



REPUBLIC OF KENYA



**Kalasinga v Kaikai & another (Civil Appeal 1 of 2021)
[2024] KEHC 2350 (KLR) (4 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2350 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KILGORIS
CIVIL APPEAL 1 OF 2021
F GIKONYO, J
MARCH 4, 2024**

BETWEEN

DANIEL LEURU KALASINGA APPELLANT

AND

JAMES KAYIONI KAIKAI 1ST RESPONDENT

HON ATTORNEY GENERAL 2ND RESPONDENT

*(Being an appeal from the judgment and decree of Hon. R.M. Oanda
(PM) delivered on 31.03.2021 in Kilgoris SPM ELC No. 38'A' of 2019)*

JUDGMENT

1. This appeal challenges the judgment of the Senior Principal Magistrate's Court at Kilgoris in Environment and Land Case No. 38 'A of 2019 delivered on 31.03.2021 in which the trial court made awards as follows: -
 - a. Special Damages (pleaded + proved) = Kshs. 168,530/=
 - b. For unlawful arrest, detention, and malicious prosecution, the 1st respondent is awarded Kshs. 5 00,000/=General damages
 - c. Plus, the costs of the suit.
2. Being aggrieved by the judgment and decree of the trial court, the appellant lodged the instant appeal. The appellant has raised 14 grounds of appeal as follows: -
 - i. The learned trial magistrate erred in fact and law in finding and holding that the appellant herein was responsible for the arrest arrangement and charge of the 1st respondent whereas the actions pertaining to and/ or concerning the said arrest, arraignment, and subsequent prosecution, are statutorily vested upon statutory and constitutional agencies, for which the



appellant hearing is not chargeable and/or Responsible for their actions and or omissions whatsoever.

- ii. The learned trial magistrate erred in law and in failing to find and hold that the mandate to arrest and prosecute, lies and all vests in the national police service and the Office of the Director of Public Prosecutions, respectively, and as a result of the error herein the learned trial magistrate attributed the actions thereof to the appellant, which has thus occasional substantial prejudice and or injustice to the appellant.
- iii. The learned trial magistrate similarly erred in law and in fact in making awards including an award of general damages for unlawful confinement and prosecution against the appellant and the 2nd respondent jointly and/or severally, yet it is trite and established that the appellant herein is not conferred with any mandate, to carry out and or undertake either of the limbs for which same has been found culpable, whatsoever.
- iv. The learned trial magistrate erred in fact and law, in finding and holding that the report and/ or complaint by the appellant, which was made with the police at Kilgoris was informed and /or otherwise riddled with malice, notwithstanding the facts that the substratum of the complaint particularly entry and occupation of LR. NO. TRANSMARA/ OLOMISMIS/1329, (hereinafter Referred to as the suit property) belonging to the appellant was not in contest and or dispute.
- v. The Learned trial Magistrate erred in fact and law in finding and holding that the 1st respondent had laid before the honourable court, sufficient material and or evidence to prove the existence of Malice, whereas no such evidence was standard and or delivered whatsoever.
- vi. In any event, in finding and holding that the complaint which was mounted by the appellant with the police and which culminated into the arrest and prosecution of the 1st respondent was malicious, the learned trial magistrate erred in failing to ascertain and/ or assess authenticate that the complaint, arrest, and subsequent prosecution, were carried out and or undertaken long before the filing of the civil suit which is the only particular of Malice adverted to by the 1st respondent.
- vii. Nevertheless, the learned trial magistrate also erred in law in finding and making an award for special damages in favor of the 1st respondent, notwithstanding the fact that the special damages though pleaded, had not been proved and or established to the requisite standard provided under the law or at all.
- viii. In any event the learned trial magistrate's Judgment on special damages, was anchored and or grounded on illegitimate documents, (Read receipts and petty cash vouchers respectively), Which documents were legally inadmissible on account of the provisions of sections 19 and 20 of the *Stamp Duty Act*, chapter 48, laws of Kenya. Consequently, the judgment on special damages constitutes an amount to illegality.
- ix. On the other hand, the learned trial magistrate erred in law and fact in returning a favorable finding on account of special damages, even though the documents founding the award of special damages, were incomplete and bereft of authentication and/ or receipts and thus devoid of the requisite probative value and were otherwise legally worthless.
- x. Besides, the learned trial magistrate had in fact and law in making an award for general damages and in particular, awarding to and or in favor of the first respondent the sum of Kshs 500,000/



= only, which amount was manifestly excessive and otherwise grossly exaggerated, contrary to the established doctrine of comparable awards in respect of the specific areas and /or claims.

