



REPUBLIC OF KENYA



**KENYA LAW**  
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**Maina v Kilungu & another (Civil Appeal E1B of 2022)  
[2024] KEHC 7448 (KLR) (21 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7448 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CIVIL APPEAL E1B OF 2022  
JN ONYIEGO, J  
JUNE 21, 2024**

**BETWEEN**

**ZAKAYO MWANGI MAINA: INVESTIGATING OFFICER ..... APPELLANT**

**AND**

**JOHN MUTUNGI KILUNGU ..... 1<sup>ST</sup> RESPONDENT**

**ISAAC MARTIN OMONDI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the ruling and order delivered on 21.06.2022 by Hon.  
Shadrack Otuke R.M in the CMCC No. 08 of 2019 at Garissa Law Courts)*

**JUDGMENT**

1. Sometime between the period 2013 and 2014, one John kilungu (hereafter the 1<sup>st</sup> respondent) and Martin Omondi (hereafter the 2<sup>nd</sup> respondent) were working for Film Aid international corporation-Kenya as field manager and finance manager respectively. Mr. kilungu was based in Dadaab while Omondi was based in Nairobi but taking charge of Dadaab finance matters. During the intervening period, it came to the attention of Stellah Suge the county director Film Aid Kenya that there were financial impropriety cases in their Dadaab office thus causing her to institute a forensic audit which revealed loss of Kshs 1,496,118.70 through fraudulent payments allegedly orchestrated by John Kilungu and Martin Omondi.
2. Consequently, she reported the matter to the CID head-quarters on 14-12-2014 where she was advised to report to the CID Dadaab which she did on 18-12-2015. As a consequence, one Zakayo Mwangi Maina (hereafter the appellant) a police officer at Dadaab dci's office was assigned the case to investigate. Meanwhile, mr. kilungu had by then resigned vide his letter tendered on 12-05-2015 while Omondi martin was dismissed the same date.
3. Convinced by the evidence at hand supported by the implicating forensic audit report, the investigating officer preferred several charges for prosecution against Omondi and Kilungu. The charges cut across



- stealing by servant, conspiracy to defraud, fraudulent false accounting and uttering false document. He proceeded to arrest the two at Nairobi and sought for custodial orders at Milimani law courts but the same were denied and instead the suspects directed to present themselves at Garissa dci office which they did. Subsequently, they were charged in criminal case number 291 of 2016 at Garissa CM's court.
4. After full trial, the two were acquitted on 27-07-2016 under section 215 of the CPC for lack of sufficient evidence. Aggrieved by what they referred to as malicious prosecution, they moved to the CM's court Garissa seeking various reliefs key among them, general damages.
  5. By a plaint dated 07.03.2019, the respondents herein sought for orders against the defendants among them the appellant jointly and severally as hereunder:
    - i. General damages for unlawful arrest, detention and malicious prosecution together with interest thereon at court rates as against all the defendants.
    - ii. Special damages as enumerated in paragraph 14 above, as against all the defendants.
    - iii. General damages for defamation as against the 1<sup>st</sup> and 2<sup>nd</sup> defendant.
    - iv. The costs of this suit.
  6. It was their case that there was no probable cause that existed at the time the 4<sup>th</sup> defendant authorized the commencement or continuation of the criminal proceedings aforementioned as the same were purely acts of malice by the defendants.
  7. The 1<sup>st</sup> and 2<sup>nd</sup> defendant in their defence filed on 18-02-20 denied all the allegations preferred against them. They stated that the criminal proceedings against the plaintiffs were not malicious as they had probable cause to report a suspected criminal action to the police for investigation; That the police had a duty to obtain proper and efficient evidence to warrant criminal charges against the plaintiffs.
  8. They further reiterated that it was not within their prerogative to arrest, detain and prosecute the plaintiff. They further stated that they did not in any way defame the respondents. That a mere acquittal does not translate to malice hence their report was made in good faith given the available evidence. It was their prayer that the suit be dismissed with costs.
  9. On their part, the 3<sup>rd</sup> (appellant) and 4<sup>th</sup> defendant filed their defence on 15-01-2021 denying the allegations. They averred that there was probable cause to investigate and charge the respondents hence no malice whatsoever. That an acquittal in a criminal case does not imply malice. They expressed their intention to raise a preliminary objection at the appropriate time under Section 66 of the [National police service Act](#) on grounds that no police officer should be held liable for actions undertaken while executing his duties in good faith.
  10. Subsequently, the 3<sup>rd</sup> and 4<sup>th</sup> defendant filed a preliminary objection dated 18.08.2021 stating that; the suit was time barred by limitation of time contrary to section 3(1) of the [Public Authorities Limitation Act](#) CAP 39 LOK; the suit was improperly before the court and that the court lacked jurisdiction to hear and determine the matter.
  11. It was their case that under section 3(1) of the public authority limitation Act, claims against the government ought to be filed within 12 months. In response, the respondents contended that their claim was in the nature of a constitutional tort which had no limitation.
  12. The trial magistrate considered the facts before him together with the law and reached a determination that the suit before him raised constitutional issues resultant which he had no jurisdiction to handle. The court however held that the suit was properly filed as a civil suit to which he had jurisdiction. He



