



REPUBLIC OF KENYA



**Nguti v Mutua & 6 others (Civil Appeal E072 of 2022)
[2024] KEHC 10684 (KLR) (16 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10684 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E072 OF 2022**

**FR OLEL, J
SEPTEMBER 16, 2024**

BETWEEN

RASHID MUTUA NGUTI APPELLANT

AND

PETER KYALO MUTUA 1ST RESPONDENT

NZIOKA WILSON NDUTU 2ND RESPONDENT

DANIEL MULANDI KIKUNZE 3RD RESPONDENT

ROSEMARY K MUTUNGA 4TH RESPONDENT

JULIUS KIOKO 5TH RESPONDENT

OCS ATHI RIVER POLICE STATION 6TH RESPONDENT

ATTORNEY GENERAL 7TH RESPONDENT

*(Being an appeal from the judgment of Hon Stephen Jalango (PM) delivered on
12th May 2022 in the Mavoko Chief Magistrate Court Civil suit No. 720 of 2018)*

JUDGMENT

A. Introduction

1. This appeal arises the judgment/decree of Honourable Stephen Jalang'o, Principal Magistrate delivered on 12th May 2022 in Mavoko Chief Magistrate court case no. 720 of 2018, where he dismissed the Appellant's suit as against the respondents, based on malicious prosecution emanating from Mavoko Criminal case No 1092 of 2013.
2. Being completely dissatisfied by the said judgment/decree the Appellant filed his Memorandum of Appeal, where he raised the following grounds of Appeal;



- a. That the learned Magistrate erred in law and in fact in his finding that the Appellants case had not been proved on a balance of probabilities which was contrary to the evidence adduced by the Appellant.
 - b. That the learned magistrate erred in law and in fact by failing to evaluate the evidence presented by the Appellant clearly demonstrating that there was no probable cause to prosecute him for malicious damage to property and in so doing arrived at an erroneous decision.
 - c. That the learned Magistrate erred in law and in fact by failing to consider the proceedings and the judgment of criminal case No 1092 of 2013 in the principal Magistrate court at Mavoko and in so doing misdirected himself by making a finding that the Appellant's detention was not malicious and was instituted with reasonable and probable cause by the respondents,
 - d. That the learned Magistrate erred in law by shifting the burden of proof from the Appellant to the Respondent and in so doing, misdirected himself on the law and facts.
 - e. That the learned Magistrate erred in law and in fact by failing to understand and appreciate the peculiar circumstances of the existing High court case, HCC No 75 OF 2013 at Machakos High court which culminated in the Appellants arrest for the trumped up charges preferred in criminal case No 1092 of 2013.
3. The Appellant urged that this court finds that this Appeal had merit and proceed to set aside the entire judgment of the trial court and instead substitute the same with an order awarding him appropriate damages.

A. Evidence at Trial

4. PW1 Rashid Mutua Munguti adopted his witness statement, where in he had stated that he was arrested on 03.10.2013 and spent one night in a filthy, tiny, cold room/police cell, before being arraigned before court on 04.10.2013 and was charged with the offence of malicious damage to property based on a report made to the police station by the 1st to 5th respondents regarding uprooting of bacons placed parcel Mavoko Town Block 3/2347 (hereinafter referred to as the suit property). He was released on cash bail and the trial of the said criminal case took four (4) years before he was acquitted on 13.04.2017. It was his contention that the main aim of the respondents in filing the complaint was to frustrate and sabotage hearing of HCCC NO 75 of 2013 at Machakos High court, which he had filed relating to the same parcel of land.
5. As a result of the criminal case, the appellant averred that he had suffered both emotionally, mentally and financially and had spent about Kshs.472,000/= to pay legal services fee and for court attendance. He blamed the respondent's for maliciously instigating his arrest and prosecution and prayed to be awarded costs. Upon cross examination PW1 confirmed that he was a member of Athi River slum dwellers, who owned the suit property and that the 1st to 5th respondents were their trustees. The suit parcel of land had not been sub divided and they had internal disputes relating to the said parcel, and he had filed a dispute before the ELC court to stop its sub division. He also confirmed that if any person was aggrieved over a dispute, such a person had a right to file a report with the police for investigations.
6. He had been arrested on 03.10.2013 at 6.00pm after a complaint had been made to the police and was arraigned in court on the following day before being released on bond. During the criminal proceedings, eight (8) witnesses testified as against him and he was put on his defence before being finally acquitted. The appellant also confirmed the plaint did not particularized malice in respect of the 6th and 7th Respondents. In re-examination, the appellant confirmed that the report to the police



was made by the 1st to 5th Respondent and he was not interrogated before arrest and was entitled to damages.

