



REPUBLIC OF KENYA



KENYA LAW
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**Ndung'u & another v Attorney General & 2 others (Civil Appeal
37 of 2019) [2024] KEHC 9838 (KLR) (6 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 9838 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL 37 OF 2019
S MBUNGI, J
AUGUST 6, 2024**

BETWEEN

CHARLES MATHENGE NDUNG'U 1ST APPELLANT

MARY WANGARI MATHENGE 2ND APPELLANT

AND

ATTORNEY GENERAL 1ST RESPONDENT

SERGEANT EDWIN ELIMA 2ND RESPONDENT

JOHN NGUGI NDEGWA 3RD RESPONDENT

*(Being an appeal against judgement of Hon. W. Kagendo Chief
Magistrate Nyeri in CMCC 417 OF 2011 dated 24th May 2019.)*

JUDGMENT

1. What is before this Court is an appeal against the decision of the trial Court in CMCC No. 417 of 2011 which is triggered from the determination of CMCC No. 1065 of 2009. The 3rd defendant had made a complaint to the police and the plaintiffs were arrested and charged with;
 - a. The offence of conspiracy to defraud contrary to Section 317 of the Penal Code
 - b. The offence of giving false information to a person employed in the public service contrary to section 129 of the Penal Code
 - c. The offence of obtaining registration by certificate of title by false pretence contrary to section 320 of the Penal Code.
2. The matter proceeded to a full hearing until the prosecution closed its case and the accused was acquitted under Section 215 of the Penal Code, where the learned Chief Magistrate found no criminal



offence but a moral wrong against the plaintiffs. The trial court was set to determine whether the plaintiff proved false imprisonment, whether the plaintiff proved malicious prosecution and special damages. The trial court found that acquittals in criminal matters does not mean there was malicious prosecution. Liability was not established to award general damages and the entire suit was dismissed with costs.

3. The appellant being dissatisfied with the decision filed the present appeal vide a memorandum of appeal dated 24th May 2019 on the following grounds;
 - a. The learned trial magistrate erred in law and fact in making a finding that there was no malice in prosecution of the criminal case against the appellants
 - b. The learned trial magistrate erred in law and fact in failing to take into consideration that at the time of reporting the matter to police the 3rd respondent was not the registered proprietor of the land in dispute and the report was made through malice.
 - c. The learned trial magistrate erred in law and fact in failing to take into consideration that the land in dispute having been sold through public auction in execution of a decree issued by a competent court a fact well within the knowledge of the 3rd respondents and his sister there was no justifiable cause for the 3rd respondent to have made a false report to police which lead to the arrest and prosecution of the appellants.
 - d. The learned trial magistrate erred in law and fact in failing to take into consideration that the appellants acquired the land in dispute lawfully and the arrest and prosecution of the appellants was malicious.
 - e. The learned trial magistrate erred in law and fact in ignoring the appellants evidence and the documentary evidence produced by the appellants during hearing of the case
 - f. The learned trial magistrate erred in law and fact in arriving at a judgement against the weight of evidence and law.
4. The appellants sought to have the appeal allowed, for the judgement of the trial court set aside and to be awarded costs of the appeal.
5. The appeal was canvassed by way of written submissions.

Appellants Submissions

6. The appellant submitted that malicious prosecution is an intentional tort designed to provide remedy for unfounded prosecution as elucidated in the Black's Law Dictionary 9th edn page 1102. The ingredients which a plaintiff must prove to succeed in such a case was espoused in the case of Sila Mumo Muli v Mbaku Ngiga & another (2019) eKLR, the court relied on the case of Mbowa v East Meno District Administration (1972) EA 352.
7. The appellant also submitted on whether they initiated the proceedings without any reasonable or probable cause as was discussed in Meru Central Farmers Coop Union ltd v Justus Muriuki Andrew (2019)eKLR. The appellants further contended that the ingredients were clearly demonstrated.