however upheld the preliminary objection that the suit was time barred only in so far as it related to the 4<sup>th</sup> defendant.

13. Being dissatisfied with the said ruling, the appellant filed the appeal herein in which he listed fifteen (15) grounds of appeal in the memorandum of appeal dated 30.06.2022. A perusal of the grounds of appeal revealed that the appellant faults the trial court for failing to appreciate the intention and application of section 3(1) of the *Public Authorities Limitation Act*.
14. Directions were taken that the appeal be canvassed by way of written submissions and all the parties complied with the said direction.
15. The appellant in his submissions dated 30.05.2023 coined three issues for determination as follows:
  - i. Whether the suit was filed out of the statutory time limit as set out in section 3(1) of the *Public Authorities Limitation Act*?
  - ii. If the answer to (i) is in the affirmative, whether the protection offered under section 3(1) of the *Public Authorities Limitation Act* cover the appellant herein?
  - iii. Who is to bear the costs of the suit.
16. On the first issue, it was submitted that the suit by the respondents was founded on tort wherein the cause of action arose on 27.07.2016 when the respondents herein were all acquitted of all the charges. That it was not in doubt that the cause of action having occurred as far back as 27.07.2016, the respondents' suit having not been filed until 08.03.2019, a lapse of more than twelve months, the suit was incompetent and not maintainable in law. That the suit was not instituted as required by the mandatory provisions of section 3(1) of the *Public Authorities Limitation Act* Cap 39 Laws of Kenya. The appellant relied on the case of Jacob Juma & Another v Commissioner of Police & Another Civil Suit 661 of 2007 [2013] eKLR to support their position that the suit herein was time barred.
17. In regards to the second issue, it was submitted that the learned trial magistrate erred in law and fact by failing to appreciate the provisions of section 3(1) as well as section 2(2) (a) of the *Public Authorities Limitation Act*. It was stated that the respondents sued the appellant in his capacity as the investigating officer in Garissa Criminal Case No. 291 of 2016 and therefore, the appellant was entitled to full protection as clearly and expressly outlined in the provision and full enjoyment and all the benefits conferred by the very section of the law. The appellants relied on the case of Joseph Labrosse v Seraphin Allisop and Government of Seychelles (CS. No. 285 of 1996) where it was held that:

