



Secretary, Board of Management Lugulu Mixed and Boading Primary School & another v Mutanda (Civil Appeal E090 of 2023) [2024] KEHC 5319 (KLR) (17 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5319 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E090 OF 2023**

DK KEMEL, J

MAY 17, 2024

BETWEEN

**SECRETARY, BOARD OF MANAGEMENT LUGULU MIXED AND BOADING
PRIMARY SCHOOL 1ST APPELLANT**

THE ATTORNEY GENERAL 2ND APPELLANT

AND

KENNETH WASWA MUTANDA RESPONDENT

*(Being an appeal arising from the judgment and decree of Hon.T. Olando
(PM) delivered on 20.8.2023 in Bungoma CMCC No. E002 of 2021)*

JUDGMENT

1. What is before this Court is an appeal against the decision of the trial Court in CMCC No. E002 of 2021. The 1st appellant made a complaint against the respondent which resulted in a charge for the offence of stealing by servant contrary to section 280 of the *Penal Code*. After the trial, the respondent was acquitted under section 210 of the *Criminal Procedure Code*. The appellant then instituted a suit for malicious prosecution against the respondents. The trial Court analyzed the submissions by the rival parties against the precedent set for a case for malicious prosecution to succeed and found that the respondent succeeded in proving his case on a balance of probabilities. The respondent was awarded Kshs.200,000/= as general damages and Kshs.150,000/= as special damages.
2. The appellant, being dissatisfied with the decision of the Court filed the present appeal vide a Memorandum of Appeal dated 21st August, 2023 on the following grounds;
 - a. That the learned trial magistrate erred in law and in fact in finding the respondent proved his case against the appellants.



- b. That the learned trial magistrate erred in law and in fact in finding and holding that the prosecution of the respondent in the said criminal case was actuated by malice yet there were no reasons to support such a finding.
 - c. That the learned trial magistrate erred in law and in fact in condemning the appellant to pay the respondent damages for malicious prosecution yet there was no specific finding that there was no reasonable and probable cause to charge and prosecute the respondent in the criminal case.
 - d. That the learned trial magistrate erred and misdirected himself in law and fact by failing to appreciate sufficiency or at all, consider and correctly analyze the evidence and exhibits and submissions tendered by the parties in determining the suit.
 - e. That the learned trial magistrate erred and misdirected himself in law and fact by holding that the 1st appellant was liable for damages for malicious prosecution.
 - f. That the learned trial magistrate erred and misdirected himself in law and fact by failing to consider or sufficiently consider the 1st appellants position as set out in its pleadings and evidence thus reaching a manifestly erroneous finding against the 1st appellant.
 - g. That the learned trial magistrate erred and in law and fact in awarding the respondent general damages for malicious prosecution for Kshs. 200,000/= without any factual basis.
3. The appellants sought to have the appeal allowed, for the judgment of the trial court set aside and to be awarded costs of the appeal.
 4. The appeal was canvassed by way of written submissions.
 5. The appellants filed their submissions dated 6th March, 2024 where they submitted that the respondent failed to prove a case for malicious prosecution. It was their argument that the mere fact that he was acquitted was not sufficient grounds to succeed in a suit for malicious prosecution. It was their contention that the respondent did not prove malice on the part of the appellants and they placed reliance in the case of *Margaret Ndege & 3 others v Moses Oduor Ademba* [2021]eKLR. It was argued that the 1st appellant was never the investigator or the prosecutor and that all it did was provide witnesses. The 1st appellant argued that a party to a suit of malicious prosecution ought to be the Attorney general and not the complainant in the criminal case. They quoted the case of *Douglas Odhiambo Apel v Telkom Kenya Limited & Attorney General* while quoting with approval *John Munene Maina v Peter Murage Kamanja* [2019] eKLR.
 6. The respondent on his part filed submissions dated 20th March, 2024 where he stated that for a party to succeed in a claim for malicious prosecution one has to prove the elements set out in the case of *Mbowa v East Mengo District Administration* [1972] EA 352 which he claims he has met. It was his argument that the criminal proceedings were instituted by the 1st appellant through its principal whereupon the officers did improper investigations leading to his arrest. It was further his submission that the criminal proceedings terminated in his favour under section 210 of the *Criminal Procedure Code*. He quoted the cases of *Stephen Gachau Gitthaiga & Another v Attorney General* [2015] eKLR and *Paramount Bank Limited v Vagvi Syed Qamara & Another* [2017] eKLR. The respondent therefore stated that the trial court was proper in entering judgment in his favour as it did. He urged this court to dismiss the appeal and uphold the trial magistrate's judgment
 7. After perusal of the record of appeal, submissions from the rival parties and pleadings, i have identified the following issues for determination;
 - a. Whether malice was proven.



