



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kuru v Attorney General (Civil Appeal E085 of 2022)
[2024] KEHC 16913 (KLR) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 16913 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E085 OF 2022**

**F WANGARI, J
JULY 19, 2024**

BETWEEN

KELVIN KUGURU KURU APPELLANT

AND

THE HON. ATTORNEY GENERAL RESPONDENT

JUDGMENT

1. This Appeal arises from the Judgement and Decree of Trial Court delivered on 10th March 2022 by Hon. Kiage, SRM in Mombasa CMCC No. 965 of 2019.
2. The Appellant filed this Appeal and preferred the following grounds in the Memorandum of Appeal.
 - a. That considering the totality of the evidence presented before the trial court, the trial court erred in both law and fact by dismissing the claim of general damages for wrongful arrest, malicious prosecution and defamation when all the ingredients for award of such damages had been proved.
 - b. The Trial Court erred in that having found that the appellant was entitled for an award of Kshs. 550,000/- by way of special damages it amounted to a material contradiction for same appellant to be denied an award of general damages relating to the same incident.
 - c. The Trial Court erred in that having found that the prosecution of the appellant terminated with the acquittal of the appellant and that the prosecution was without reasonable course, the trial court erred in that it failed to award any compensation for the tort of unlawful arrest and malicious prosecution to the appellant.
 - d. The trial court further erred in that the trial court failed to refer to the Appellant's written submission filed on 8th October, 2021 and 15th February, 2022 and the trial court further erred in that it unreasonably held that the appellant had not filed submissions to assist the court in



arriving at the basis of awarding compensation yet aforesaid submissions, the appellant had filed submission on 8th October, 2021 and 15th February, 2022 which the said issues.

- e. The Trial Court erred in both in law and fact in arriving at a decision that was wholly against the weight of Evidence, Law and Justice.
3. The Claim arose from a claim for damages for malicious prosecution in which the Appellant averred that on 16th August, 2015 he was arrested and detained at Central Police Station by Police officers employed by the National Police Service, arraigned in court and charged with two counts of stealing 6 blended bags of tea and conspiracy to commit a felony.
4. That later on the 7th March, 2017 the prosecution eventually withdrew the charges against the Appellant for lack of evidence.
5. The Defendants denied liability citing that the appellant was arrested and arraigned in court following a complaint but that further investigations had revealed that there were no reasonable grounds to believe an offence had been committed by the appellant.
6. On 10th March 2022, the Trial Court allowed the claim for special damages of Kshs. 550,000/- but dismissed the claim for general damages. Aggrieved by the finding of the Trial Court, the Appellant lodged this Appeal.

Submissions

7. The parties filed written submissions in support of their rival positions. The Appellant submitted that the trial court had denied a deserving party appropriate damages as he had spent some few days in prison and had suffered mental anguish and trauma.
8. That the court had let an aggrieved person go without remedy despite the known principle that Equity will not suffer a wrong to be without a remedy. That there was no reasonable cause for denial of the said general damages.
9. On the part of the Respondent, it was submitted that the award of general damages is discretionary and that the lower court made mention that the appellant did not lay basis for any of the relief sought nor provided a rationale to guide the court save for the limb of special damages.

Analysis

10. This Court has considered the pleadings, evidence, submissions and authorities relied on by the parties in support of their case. The issue that falls for this Court's determination is whether the Trial Court erred in the failure to award general damages for malicious prosecution.
11. This being a first Appeal, the Court should with judicious alertness re-evaluate the evidence, and consider arguments by parties and apply the law thereto, and, make its own determination of the issues in controversy. Except however, that it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies.
12. In the case of *Selle & Another vs. Associated Motor Board Company Ltd.* [1968] EA 123, the Court stated as follows:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon 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, in particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

13. I have perused the Memorandum of Appeal and the entire record of the Trial Court and I am alive to the fact that my task is to re-evaluate the evidence in order to establish whether or not the Trial Court erred its finding. On the lawfulness of the arrest and malicious prosecution, the elements to be proved in an action for malicious prosecution are well settled.
14. In *Mbowa vs. East Meno District Administration* [1972] EA 352 (Sir William Duffus P, Lutta and Mustafa JJA), the court summarized the law 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 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) the criminal proceedings must have been instituted by the defendant,
- (2) the criminal proceedings must have been terminated in the plaintiff's favor,

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..."