“The government exercise its executive functions through its ministers and public officers...”
18. On costs, the appellant contended that the same follow the event and therefore urged this court to allow the appeal with costs in his favour.
19. The respondents in their submissions dated 21.07.2023 submitted in reference to three issues to wit:
  - i. Whether the trial magistrate had jurisdiction to hear and determine the suit herein.
  - ii. Whether the matters raised in the suit were res judicata.
  - iii. Whether the appellant should be retained in the suit.
20. On the first issue, it was submitted that the trial court had jurisdiction to hear the matter before it for the reason that the suit was founded on grounds of malicious prosecution which is a matter of infringement of an individual's constitutional right through the actions of the appellant. It was urged that the same were so flagrant to construe an ulterior motive. Reliance was placed inter alia



on the case of Njuguna Githiru v Attorney General [2016] eKLR to support the fact that courts have consistently held that there is no time limitation with respect to constitutional petitions alleging violation of fundamental rights.

21. That the respondents established their deprivation of their human dignity and liberty in the particulars of malice vide the plaint dated 07.03.2019 that comprised of a constitutional tort.
22. On the second issue, it was submitted that it is trite that the doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. That the learned trial magistrate was right in his finding and therefore, the appeal herein should be dismissed for want of merit.
23. On the third issue, it was submitted that the respondents were maliciously prosecuted by the appellant which in itself is a matter of contravention of a person's constitutional rights. The respondents contended that public officers are bound by *the constitution* and are personally liable for violating the same. That in any event, they should be called out to bear personal responsibility whenever they acted maliciously. Reliance to support the same was placed on the case of Shakil Ahmed Khan & 2 Others v Ethics and Anti-Corruption Commission & 6 others [2020] eKLR. In the end, this court was urged to dismiss the appeal herein as it was devoid of merit.
24. The 3<sup>rd</sup> and 4<sup>th</sup> defendants although not named as respondents in the appeal filed submissions dated 18.09.2023 wherein they submitted in regards to two issues on whether the appellant's appeal is merited and ought to be allowed and whether a case would stand against the 1<sup>st</sup> and 2<sup>nd</sup> respondents should the appeal succeed.
25. On the first issue, the trial magistrate was faulted for having not considered the fact that the suit herein was time barred and further, acknowledging that he lacked the jurisdiction to determine the matter before him. The trial court was faulted for unintentionally encouraging the 1<sup>st</sup> and 2<sup>nd</sup> respondents' indolence in that after having filed the suit out of time, their disinterest was further exhibited by the fact that the matter was filed on 08.03.2019 but the summons to enter appearance and plaint were served on 22.01.2020.
26. The respondents submitted that their claim was that of malicious prosecution and the same ought to have been brought within a period of one year as per section 3 of the *Public Authorities Limitation Act*. Reliance was placed on the Court of Appeal case of James Nderitu v Attorney General & Another [2019] eKLR to support the fact that a constitutional petition was not meant to circumvent the law on limitation of actions and that each petition filed alleging violation of the Bill of Rights ought to be considered on a case by case basis.
27. That the learned trial magistrate made a grave error to categorize the suit as a human rights petition despite the fact that the 1<sup>st</sup> and 2<sup>nd</sup> respondents fashioned the same as a civil suit seeking redress within the purview of a civil suit. It was further argued that the substratum of the plaint was tortious act which was time barred and thus incompetent and the trial magistrate's position to treat the same as a human rights petition was meant to defeat the statutory impediment.
28. On the second issue, it was submitted that for an allegation of malicious prosecution to be exhibited, an examination of the prosecutor and the investigating officer must be thoroughly conducted to establish whether or not there was any collusion between them and the complainant, If the same cannot be established, then the case fails and in the absence of both, the case automatically fails.



29. This is a first appeal. The duty of a first appellate Court was succinctly stated by Wendoh J in *JWN v MN* [2019] eKLR in the following words:

“It is settled law that the duty of the first appellate court is to re-evaluate the evidence tendered in the subordinate court, both on points of law and facts and come up with its findings and conclusions.”

