



REPUBLIC OF KENYA



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Ponda v Mweu (Civil Appeal 66B of 2023) [2024] KEHC 8500 (KLR) (12 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8500 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 66B OF 2023**

M THANDE, J

JULY 12, 2024

BETWEEN

CHRISTOPHER CHOME PONDA APPLICANT

AND

PAUL KATANA MWEU RESPONDENT

(An Appeal from the Judgment of Hon. Nelly Chepchirchir Adalo, Senior Resident Magistrate delivered on 1.3.22 in Mariakani PMCC No. 474 of 2017)

JUDGMENT

1. The Appellant herein is aggrieved by the judgment of the subordinate court in Mariakani PMCC No. 474 of 2017 in which the trial Magistrate dismissed his suit with costs. The Appellant had instituted a suit against the Respondent seeking compensation and damages for malicious complaint against him to the police and for loss of reputation.
2. In his plaint dated 5.9.17 and amended on 28.10.19, the Appellant claimed that the Respondent had by an undertaking dated 15.10.15 committed to pay him the sum of Kshs. 135,000/= as compensation for theft in his shop, by the Respondent's son. The Appellant averred that in order to evade his obligation, the Respondent maliciously lodged a false complaint against him at the Kaloleni Police Station. As a result, the Appellant was arrested and Criminal Case No. 317 of 2015 was instituted against him. The charges were however dismissed under Section 210 of the Criminal Procedure Code. The Appellant alleged that as a consequence of the prosecution, he suffered loss of reputation and of business.
3. The Respondent filed a defence dated 16.11.21 in which he denied the Appellant's allegations. His case was that he lawfully lodged a complaint with the police but did not advise them on whether to charge.
4. The Appellant has filed the Appeal herein challenging the decision of the trial court. In his memorandum of appeal dated 30.3.22, the Appellant faulted the trial magistrate for dismissing his suit without considering and evaluating the overwhelming evidence he tendered. He further faults the trial Magistrate for not considering his submissions and cited authorities and thereby arrived at



an erroneous and unjust decision. He urged that the said decision be set aside and that judgment be entered as prayed in his amended plaint. He further prayed that costs of the suit and Appeal be borne by the Respondent.

5. In opposition to the Appeal, the Respondent filed a preliminary objection dated 28.8.23, challenging the completeness of the record of appeal for want of the decree appealed against. This was dismissed vide a ruling dated 27.10.23. The Respondent subsequently appeared to have lost interest in the matter and has not participated in the same nor complied with directions to file submissions.
6. Being a first appeal, this Court is called upon to re-assess and analyze the evidence on record being mindful that it neither saw nor heard the witnesses testify. (See *Selle v Associated Motor Boat Co.* [1968] EA 123). The Court is also guided by the Court of Appeal in the case of *Samuel Kalomit Murkomen v Telkom Kenya Limited* [2017] eKLR, where it stated:

Our role as the first appellate court is to re-evaluate the evidence tendered before the trial court and reach our own conclusion. However, we are conscious of the fact that unlike the trial court, we did not have the benefit of observing the witnesses as they testified. Accordingly, we ought not to interfere lightly with findings of fact by the trial court. This much was appreciated by this Court in *J. S. M. v E. N. B.* [2015] eKLR -

“We shall however bear in mind that this Court will not lightly differ with the trial court on findings of fact because that court had the distinct advantage of hearing and seeing the witnesses as they testified and was therefore in a better position to assess the extent to which their evidence was credible and believable. Should we however, be satisfied that the conclusions of the trial judge are based on no evidence or on a misapprehension of the evidence on record or that the learned judge demonstrably acted on wrong principles, we are enjoined to interfere with those conclusions.”

