There was no finding that the prosecution instituted by Uganda Police was malicious, or brought without reasonable or probable cause. The Uganda Police, unlike Administration Police, are not servants or agents of the respondent... The decision whether or not to prosecute was made by the Uganda Police, who are not servants of the respondents after investigation. There is no evidence of malice on the part of the respondent. The appellant was an obvious suspect as he was responsible for the security of the office from which the cash box disappeared. It cannot be said that there was no reasonable and probable cause for the respondent instigating a prosecution against the appellant. The actual decision to do so was taken by the Uganda Police. As the Judge has made no finding as to whether the instigation of the prosecution was due to malice on the part of the respondent, this Court cannot make its own finding. The circumstances of this case reasonably pointed to the appellant as a suspect and there was not sufficient evidence that in handing the appellant over to the Uganda Police for his case to be investigated and, if necessary, prosecuted, the respondent was actuated by malice”.

34. In *Gitau v Attorney General* [1990] KLR 13, Trainor, J had this to say: -

To succeed on a claim for malicious prosecution the plaintiff must first establish that the defendant or his agent set the law in motion against him on a criminal charge. Setting the law in motion” in this context has not the meaning frequently attributed to it of having a police officer take action, such as effecting arrest. It means being actively instrumental in causing a person with some judicial authority to take action that involves the plaintiff in a criminal charge against another before a magistrate. Secondly, he who sets the law in motion must have done so without reasonable and probable cause... The responsibility for setting the law in motion rests entirely on the Officer-in-Charge of the police station. If the said officer believed what the witnesses told him then he was justified in acting as he did, and the court is not satisfied that the plaintiff has established that he did not believe them or alternatively, that he proceeded recklessly and indifferently as to whether there were genuine grounds for prosecuting the plaintiff or not. The Court does not consider that the plaintiff has established animus malus, impropor and indirect motives, against the witness.

20. The foregoing aptly captures the law and the spirit relating to the tort of malicious prosecution. Of cardinal importance is the fact that a Plaintiff must, in the first instance, establish that the Defendant or



his agent set the law in motion against him on a criminal charge. As stated in *Gitau v Attorney General case (supra)*, setting the law in motion means: -

“Setting the law in motion” in this context has not the meaning frequently attributed to it of having a police officer take action, such as effecting arrest. It means being actively instrumental in causing a person with some judicial authority to take action that involves the plaintiff in a criminal charge against another before a magistrate.”

21. The above brings into focus the manner in which public criminal prosecutions are instituted in Kenya. In simple parlance, a complaint must be made to the police by a party. The police then undertake investigations and on completion, makes recommendations on the way forward in the matter and forwards the file to the Director of Public Prosecutions who will review the evidence and, if satisfied that an offence known in law has been established, shall then give the consent to charge. The suspect will then be arrested and be arraigned before Court to face the appropriate charge or charges as the case may be.
22. It is, therefore, imperative to note that no one in Kenya may be charged with any criminal offence without the express sanction of the Director of Public Prosecutions. The only exception is when the prosecution is instituted by way of private prosecution. But, even in such instances, the Director has constitutional powers to take over the said proceedings.
23. The Office of The Director of Public Prosecutions is a State organ pursuant to Article 260 of the *Constitution*. The Office is established under Article 157 of the *Constitution*.
24. Among the powers of the Director relating to instituting criminal proceedings are in Article 157(6)(a) of the *Constitution* which provides as follows: -
 - (6) The Director of Public Prosecutions shall exercise State powers of prosecution and may-
 - (a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
25. In discharging its powers and functions, the Director must always be independent and remain free from influence as provided for in Article 157(10) of the *Constitution*, as follows: -

The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.
26. Therefore, regardless of the nature of the complaint lodged with the police, the evidence gathered during the investigations and the recommendations made by the police, the Director always has the final word on whether to charge a suspect or not. The only challenge to such power is the manner in which the power is exercised by the Director. That is the province of Article 157(11) of the *Constitution*.
27. Returning to the case at hand, a perusal of the Plaint shows that Emily did not enjoin the Director of Public Prosecutions as a party in the suit. Instead, it was only the Hon. Attorney General who was made a party pursuant to the provisions of Article 156 of the *Constitution*. Therefore, Emily did not see the need to bring the entity, that was satisfied that a criminal offence had been sufficiently demonstrated against her and made the decision to have her charged in the proceedings alleged to have been malicious, to Court.



28. Further, it is the Director of Public Prosecutions who prosecuted the criminal case before the Chief Magistrates Court in Kitale to its conclusion. Again, Emily did not find any fault in that party.
29. The above rendition avails the settled position that the Director of Public Prosecutions must always be the main party in a claim for malicious prosecution. The above is akin to an aggrieved party in Presidential, Parliamentary or Civic elections filing an Election Petition without making the Independent Electoral and Boundaries Commission a party. Such a Petition is a non-starter and cannot see the light of the day.
30. Likewise, a suit seeking damages for malicious prosecution that does not enjoin the Director of Public Prosecutions as a party cannot legally stand. However, a party can successfully sustain separate claims against the person who lodged the complaint and the way the police acted thereafter. Such actions may be, for instance, torts of false imprisonment, defamation among others. [See *Egbema vs. West Nile Administration case (supra)*].
31. The Plaintiff in the suit was very pointed to the tort of malicious prosecution. It did not bring out any other action based on defamation, false imprisonment or assault. Therefore, since the main party was not made a party in the suit, then there was no way the rest of the Defendants or any of them could be held liable.
32. The suit suffered a false start and the provisions of Order 1 Rule 9 of the *Civil Procedure Rules, 2010* cannot be applied to overrule the *Constitution* on the role of the Director of Public Prosecutions relating to criminal cases and prosecutions in Kenya. Since the suit was instituted post 2010, then unlike how suits for malicious prosecution were tailored before then, the now suits must take into account the provisions of Article 157 of the *Constitution* and enjoin the Director of Public Prosecutions as a party.
33. As such, with tremendous respect to the trial Court, the finding that the suit succeeded against Obat was in error. The only remedy that was available, in the circumstances of the case, was to disallow the suit.

Disposition:

34. Deriving from the above, and in view of the finding that, a suit seeking damages for malicious prosecution that does not enjoin the Director of Public Prosecutions as a party cannot legally stand, the suit was a non-starter and, the main appeal subject of this judgment, must succeed. On the other hand, the Cross-Appeal must fail.
35. In the end, the following final orders do hereby issue: -
 - (a) The main Appeal is hereby allowed. The judgment in Kitale Chief Magistrates Civil Case No. 353 of 2015 is hereby set-aside and the suit is hereby struck out on account of the non-joinder of the Director of Public Prosecutions.
 - (b) The Cross-Appeal is hereby dismissed.
 - (c) Emily Kaggia Masinde shall bear the costs in the suit as well as in the appeals.Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 17TH DAY OF JANUARY, 2024.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of: -



Mr. Nyakundi, Learned Counsel for the Appellant.

Mr. Oduor, Learned Counsel for the 1st Respondent.

Miss Kiptoo for Mr. Odongo, Learned Counsel for the 2nd & 3rd Respondents.