- b. Whether the trial Court erred in awarding Kshs.200,000/= in general damages.
6. On the first issue for determination, the tort of malicious prosecution is an intentional tort that provides redress to a party, for losses incurred following unsuccessful and malicious proceedings which are initiated without any lawful reasonable and/or probable cause by the Defendant. Although it is within any person's rights to approach the Courts and/or other quasi-judicial bodies to seek redress for wrongs committed against them, this right must be exercised within the confines and parameters of the law, for genuine and lawful reasons. If the right is exercised with other ulterior motives, this constitutes abuse of process, which is in itself a wrong and/or violation attracting a claim for damages for malicious prosecution. The elements of the tort of malicious prosecution have been discussed in various authorities including *Murunga v The Attorney General* (1976-1980) KLR 1251 where Cotran J listed them as follows: -
- i. That a prosecution was instituted by the defendant or by someone for whose acts he is responsible.
 - ii. That the prosecution terminated in the Plaintiff's favour.
 - iii. That the prosecution was instituted without reasonable and/or probable cause.
 - iv. That the prosecution was actuated by malice.
8. Instructively, all the elements apply conjunctively and must all be proven in order to successfully claim for damages for malicious prosecution. See *Attorney General v Peter Kirimi Mbogo & Another*, Meru Civil Appeal 52 & 56 of 2020 (Consolidated) [2021] eKLR. On the first element, it is not in dispute that the 1st appellant through its representative made a complaint at Webuye Police Station concerning theft and it is from this complaint that the respondent was arrested and charged in Criminal Case No. 277 of 2018. On whether the prosecution terminated in the plaintiff(respondents) favour, it is evident that the respondent was acquitted under section 210 of the *Criminal Procedure Code*. The court found that the prosecution failed to establish a case to warrant the accused person being placed on his defense and he (the respondent) was found without a case to answer.
9. The last element on whether the prosecution was actuated by malice 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.”
10. In the case of *Hicks v Faulkner* [1878] 8 Q.B.D 167 at 171, Hawkins J held as follows with respect the meaning of reasonable and probable cause: -
- “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 any ordinarily 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.”



11. The test for whether a case was instituted with a reasonable and probable cause was also laid out by the Court of Appeal in *Kagane & Other v The Attorney General & Another* [1969] EA 643, where Rudd J held as follows: -

“...the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of an objective test. That is to say, to constitute reasonable and probable cause, 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 so far as that material is based upon 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 the prosecution.”

46. In *Samson John Nderitu v The Attorney General* [2010] eKLR, Nambuye J (as she then was) held as follows: -

“It is trite and this court, has judicial notice of the fact that before an accused person is taken to court, and arraigned in court for criminal prosecution, the prosecuting authority namely the police or whatever unit, whose functions fall under the office of the Defendant, usually carry out investigations, record statements from potential witnesses, analyze the facts to determine if the facts disclose an offence before arraigning such a person in a court of law.”

12. On examination of the remarks of the trial court in the criminal proceedings, the court pointed out that the witnesses did not provide any tangible proof linking the respondent to the alleged crime. The court further noted that the investigating officer did not conduct independent investigations but merely narrated the evidence as recorded by the witnesses. The court opined that the case was poorly investigated and poorly prosecuted. By looking at these findings of the criminal court and the circumstances of this case, I am persuaded that it was spiteful for the 1st appellant to make the complaint without satisfying itself on the circumstances surrounding the loss of the monies and items and for the prosecution to have presented a case that was not water tight given the standard of proof in criminal cases. In the premises, I find that malice has been proven.
13. On whether the trial court erred in awarding damages as it did, the respondent sought for general damages for unlawful arrest, detention and malicious prosecution and for special damages and the trial court awarded Kshs. 200,000/= and Kshs 150,000/= respectively.
14. As for the award of special damages, I note that they were all specifically pleaded and strictly proved in evidence vide a receipt produced as PExhibit 3 without objection thus the same will remain undisturbed. I find that there is no reversible error made by the trial court.
15. Turning to the award for general damages, having found that the three elements of the tort of malicious prosecutions were proved, it is incumbent that the respondent is entitled to damages having proved his case on a balance of probabilities. The respondent was arrested on 02/05/2018 and stood trial to 24/09/2023 when he was acquitted by the court. It is note worthy that he was a teacher and an official of KNUT within the area. It was his testimony that he had to transfer his children from the school while he sought for a transfer to another school and thus lost friends and underwent mental and physical anguish as a result.



16. It is trite law that an appellate court ought not to interfere with a trial court's assessment of damages unless it is persuaded that the award was made on the wrong principles of law or that the same is either inordinately high or inordinately low as to make an entirely erroneous estimate of the damages. See Butt v Khan [1981] KLR 349 where it was held: -

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.”

17. It is my finding that the respondent's claim was merited and that the assessment of damages by the lower court was fair and reasonable and there is no reason to interfere with the same.

18. In the end, I find that the appeal lacks merit and is hereby dismissed with costs to the Respondent.
It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 17TH DAY OF MAY 2024.

D. KEMEI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of

No appearance for Tarus for Appellant

Wekesa for Wattangah for Respondent

Kizito Court Assistant