30. I have considered the record of appeal, grounds of appeal and the submissions by the parties herein and I form the following issues for determination:

- i. Whether the trial magistrate had jurisdiction to hear and determine the suit herein.
- ii. Whether the trial court was right to dismiss the preliminary objection in so far as it related to the appellant.
- iii. Whether the protection offered under section 3(1) of the *Public Authorities Limitation Act* covers the appellant herein?

31. The appellant faulted the trial court challenging its jurisdiction to hear and determine the suit in view of the mandatory provision of section 3(1) of the *Public Authorities Limitation Act*.

32. In the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, the Supreme Court held as hereunder;

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. [Also see Articles 165 (5) and 162 (2) of *the constitution*; and Section 13 of the *Environment and Land Court Act*].

33. Section 8 of the *Magistrates’ Courts Act* 2015 notes that:

8.

- (1) Subject to Article 165 (3) (b) of *the Constitution* and the pecuniary limitations set out in section 7(1), a magistrate's court shall have jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
- (2) The applications contemplated in subsection (1) shall only relate to the rights guaranteed in Article 25 (a) and (b) of *the Constitution*.
- (3) Nothing in this Act may be construed as conferring jurisdiction on a magistrate's court to hear and determine claims for compensation for loss or damage suffered in consequence of a violation, infringement, denial of a right or fundamental freedom in the Bill of Rights.
- (4) The Chief Justice shall make Rules for the better exercise of jurisdiction of the magistrate's courts under this section.



34. A look at the plaint herein reveals that the plaintiffs sought for orders against the defendants jointly and severally seeking for general damages, special damages and costs of the suit. In my humble view therefore, as will be noted elsewhere in this judgment, the issues raised by the plaintiff did not meet the prerequisites of a petition nor did they raise violations that could only be handled by a constitutional court. It therefore follows that the trial court was clothed with jurisdiction to hear the matter herein as presented by the plaintiffs as a civil suit.
35. The appellant's contention is that the suit was not instituted as required by the mandatory provisions of section 3(1) of the *Public Authorities Limitation Act* Cap 39 Laws of Kenya and that if it applies in favour of the 4<sup>th</sup> defendant, it should also be applicable to him.
36. Section 3 of the *Public Authorities Limitation Act* Cap 39 Laws of Kenya provides that:

“Limitation of proceedings

- (1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.
  - (2) No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued.
  - (3) Where the defence to any proceedings is that the defendant was at the material time acting in the course of his employment by the Government or a local authority and the proceedings were brought after the end of—
    - (a) twelve months, in the case of proceedings founded on tort; or
    - (b) three years, in the case of proceedings founded on contract, from the date on which the cause of action accrued, the court, at any stage of the proceedings, if satisfied that such defendant was at the material time so acting, shall enter judgment for that defendant.
37. In the same breadth, Maraga, J. (as he then was) in the case of *John Ndeto Kyalo v Kenya Tea Development Authority and The Hon. Attorney General* [2005] eKLR at Paragraphs 4 and 5 observed as follows:

“Claims for false imprisonment (wrongful detention) and malicious prosecution are distinct causes of action, and even though the evidence that may be adduced by a Plaintiff may cover them both, the evidence must prove each of them distinctly, on a balance of probabilities; As regards a claim for false imprisonment (wrongful detention), the cause of action would arise on the last day of the period of the alleged imprisonment; By dint of Section 3(1) of the Public Authorities Limitations of Actions Act, a claim for false imprisonment (wrongful detention) would be time barred as against the Attorney General unless instituted within one year of the last day of the period of the alleged imprisonment...”