7. The only issue for determination is whether the trial court erred in dismissing the Appellant’s suit after finding that there was no malice on the part of the Respondent.
8. It is the Appellant’s case that his prosecution was orchestrated by the Respondent who in his statement of defence and testimony, acknowledged that he had made the complaint against the Appellant. Further that the criminal proceedings were terminated in his favour after the court found that the parties had agreed that the Respondent would pay compensation to the Appellant for the monies stolen by his son. The Appellant argued that the complaint made by the Respondent and the prosecution of the Appellant was without reasonable or probable cause. Additionally, the Appellant submitted that the Respondent’s complaint against the Appellant intended to avoid honoring his obligation in his undertaking dated 15.10.15 and was actuated by malice. The Appellant further submitted that the criminal proceedings were instituted by the Respondent against him without probable cause.
9. Relying on the case of *George Masinde Murunga v Attorney-General* [1979] eKLR, the Appellant submitted that he had established in the trial court, all the elements for the tort of malicious.
10. In her judgment, the trial Magistrate found that the Appellant failed to provide any shred of evidence which shows malicious intent or improper motive on the part of the Respondent or what he stood to gain from it. The trial Magistrate went stated:

The best explanation would be that the plaintiff was arrested in response to a complaint lodged at the police station by the complainant and the police had acted on the belief that



the investigations they carried out were satisfactory. The plaintiff failed to sue the police and the directorate of public prosecutions. In the premises, this Court finds that there was no malice on the part of the defendant. Thus, the plaintiff's claim for malicious prosecution and damages is not meritorious and therefore dismissed with costs.

11. I have looked at the record. It does show that the Appellant was charged in Kaloleni Criminal Case No. 367 of 2015 with the offence of demanding property with menaces contrary to Section 302 of the Penal Code. The particulars of the offence are that on 15.10.15 at Kinarani village, Mwanamwinga location, Kaloleni subcounty in Kilifi county, jointly with others not before court with menaces, demanded Kshs. 135,000/= from Paul Katana Mweu, the Respondent herein, with intent to steal.
12. The record further shows that the Respondent's minor son had stolen from the Appellant's shop. He pleaded guilty when charged in court and was given a non-custodial sentence. The Appellant testified in the trial court that the Respondent signed the undertaking to pay him the amount owed at the chief's office in the presence of 12 witnesses. The Respondent was to pay Kshs. 35,000/= and the balance of Kshs. 100,000/= in installments. Initially, the Respondent offered to pay Kshs. 15,000/= and then Kshs. 22,500/= which the Appellant declined as it was not what they had agreed. The Respondent was to go back to the Appellant on 20.11.15. However, on 19.11.15, the Appellant received summons from the OCS Kaloleni. He reported at the police station on 20.11.15 and was told he was demanding money by force. He denied and stated that the Respondent had written the undertaking himself, but was locked up in the cells and later charged in court. On his part, the Respondent told the trial court that he had been forced to sign the agreement. He also conceded that he had not paid the money. He lodged a complaint at the police station reported because the Appellant had had his (Respondent's) son arrested and charged.
13. It is quite evident from the record that the undertaking to pay the Appellant was done in the Respondent's own hand, a fact that he acknowledges. Although the Respondent stated in his testimony that he had been forced to write the agreement and that there were people who saw that he was forced, he did not produce any of the said witnesses to testify in support of his claim.
14. In the criminal case against the Appellant, the trial court after taking the evidence stated:

In any event, it was the complainant who personally authored the agreement in the presence of twelve witnesses. None of those witnesses disputed or cast a doubt on the content or tenor of the agreement. On that score, I make a finding that the prosecution has failed to establish all the three elements of this offence to warrant the accused to offer his defence. I acquit the accused under section 210 of the C.P.C. And set him free unless otherwise fully held.
15. Malicious prosecution, as the label implies, is an intentional tort that requires proof that the defendant's conduct in setting the criminal process in motion was fueled by malice (see [Stephen Gachau Gitthaiga & another v Attorney General](#) [2015] eKLR). Mativo, J. went on to state:

The malice requirement is the key to striking the balance that the tort was designed to maintain: between society's interest in the effective administration of criminal justice and the need to compensate individuals who have been wrongly prosecuted for a primary purpose other than that of carrying the law into effect.
16. The four elements to the tort of malicious prosecution were restated in the case of [George Masinde Murunga](#), (*supra*). Cotran, J stated:

As to malicious prosecution the plaintiff must prove four things:



- (1) that the prosecution was instituted by Inspector Ouma (there is no dispute as to this);
 - (2) that the prosecution terminated in the plaintiffs' favour (there is also no dispute as to this);
 - (3) that the prosecution was instituted without reasonable and probable cause; and
 - (4) that it was actuated by malice.
17. There is no dispute that the criminal proceedings the Appellant complains of, were instituted at the instance of the Respondent. He stated so himself in both the criminal and civil cases. The record also shows that the criminal proceedings were terminated in the Appellant's favour, when the trial court acquitted him under Section 210 of the Criminal Procedure Code. The first 2 elements were thus established.
18. I now turn to the element whether that the prosecution was instituted without reasonable and probable cause. In the old case of *Hicks v Faulkner* (1878) 8 Q.B.D 167 at 171, Hawkins, J. defined probable and/or reasonable cause as:
- 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.
19. The circumstances herein are that the Respondent undertook in writing to compensate the Appellant for theft in his shop by the Respondent's son. The undertaking was made in the chief's office in the presence of witnesses. This information was conveyed to the police when they arrested the Appellant. My view is that no reasonable, prudent and cautious man confronted with the complaint by the Respondent and the response by the Appellant would conclude that the Appellant was probably guilty of the crime imputed. It is not clear why the police disregarded this information and proceeded to charge the Appellant in court. They thus prosecuted the Appellant under circumstances where it was impossible to convict. I am satisfied that the complaint against the Appellant and the subsequent prosecution based on the facts herein were without probable or reasonable cause
20. The fourth element of the tort of malicious prosecution is malice on the part of the person who initiates the process. In *Patrick Nyamuke Etori v National Police Service Commission & 2 others* [2019] eKLR, Mwita, J. stated that for one to establish a case for malicious prosecution, he must prove that the prosecution had no legal basis and that it was actuated by malice. He added:
26. The position was well stated in the case of *Mbowa v East Menjo Administration* [1972] EA 352, thus;
- “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.”



21. Looking at the record, it is quite evident that the undertaking to pay the Appellant was done in the Respondent's own hand, a fact that he acknowledges. His claim that he was forced to write the agreement is rather feeble and unconvincing. He stated that there were people who saw that he was forced. He however stated that the said witnesses were not in court. He has acknowledged in both lower courts that he did not pay the amount due. The trial court in the criminal case was able to see right through this and did not even find it necessary to put the Appellant on his defence but acquitted him under Section 210 of the CPC. I am thus persuaded by the Appellant's contention that rather than paying the amount due as per the undertaking, the Respondent maliciously made a complaint to the police, which led to the Appellant's arrest and prosecution. The purpose of the prosecution of the Appellant was clearly not for the public benefit, but was personal, actuated by spite and intended to evade an obligation to pay the amount as per his written undertaking.
22. The trial Magistrate faulted the Appellant for not suing the police and the directorate of public prosecutions. Is this fatal? I think not. In *Gitau v Attorney General* [1982] eKLR, Trainor, J. stated:
- To succeed on that claim 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 an arrest. It means being actively instrumental in causing a person with some judicial authority to take action that involves the plaintiff in a criminal prosecution. An example would be where a person prefers 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.
23. The malicious initiation of criminal proceedings in the absence of reasonable and probable cause can be by a private or public actor. As such, the trial Magistrate erred in faulting the Appellant for not suing the police and dismissing his suit on that score.
24. In the end and in view of the foregoing, I find that the Appeal is merited and make the following orders:
- i. The judgment of the trial Magistrate delivered on 1.3.22 is hereby set aside.
 - ii. The Respondent shall pay to the Appellant the sum of Kshs. 135,000/= as per his undertaking dated 15.10.15. This amount shall attract interest at court rates from the date of judgement in the lower court until payment in full.
 - iii. The matter is hereby remitted to the lower court for determination on prayers b), c) and d) of the amended plaint dated 28.10.19, by a Magistrate other than Hon. Nelly Chepchirchir Adalo.
 - iv. The Appellant shall have costs of this Appeal.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 12TH DAY OF JULY 2024

M. THANDE
JUDGE