- xi. The learned trial magistrate failed and or neglected to accumulatively and/ or exhaustively evaluate the entire evidence (both oral and documentary) on record and hence failed to capture and decipher the salient issues and or features of the appellant's defense and thus arrived at an erroneous and slanted conclusion, contrary to and in contradiction of the evidence on record.
- xii. The learned trial magistrate erred in law in disregarding and or ignoring the submissions mounted and /or filed by the appellant herein without assigning any plausible explanation and or reason, whatsoever. Consequently, the appellant herein, has been subjected to discrimination and unfair treatment and hence suffered a miscarriage of justice.
- xiii. The judgment of the learned trial magistrate is convoluted and the issues raised by the learned magistrate, are slanted and thereby camouflage the judicial mind of the trial court from appreciating, discerning, and /or understanding the true nature of the appellant's defence. Consequently, the judgment of the magistrate is a nullity.
- xiv. Though the learned Trial Magistrate itemized issues for determination, (which in any event, were slanted), the learned trial magistrate, failed to address and/ or analyze the issues for determination either Seriatim or at all and thus failed to render any determination on the itemized issues and the reasons for such determination. Consequently, the judgment of the landed child majestic contravenes the mandatory provisions of Order 21 Rule 4 of the Civil Procedure Rules, 2010.

Background of the case

3. The appellant alleged that on or about 14th July 2015 the first respondent entered his land parcel number L R No. Transmara Olomismis/1329. The appellants stopped him alleging he had invaded his land. The appellant reported to Kilgoris police station. The first respondent was arrested and arraigned in court and charged with three counts of; - forceful detainer contrary to section 91 of the Penal Code, illegal grazing contrary to section 3 (1) of the [Trespass Act](#), and trespass with intent to annoy contrary to section 5(1) of the Penal Code.
4. The trial proceeded and the 1st respondent was placed on his defense. He was later acquitted under section 215 of the criminal procedure code.
5. Vide Complaint dated 22nd March 2016, the 1st respondent sued the appellant and the 2nd respondent for malicious prosecution. The 1st respondent sought special damages of Kshs. 279,300/=, general damages for unlawful arrest, defamation, and malicious prosecution, and costs of the suit. The trial court delivered its judgment and awarded the 1st respondent Kshs. 168,530/= being special damages and Kshs. 500,000 being general damages.

Directions of the court

6. The appeal was canvassed by way of written submissions. All parties are filed.

Appellant's Submissions

7. The appellant submitted that there is no evidence to demonstrate that the appellant acted maliciously and that he influenced the investigations and prosecution of the 1st respondent. The appellant argued that he is not mandated to investigate, arrest, and charge but the mandate lies with the police and the office of the Director of Public Prosecutions who acted lawfully and independently. Therefore, the



learned magistrate erred in law and facts by finding and holding otherwise. The appellant relied on articles 157 (6) and 245 of *the Constitution*, section 24 of the National Police Act, section 6 of the Director of Prosecutions Act, Dande & 4 Others Vs Inspector General, National Police Service & 2 Others Civil Appeal to 43 of 2016 2022 KECA 170KLR attorney general vs Peter Kirimi mbogo and another, Meru civil appeal 52 and 56 of 2020 (consolidated) [2021] eKLR William Michael Omberti vs RGB & another [2011] eKLR, Kagane And Another Vs The Attorney General And Another 1969 EA 643.

8. The appellant submitted that the trial court did not apply discretion in awarding general damages of Kshs 500,000. Further, the 1st respondent did not prove the special damages pleaded fold stop the appellant's contents that the receipts and petty cash vouchers were not assessed for stamp duty before being admitted as exhibits. The appellant relied on sections 19 and 20 of the *Stamp Duty Act*, AUL N Njoroge Vs Abdul Saboni Sabonyo [2015] eKLR
9. The appellant submitted that a mere acquittal of any person in criminal proceedings does not necessarily entitle them to the orders of malicious prosecution.
10. The appellant submitted that he has proved his appeal to the dictates of sections 107 and 108 of the *Evidence Act*. The appellant relied on James Monio Musharraf Vs National Bank of Kenya Limited [2011] eKLR.