7. The respondent's did not testify but adopted their defence and evidence given in Mavoko CMCC No 721 of 2018. The said proceedings were not filed as part of the record of Appeal but the trial Magistrate did refer to them in his Judgement and recorded that the 3rd respondent Daniel Mulandi Kikunze had testified that they were trustee's of Athi River slum dwellers association, which was made up of a group of around 400 members, including the Appellant. They owned the suit property and had decided to sub divide the same on 22.08.2013. During the sub division process, they had disagreements and the appellant, Joshua Kyalo and Jacinta Wanzila had told them to finish the sub division work and leave so that they could also do their work.
8. The respondents supervised as the surveyors did their work and placed bacons up to around 5.00pm and thereafter left the suit property. On 24.08.2013 they found that all the bacons placed on the suit parcel had been removed and reported the matter at Athi River police station. After investigations, the Appellant and three other persons were arrested and charged with the offence of malicious damage to property in Mavoko Cmc No 1092 of 2013. It was the respondent's contention that the report made to the police was genuine, as the appellant and the other co accused were on the suit parcel and did not want it to be sub divided, yet they had the power to do so as trustees to enable them give individual members their portion of land.
9. DW2 Rosemary Katunge Mutunga (the 4th respondent) also testified along the same lines, that they owned the suit parcel and as trustees they had been mandated to sub divide the same to enable individual members get their portion. While undertaking the said process, some of their members including Jacinta Wanzila, Angelica Mutile, the appellant herein and Kyalo Nyumbo came and told them to complete the exercise they were undertaking and thereafter, they would also do their work. In other words, the said members were opposed to the suit parcel being sub divided and indeed on the following day when they returned to the suit parcel, they found that all the bacons had been removed and this prompted them to make a report to the police. The police carried out their investigations and subsequently arrested and charged the appellant and his co accused.

(B) Submissions

The Appellants submissions

10. It was the appellant contention that the report made to the police was false and was due to the fact that he had filed Machakos ELC case No 75 of 2013 which was pending before court as between the said parties and touching on the subject matter. Therefore, the report made to the police was actuated by malice on the part of the 1st to 5th respondent's and the 6th respondent also did not have a reasonable cause the basis upon which they could charge him in court. The appellant further faulted that trial Magistrate for failing to consider the judgement delivered in Mavoko Criminal Case No 1092 of 2013, which judgment was to the effect that the complaint lodged by the respondents to the police were a mere frame up because of the suit filed before the ELC, where the appellant had obtained conservatory orders to stop the sub division exercise.
11. The appellant also faulted the trial court for finding that he had not particularized the facts constituting malice, yet the same had clearly particularized at paragraph 14 of the plaint. It was not in dispute that the 1st to 5th respondents made a complaint to the police, the Mavoko Criminal Case No 1092 of 2013 was determined in his favour and his co accused, the prosecution had been instituted without proper legal cause/proper investigations, the report made was instigated by existence of differences between group members of Athi River Slum dwellers group and therefore tainted with malice. None



of the witnesses who testified could also link any of the damages done to the accused person and on a balance of probability had proved his case. Reliance was placed on *Risper Nyomenda v George Martin Kenyatta* (2021) eKLR, which was quoted with approval in *George Masinde Murunga v Attorney General* (1979) eKLR, *Samson John Nderitu v The Attorney General* (2010) eKLR, *Thomas Mboya Olouch & another v Lucy Muthoni Stephen & another* (2005) eKLR and *Stephen Gachau Githaiga & another v Attorney General* (2015) eKLR.

12. The appellant urged the court to find that the criminal case was misused or manipulated to advance ulterior motive and offended the courts sense of justice and propriety as there was no link between him and destruction of the said bacons. It was also apparent that the criminal case was intended to derail the appellant from prosecuting the civil case filed challenging ownership of the suit parcel of land being Machakos ELC case No 75 of 2013. The appellant therefore urged the court to overturn the judgement of the trial court and proceed to award him damages.