Respondents Submissions

8. The 1st and 2nd respondents chose not to escalate themselves further in the matter.
9. The 3rd respondent submitted that it was upon the appellants to prove the four ingredients which they did not placing reliance on several cases: Murunga v AG (1979)KLR 138, Robert Okeri Ombeka v



Central Bank of Kenya (2015) eKLR and Music Copyright Society of Kenya v Tom Odhiambo Ogowl (2014)eKLR.

10. He further submitted that does the mere fact that the appellants acquitted under Section 215 of the CPC render the prosecution malicious?
11. 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 Appellant is liable to compensate the Respondent in damages for malicious prosecution and what damages should be awarded to the Respondent.

Analysis And Determination

12. This court has the duty as the first appellate court to analyse and re-evaluate the evidence before the trial court and arrive at its own conclusion, while bearing in mind that it neither saw nor heard the witnesses testify (See the case of *Selle –vs- Associated Motor Boat Co. Ltd* [1968] EA 123).
13. 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.
14. The elements of the tort of malicious prosecution have been discussed in various authorities including *Murunga vs 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.
15. 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.
16. It is not in dispute that the 3rd respondent herein made a complaint to the police where the 1st appellant was arrested on 15th October 2009 and criminal charges preferred against him and after a full trial the court did not find the appellant guilty as charged in all the counts and acquitted them under Section 215 of the CPC. This however does not connote malice on the party who instituted the prosecution so long as the same was done honestly, reasonably and without malice. In the case, *Republic v James Mureri Karugu & 2 others* [2019] eKLR it was held that; the respondent has the burden to prove that the prosecutor acted dishonestly and unreasonably. In the trial before the lower court, this burden was not discharged. The appellant did not demonstrate how the police (prosecutor) acted maliciously and dishonestly.



17. Further 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.”
18. 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.”
19. On the aspect of the prosecution having been instituted with any reasonable and probable cause, Salmond, a legal scholar in his book *Salmond on the Law of Torts* defines reasonable and probable cause to mean:-
- “a genuine belief, based on reasonable grounds, that the proceedings are justified.”
20. 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.”
21. 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.”
22. It is insufficient to simply state that the criminal proceedings were motivated by malice. There is a need to establish how the court’s procedure is being abused or exploited, as well as to indicate or show the foundation on which the respondent’s rights were seriously threatened by the criminal prosecution. In the absence of concrete evidence that a criminal prosecution was a “abuse of process,” a “manipulation,”



- "amounts to selective prosecution," or any other process, or even that the respondent did not receive a fair trial as guaranteed by *the Constitution*, it is not mechanical enough to conclude that the existence of an acquittal is sufficient to amount to a fair trial.
23. The case *Kagane and Others v Attorney General and Another* [1969] EALR 643, held that reasonable and probable cause is an honest belief in the guilt of the accused founded on reasonable grounds of existence of circumstances that point to the commission of the offence.
 24. On examination of the remarks of the trial court in the criminal proceedings, the court pointed out that the plaintiff's submission is evidently a faintly argued submission that there was no reasonable and probable cause to prosecute. The plaintiff failed to particularly prove the prosecution was actuated by malice. The trial court in the criminal proceedings opined that, " this is a scenario where people who are friends and neighbours suddenly turn foes. The problem was created by the accused who was aware of the financial difficulties of the complainant and the case existing in respect of the land and rescinded the sale and bought the land by proxy. Morally this is very wrong but legally it is not an offence."
 25. By looking at these findings of the criminal court and the circumstances of this case, I am persuaded that it was not spiteful for the 3rd respondent to make the complaint without satisfying itself on the circumstances surrounding the case and for the prosecution to have presented a case that was not watertight given the standard of proof in criminal cases. In the premises, I find that malice has not been proven.
 26. In the end, I find that the appeal lacks merit and is hereby dismissed with costs to the Respondents.
 27. It is so ordered. Right of appeal 30 days explained.

SIGNED, DELIVERED & DATED AT KAKAMEGA VIRTUALLY THIS 6TH DAY OF AUGUST 2024.

HON JUSTICE. S. MBUNGI

JUDGE.

Court:

Ms Njuguna holding brief Wahome for 3rd Respondent Present Online.

Ms Angong'a Elizabeth – Court Assistant – Present

The Appellant – Present on Line