The 1st Respondent's Submissions

11. The 1st Respondent Submitted that the Appellant set the law in motion, the police did not carry out independent investigations before preferring charges. The appellant and the police were actuated by Malice and they sought to use any means to fix the 1st respondent. The 1st respondent was acquitted under section 215 of the criminal procedure code.
12. The 1st respondent submitted that the appellant originated the complaint.
13. The 1st respondent submitted that the special damages awarded were neither arbitrary nor excessive.
14. The 1st respondent submitted that an award of general damages is discretionary upon the trial code. The conventional figure arising out of them is scanner shillings 800,000 to 1 million. An award of Kenya shillings 500,000 was most reasonable in all circumstances of this case the 1st respondent prayed that the same be maintained.
15. The 1st respondent submitted that it is clear from the judgment on pages 19 to 20 that the learned Magistrate went through the politics considered the evidence and the issues raised and looked at the respective submissions.
16. The 1st respondent relied on the cases of; - i) Sylvia Kambura vs George Kathrima Japhet & 2 others [2021] eKLR, ii) Lawrence Onyo Odori vs Attorney General & another [2022] eKLR

The 2nd Respondent Submissions

17. The 2nd respondent submitted that the first respondent had failed to prove his case on the balance of probabilities that the 2nd respondent was liable for his alleged unlawful arrest, wrongful detention, and or malicious prosecution. The 2nd respondent contends that the 1st respondent failed to prove that the prosecution was instituted without reasonable and probable cause and that the prosecution was actuated by malice. The 2nd respondent relied on Maurice Owino Onyango Vs Music Copyright Society of Kenya [2015] eKLR, Mbowe Vs East Meno District Administration 1972 EA 352,



James Karuga Kiru vs Joseph Mamburi & 2 others [2001] eKLR, Nzoia Sugar Company Limited Vs Fungututi 1988 KLR 399

18. The 2nd respondent submitted that the 1st respondent's arrest was lawful, procedural, and in the exercise of the statutory duties of the police once a suspect had been found culpable for an offense recognized in law. The 2nd respondent contends that the 1st respondent was arrested on 15th July 2016 and arraigned in court on 16 July 2016. Therefore, he was not detained beyond 24 hours.
19. The 2nd respondent submitted that this court should set aside the special damages awarded to the first respondent in the trial court since it was not supported by factual documentary evidence. The 2nd respondent relied on sections 5,19,86 and 88 of the Stamp Duty Act.
20. The 2nd respondent urged this court to set aside the judgment of the trial court and substitute with an order dismissing the 1st respondent's case with costs.

Analysis and Determination

Duty of court

21. This being a first appeal, this court will evaluate the evidence tendered and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify- a benefit this court lacks. See *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR.

Issues

22. The 14 grounds of appeal, simply translate into one broad issue;
Whether the 1st respondent proved a case of malicious prosecution on the balance of probabilities.
23. From the evidence on record, the 1st respondent was charged and prosecuted with the offenses of forceful detainer contrary to section 91 of the Penal Code, illegal grazing contrary to section 3 (1) of the Trespass Act, and trespass with intent to annoy contrary to section 5(1) of the trespass act. According to the 1st respondent, the appellant is his neighbor with whom they had a boundary dispute and the 1st respondent has never trespassed onto the Appellant's land or cut down trees. He claimed that after the close of the prosecution's case, he was acquitted under section 215 of the Criminal Procedure Code For lack of evidence. 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. It also found that the element of the prosecution being terminated in favor of the appellant had been established. It was also in evidence that the 1st respondent and the appellant had a pending case at the land and environment court when the criminal charges were instituted, which, according to the trial court, the appellant wanted to punish the 1st respondent from the two fronts. The trial court thus found that the 1st respondent had proven his case on a balance of probability and was entitled to the relief sought.
24. A successful case for malicious prosecution should prove:
 - 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.