The Respondents Submissions

13. The respondents on the other hand urged the court to strike out the record of Appeal on the basis that it was incomplete and failed to comply with provisions of order 42 Rule 13(4)(c) of the civil procedure Rules. It was not dispute that the 1st to 5th respondent were the trustees of Athi River slum dwellers associated which owned the suit parcel and the said members had resolved to sub-divide the suit parcel into 400 plots and hired a surveyor to undertake the said exercise and put bacons. The following day they found that some bacons had been uprooted and it was alleged that the appellant was amongst the persons seen uprooting the said bacons and had earlier in the day told the surveyor that he should finish his work and they would do theirs. The complaint made to the police was proper, raised a probable cause and was not actuated by malice.
14. Further it was the respondent's submissions that the appellant had failed to plead particulars of malice as against the 6th and 7th respondent's (the investigate agencies) and this was a fatal omission which made the appellants case to be hopelessly defective. The evidence presented before court also placed the appellant squarely at the scene of the crime and PW2 had testified in seeing him a as part of the group that were physically uprooting the bacons. The report made to the police was therefore genuine and not fabricated nor was it made with any ulterior or malicious intention. Reliance was placed on *Kagame & others v Attorney General & another* Civil case No 1334 of 1966; where the theory of objective test was discussed and held that the information given to the prosecutor must be capable of satisfying an ordinary, reasonable prudent and cautious man to the extent of believing the same to be substantially true and could afford a strong basis for prosecution.
15. The respondents also urged this court to also note that the trial court had held that they had a valid reason the basis upon which they had made a report to the police and after investigations had been concluded the appellant and his colleagues were properly arraigned before court and charged with the office of malicious damage to property. The existence of the Machakos ELC case No 75 of 2013 was not a bar to institution of the criminal proceedings as both processes could be proceed simultaneously and the criminal and civil jurisdiction were mutually exclusive. The said suit Machakos ELC case No 75 of 2013 had also been dismissed on 03.02.2022 by Justice Angote, who upheld that the as the trustees had the right to sub divide the suit property. The Appellant therefore submitted that the Appeal had no merit and prayed that the same be dismissed with costs.

D. Analysis & Determination

16. I have considered this appeal, submissions and the impugned judgment. I have also considered the decisions relied on and perused the trial court's record. This being a first appeal, it is by way of a retrial



and this court, as the first appellate court, has a duty to re-evaluate, re-analyse and re-consider the evidence afresh and draw its own conclusions on it. The court should however bear in mind that it did not see the witnesses as they testified and give due allowance for that. (see *Selle v Associated Motor Boat Co Ltd & others* [1968] EA 123).

17. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal held:

This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this 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 allowances in this respect.

18. In *Nkube v Nyamiro* [1983] KLR 403, the same court stated:

A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.

(I) Whether the Appellant’s claim for malicious damages was proved on a balance of probability.

19. The law places the onus of proving once case on his/her doorstep. In *Palace Investments Ltd v Geoffrey Kariuki Mwendwa & another* (2015) eKLR, the judges of Appeal referred to “*Denning J in Miller v Minister of Pensions* (1947) 2 ALL ER 372 discussing the burden of proof had this to say;

“That degree is well settled, it must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it is more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where the parties.....are equally (un)convincing, the party bearing the burden of proof will loose because the requisite standard will not have been obtained.”

20. The tort of malicious prosecution is established where a person causes the arrest and prosecution of another person without reasonable or probable cause. The threshold for establishing a claim for malicious prosecution was laid down in the case of *George Masinde Murunga v Attorney General* (1979) KLR 138, Where it was held that;

- a. The plaintiff must show that the prosecution was instituted by the defendant, or by someone for whose acts he is responsible.
- b. The plaintiff must show that the prosecution terminated in his favour.
- c. The plaintiff must demonstrate that the prosecution was instituted without reasonable and probable cause.
- d. He must also show that the prosecution was actuated by malice.

21. The same position was held by the Judges of the East African court of Appeal in *Mbowa v East Menngo District Administration* (1972) EA 352 where they held that follows;

- a. “The action from 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 public benefit originates in the medieval writ of conspiracy which was aimed against combinations to abuse legal procedure, that is, it was aimed at 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.

Its essential ingredients are;

- i. The criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant of arrest of the plaintiff or a person arrests the plaintiff and take him before a judicial authority;
 - ii. The defendant must have acted without reasonable or probable cause i.e there must have been no facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified;
 - iii. The defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose; and
 - iv. The criminal proceedings must have been terminated in the plaintiff's favour, that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge.....
- b. The plaintiff in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, has been fulfilled and that he has suffered damages.
 - c. 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. The damage that is claimed is in respect of reputation but other damages might be claimed, for example damages to property..... The damage to the plaintiff results at the stage in the criminal proceedings when the plaintiff is acquitted or, if there is an appeal when his conviction is quashed or set aside. In other words, the damage results at a stage when the criminal proceedings came to an end in his favour, whether finally or not. The plaintiff could not possibly succeed without proving any or all of the first three essentials of malicious prosecution without the fourth which forms part of the cause of action, would not take him very far. He must prove that the court has found him not guilty of the offence charged.....
 - d. The law in action for malicious prosecution has been clearly defined and in so far as the ordinary criminal prosecution is concerned the action does not lie until the plaintiff has been acquitted of the charge.