15. I wish to set out in extenso the provisions of Section 87 of the [Criminal Procedure Code](#) which the Trial Court based on in arriving at a finding that the 1st Respondent had established a case for malicious prosecution. The law provides as follows:

"87. Withdrawal from prosecution in trials before subordinate courts

In a trial before a subordinate court a public prosecutor may, with the consent of the court or on the instructions of the Director of Public Prosecutions, at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal—

- (a) if it is made before the accused person is called upon to make his defence, he shall be discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts;
- (b) If it is made after the accused person is called upon to make his defence, he shall be acquitted."

16. Whether the termination of the prosecution under the above stated Section 87(a) of the [Criminal Procedure Code](#) amounted to a determination in favour of the Appellant, in the case of *Stephen Gachau Githaiga & another vs. Attorney General* [2015] eKLR Mativo J (as he then was), stated that



a termination of a prosecution would be favourable to a party regardless of the route taken, be it an acquittal, a discharge, a withdrawal or a stay. In that case, the court said:

“The second element of the tort demands evidence that the prosecution terminated in the plaintiff’s favour. This requirement precludes a collateral attack on a conviction properly rendered by a criminal court, and thus avoids conflict between civil and criminal justice. The favourable termination requirement may be satisfied no matter the route by which the proceedings conclude in the plaintiff’s favour, whether it be an acquittal, a discharge at a preliminary hearing, a withdrawal, or a stay.”

17. In *Paramount Bank Limited vs. Vaqvi Syed Qamara & another* [2017] eKLR (Makhandia, Ouko and M’Inoti JJA), stated:

“The favourable termination requirement of criminal charges may be satisfied in various ways depending on how the proceedings are concluded in favour of the accused person. For instance, by acquittal, a discharge or a withdrawal.

Courts in this jurisdiction have relied, over the years on the following passage from the case of *Egbema v. West Nile Administration* [1972] EA 60 for the foregoing proposition;

“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...”

Although the withdrawal of a charge under Section 87 is technically not on acquittal and does not operate as a bar to subsequent proceedings against an accused person on account of the same facts, guided by the foregoing holding, we note in this appeal that five years after the charges were withdrawn on 30th July, 2012, ostensibly pending the arrest of Lawrence Atieno, no fresh charges have been preferred against the 1st respondent. There was no indication whether Lawrence Atieno was ever arrested and charged. The discharge of the respondent, therefore amounted to a termination of the prosecution in his favour.

18. Based on the above authorities persuasive and binding to this Court, I note that in the instant case, the charge that the Appellant faced in Mombasa CMCCRC No. 1595 of 2015 was withdrawn on the 7th March 2017. The trial court record indicates that plea was taken on 18th August, 2015 and he was denied bail. He was later released on bond and attended court severally. The act of detention and denial of bail only to be discharged later by no means caused the Appellant anguish and mental torture.
19. I am in agreement with counsel for the respondent that general damages are discretionary and I find that this is a matter that the trial court ought to have awarded general damages for malicious prosecution based on the circumstances of the case.
20. To that extent therefore, the appeal is allowed and general damages of Kshs. 300,000/-awarded to the Appellant for malicious prosecution with interest at court rates from the date of judgment until payment in full.
21. The Appellant shall have half the costs of this appeal.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 19TH DAY OF JULY, 2024.



.....

F. WANGARI

JUDGE

In the presence of;

Gikandi Advocate for the Appellant

N/A by the Respondent

M/S Salwa, Court Assistant