38. In the instant case, the respondents averred at paras 8 and 15 respectively that they were arrested on 15.03.2016 but on 27.07.2016, they were acquitted of all nine counts previously preferred against them. That they were acquitted under section 215 of the Criminal Procedure Code. It therefore follows that the suit at the lower court having been filed on 07.03.2019, the same was brought outside



- the prescribed one-year period in so far as it touches on proceedings under section 3 of the [public authorities limitation Act](#). It therefore follows that the suit herein was already time barred. [ See Lawrence Onyango Oduori v Attorney General & another [2022] eKLR].
39. The argument by the respondents that there was no time limitation on constitutional torts does not apply as this is not a constitutional petition but an ordinary civil suit hence the attendant civil proceedings' rules shall apply. See James Kanyiiita Nderitu v Attorney General & another (supra) where the court held that a constitutional petition is not meant to circumvent the law on limitation of actions.
40. I agree with the finding of the trial court that the 4<sup>th</sup> defendant being a government entity, proceedings can only be instituted within a period of one year from the time the cause of action arose. Section 3(1) is couched in mandatory terms hence the trial court was proper in holding as such. However, the same does not apply in favour of the 1<sup>st</sup> and 2<sup>nd</sup> defendant as theirs is three years under the [Limitation of actions Act](#) cap 22 LOK. Since there was no cross appeal, the holding in favour of the 4<sup>th</sup> defendant shall hold.
41. The next issue is whether the pronouncement in favour of the 4<sup>th</sup> defendant should have applied to the appellant. There is no doubt that the appellant was a police officer during the material time. It was his submission that he has been sued in his capacity as the investigating officer hence protected by Section 3 of the Public authorities Limitation Actions Act just like the 4<sup>th</sup> defendant. Under Section 3 (3)(a) of the Public Authorities [Limitation of actions Act](#), the appellant is protected by the same limitation of time. He is insulated against prosecution on acts of tort after the expiry of 12 months. In the case of Joseph Labrosse v Seraphin Allisop and Government of Seychelles(supra).
42. In my view, you can not separate an officer from government in so far time lines are concern save for liability where such officer can be held liable to the exclusion of the institution he represents if proved that he did not act in good faith. To that extent, the appellant was improperly excluded from benefiting from Section 3 a foresaid.
43. In view of the above, it is my humble finding that the trial court erred in dismissing the preliminary objection filed by the appellant and instead thereof I do substitute the order that the preliminary objection dated 18-08-2021 by the 1<sup>st</sup> defendant (appellant) and the 2<sup>nd</sup> defendant is upheld and the suit thereof struck out for being time barred. To that extent the appeal succeeds with no order as to costs.
44. Having held as above, the 1<sup>st</sup> and 2<sup>nd</sup> defendants urged the court to find whether in the absence of the 3<sup>rd</sup> and 4<sup>th</sup> defendants who are the appellant and DPP respectively, the claim against them would lie. They urged the court to dismiss the preliminary objection in its entirety as they had reported the crime in question in good faith.
45. From the pleadings, it is alleged that the report over theft of funds was malicious. This is a factual issue which can only be proved by tendering evidence before the trial court. Whether the case is hopeless in the absence of the 3<sup>rd</sup> and 4<sup>th</sup> defendant as parties is not up to this court to decide but rather the trial court. Each party will have his or her day in court. It is up to the plaintiffs(respondents) to decide whether the matter is suitable to continue with the 1<sup>st</sup> and 2<sup>nd</sup> defendants alone or not. Since the suit was filed within time in so far as the 1<sup>st</sup> and 2<sup>nd</sup> defendants are concern (within three years), I see no reason why I should determine on the merits of the case at this stage.
46. In conclusion, the orders that I find commendable to me are follows:
- i. That the instant appeal herein is found meritorious and therefore upheld.
  - ii. That the Preliminary objection dated 18<sup>th</sup> August 2021 by the 3<sup>rd</sup> and 4<sup>th</sup> defendants is upheld on account that the suit is time barred.



- iii. That the plaintiffs' claim against the 3<sup>rd</sup> defendant(appellant) and the 4<sup>th</sup> defendant is dismissed
- iv. That parties to bear own costs.
- v. The original file be returned to the trial court for further proceedings to continue against the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 21<sup>ST</sup> DAY OF JUNE 2024**

**J. N. ONYIEGO**

**JUDGE**