Rudd, J in *Kagane v Attorney General* (1969) EA 643, set the test for reasonable and probable cause. Citing *Hicks v Faulkner* (1878) & QBD 167 at 171. *Herniman v Smith* (1938) AC 305 and *Glinski v McIver* (1962) AC 726 the learned judge stated thus:

“Reasonable and probable cause is 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 an ordinary 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.....Excluding cases where the basis for the prosecution is alleged to be wholly fabricated by the prosecutor, in which the sole issue is whether the case for the prosecution was fabricated or not, the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of objective test. That is to say, to constitute reasonable and probable cause for the prosecution is primarily to be judged on the basis of objective test. That is to say, to constitute reasonable and probable cause the totality of 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 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 in so far as that material is based on information, the information must be reasonable credible, such that an ordinary reasonable prudent and cautious man could honestly believe to be substantially true and to afford a reasonable strong basis for the prosecution... If it is shown to the satisfaction of the judge that a reasonable prudent and cautious man would not have been satisfied that there was a proper case to put before the court, then absence of reasonable and probable cause has been established. If on the other hand the judge considers that prima facie there was enough to justify a belief in an ordinary reasonable prudent and cautious man that the accused was probably guilty then although this would amount to what I call primary reasonable and probable cause the judge may have to consider the further question as to whether the prosecutor himself did not believe in the probable guilt of the accused, and this is obviously a matter which is to be judged by a subjective test. This subjective test should only be applied where there is some evidence that the prosecutor himself did not honestly believe in the truth of the prosecution. In as much as this subjective test only comes into operation when there were circumstances in the knowledge of the prosecutor capable of amounting to reasonable and probable cause, the subjective test does not arise where the reason alleged as showing absence of reasonable and probable cause, the subjective test does not arise where the reason alleged as showing of reasonable and probable cause is merely the flimsiness of the prosecution case or the inherent unreliability of the information on which the case was based, because this is a matter for the judge alone when applying the objective test of the reasonable prudent and cautious man. Consequently, the subjective test should only be applied where there is some evidence directly tending to show that the prosecutor did not believe in the truth of his case. Such evidence could be afforded by words or letters or conduct on the part of the prosecutor which tended to show that he did not believe in his case, as for example a failure or reluctance to bring it to trial a statement that he did not believe in it and I think possibly, an unexplained failure to call an essential witness who provided a basic part of the information upon which the prosecution was based.”

22. As to what constitutes reasonable and probable cause, the law is clearly restated in *Simba v Wambari* (1987) KLR 601 as follows:

“The plaintiff must prove that the settling of the law in motion by the inspector was without reasonable and probable cause.....if the inspector believed what the witnesses told him then he was justified in acting as he did and I am satisfied the plaintiff has not established that



he did not believe them or alternatively that he proceeded recklessly and indifferently as to whether there were genuine grounds of prosecuting the plaintiff or not.”

23. The foregoing, in my considered view set out the law and the conditions to be satisfied in order for a plaintiff to succeed in the tort of malicious prosecution. There was no doubt that the criminal proceedings that were instituted as against the appellant were terminated in his favour, since he was acquitted upon being found not guilty and acquitted under section 215 of the criminal procedure code.
24. On the issue of whether the criminal proceedings were instituted by the respondent's, the 1st to 5th respondents' case was that other than reporting a crime and testifying in court, they did not undertake any investigations and/or prosecute the subsequent criminal case filed in court. That was undertaken by the police, who had the right to investigate any crime reported and charge the alleged suspects based on evidence gathered after investigations. I have myself subjected the evidence adduced to scrutiny and I am unable to find any allegation or evidence that the 1st to 5th respondents undertook any role in the matter save for reporting the damage to their property and subsequently testifying in court as witnesses in the criminal case. The 6th and 7th respondent's agents on the other hand had the powers under *the constitution*, *National police service Act* and Office of the Director of Public Prosecution Act to investigate, arrest, file charges and prosecute any criminal complaint and therefore cannot be faulted for simply carrying out their duty.
25. As to whether the Appellant demonstrated that the prosecution was instituted without reasonable and probable cause, it should be noted that In *James Karuga Kiiru v Joseph Mwamburi and 3 others*, NRB C.A No. 171 of 2000, the court held:

“To prosecute a person is not prima facie tortuous, but to do so dishonestly or unreasonably is. And the burden of proving that the prosecutor did not act honestly or reasonable lies on the person prosecuted.”
26. The Appellant was charged with the offence of Malicious damage to property contrary to section 339(1) of the penal code. The section provides that “Any person who wilfully and unlawfully destroys any property is guilty of an offence, which, unless otherwise stated, is a misdemeanour, and is liable, if no other punishment is provided, to imprisonment for five years”.
27. The key ingredients of the offence of malicious damage to property, therefore, includes;
 - a. Ownership of the property by the complainant;
 - b. Damage or destruction of property; and
 - c. Linkage of the damage to the accused person.
28. The parties herein failed to file the entire proceedings of Mavoko CMCR No 1092 of 2013, but from the final judgement passed, which was filed by the Appellant under the supplementary record of Appeal the court can glean that the 1st to 5th respondents were trustees of Athi River slum dwellers Association, which owned land parcel Mavoko Town Block No 3 /2347. On 22.08.2013, the 1st to 5th respondents while undertaking their duties as trustees of the said organisation, accompanied by surveyors undertook an exercise of sub dividing the suit parcel and placing bacons on the sub divided portions. The following day when they went back on site, they found that said bacons had been uprooted and were damaged. The 1st to 5th respondent's evidence was collaborated by PW6 one Titus Mwangi Kavoi, the surveyor who undertook the said work and PW7 Inspector Joseph Ngaira, who also visited the crime scene and documented the same.



29. The evidence of ownership of the suit property and destruction of bacons placed therein was sufficiently proved. PW2 Benjamin Musyoki Mutua and PW8 Peter Kyalo also testified that they saw the Appellant as being one of the persons in the large group of people, who participated in uprooting the bacons placed using jembe's and hammers. From the above, it is clear that there was reason to believe that the 1st respondent did participate in commission of the offence and therefore this court considers that, there existed reasonable and probable cause the basis upon which, prosecution as against the appellant was instituted.
30. Finally, on whether the prosecution was actuated by malice. The element of proving malice is the epitome and centre piece of elements to be proved for a tort of malicious prosecution to be allowed. Blacks law Dictionary defines the term malice as, "the intent without justification of excuse, to commit a wrongful act; the reckless disregard of the law or of a person's legal rights; ill will wickedness of heart."
31. In the Kagane's (Supra) it was held that;
- "The plaintiffs have further to prove that the prosecution was instituted with malice on the part of the prosecutor King. In this connection, malice means that the prosecution was motivated by something more than a sincere desire to vindicate justice"
32. Order 2 rule 2 of the Civil procedure Rules required that a person who alleges a condition of mind such as malice, provides particulars of such malice in his/her pleadings. The appellant failed to particularize the facts constituting malice as against the 6th and 7th respondent and that in my view was fatal as they were the ones who carried out the investigations, arrest and prosecution of the Appellant. See *Gitau v East African Power lighting co Ltd.* (1986) KLR 365.
33. Further, the appellant did not place any evidence before the trial court to show that the 6th and 7th respondents' action were motivated by a fact other than to ensure justice is served based on the complaint made. The appellant alluded to the fact that the criminal case was instituted to despite having knowledge that Machakos ELC case No 75 of 2013 had been filed at the high court. But as rightly pointed out by the 1st to 5th respondent's, filing of the civil case was not a bar on investigations and institution of criminal proceedings, where facts supported the same. Section 193A of the criminal procedure code, Cap 75 laws of Kenya also expressly provides that both processes can run concurrently. See *Amir Lodge Ltd & another v Mohammed Omar Sheriff & another* (2022) eKLR.

E. Disposition

34. The upshot having made the above analysis on the evidence adduced, I do find that this appeal is lacks merit and dismiss the same with costs to the 1st to 5th respondents.
35. The costs of this Appeal are awarded to the 1st to 5th respondent and the same are assessed at Kshs.200,000/= all inclusive.
36. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 16TH DAY OF SEPTEMBER, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 16th day of September, 2024.

In the presence of: -



No appearance for Appellant

Mr. Sila for Respondents

Susan/Sam Court Assistant