25. See *Kagame & Others v The Attorney General* (1969) EA 643.

The appellant and the 2nd respondent have not contested that the complaint was lodged by the appellant, pursuant to which, prosecution was instituted by the DPP. This is what is referred to also as 'setting the law in motion', meaning 'being actively instrumental in causing a person with some judicial authority to take action...in a criminal charge.' (*Gitau vs. Attorney General* [1990] KLR 13)

26. Similarly, it is not disputed that the proceeding terminated in favour of the 1st respondent.

27. The appellant and the 2nd respondent have, however, denied 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* (ibid);

"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. It was the appellant and the 2nd respondent’s case that sometime in 2015 the 1st Respondent forcefully entered into the land belonging to the appellant and started working on the land doing farming and rearing livestock. When asked to vacate he refused. According to the appellant, he had learnt from Robert Mamusi and David Chaporion who were the original members of the Olomismis Group ranch. Demarcation and adjudication were done. According to Bernard Keteere who was a committee member, the appellant was later issued with a title deed. The same is confirmed in records at the land surface as held by the Land Registrar. Evidence was reduced to that effect by Colonel Shikuku. When the 1st respondent refused to vacate the land, the appellant reported the matter to the police. The 1st respondent was charged.
30. The 1st respondent in his defense denied he was in possession of the land belonging to the appellant. It was his defense that he was not that he was entitled to land as a son of a member of Olomismis Group ranch. He later learnt that the appellant was issued with title in respect of the land he was living on. It was his defense, the appellant had never lived on the land in question and was not even a member of the group Ranch. Further, they have a suit filed initially at the Environment and Land Court in Kisii. He called in his defense one Henry to confirm he wants the land.
31. From the proceedings in the Kilgoris SRM criminal case no. 933 of 2015, the 1st respondent was found with a case to answer and was placed on his defense.
32. The facts of the matter would make any reasonable person to report the matter to the police for forcible detainer or trespass on land. Equally, these facts would constitute an honest belief that the person has committed an offence and appropriate charges may be mounted.
33. Therefore, this court, finds that the prosecution of the 1st was instituted with reasonable and probable cause.
34. Of ‘prosecution was actuated by malice’, it must be shown the intention or desire to cause harm through criminal process which is really the state of the mind (Robert Okeri Ombeka vs Central Bank of Kenya, Civil Appeal No. 105 of 2007 [2015] eKLR referring to Jediel Nyaga vs Silas Muccheke, (CA NO. 59 OF 1987 (NYERI) (UR)
35. Malice is material on the part of the prosecutor. See Music Copyright Society of Kenya –Vs- Tom Odhiambo Ogowl [2014] eKLR.
36. The 2nd respondent has submitted that a formal complaint was lodged at Kilgoris police station, the 1st respondent was arrested and charged pursuant to the said complaint and some witnesses recorded statements and gave evidence for the prosecution. The 2nd respondent contends that the 1st respondent was taken through the proper motions of the criminal justice system promptly and without delay.
37. The mere fact that a person has been acquitted of the criminal charge does not necessarily connote malice on the part of the prosecutor. Actual spite or ill will must be proved. In Nzoia Sugar Company Ltd v Fungututi [1988] KLR 399, the Court of Appeal held;

“ Acquittal per se on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecutor. The mental element of ill will or improper motive cannot be found in an artificial person like the appellant but there must be evidence of spite in one of its servants that can be attributed to the company.”



38. It is insufficient to simply state that the criminal proceedings were motivated by malice. There is a need to establish how the court's process was abused or exploited with the sole aim of causing harm to the 1st respondent. In the absence of concrete evidence that a criminal prosecution was used to achieve other ulterior motive-to injure the person- other than bringing the culprit to book, a case for .malicious prosecution will fail.
39. In conclusion, the lodging of the complaint by the appellant provoked an investigation which led the police to form an opinion that offences had been committed. The material placed before the prosecutor and the steps taken in the investigation of the complaint would have caused a reasonable and cautious person to institute charges against the 1st respondent.
40. The prosecution was instituted on the basis of reasonable and probable cause, and was not actuated by malice.
41. Thus, the court finds that the appeal has merit and makes the following orders;
- i. The appeal is allowed. The judgment of the lower court is set aside.
 - ii. As this is a matter which involved some land or boundary dispute, each party shall bear own costs of the lower case as well as the appeal.
42. Orders accordingly

**DATED, SIGNED, AND DELIVERED AT KILGORIS THROUGH THE TEAMS APPLICATION,
THIS ...4TH... DAY OF ... MARCH..., 2024.**

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Hon. F. Gikonyo M.

Judge

In the presence of:

C/A – Mr. Leken

Mr. Wafula for the Appellant – Present

Mr. Mokaya for 1st Respondent - Present

Mr. Rana for A.G – Present

