



**Otipi v Olumbe & another (Civil Appeal E045 of 2022)
[2024] KEHC 10543 (KLR) (3 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10543 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E045 OF 2022
WM MUSYOKA, J
SEPTEMBER 3, 2024**

BETWEEN

DIXON MBARIE OTIPI APPELLANT

AND

JAPHETH OLUMBE 1ST RESPONDENT

HON ATTORNEY GENERAL 2ND RESPONDENT

(An appeal arising from the judgment and decree of Hon. Mrs. Lucy Ambasi, Chief Magistrate, CM, delivered on 22nd November 2022, in Busia CMCCC No. 136 of 2019)

JUDGMENT

1. The suit, at the primary court, was initiated by the appellant, against the respondents, for compensation, for malicious prosecution, with respect to a criminal prosecution in Busia CMCCRC No. 781 of 2017, on charges of forgery, fraud, obtaining money by false pretences and possession of public stores, all of which terminated with his acquittal. The case by the appellant was that the charges were founded on a false and malicious report, and poor investigations.
2. The 1st respondent filed a defence, in which he denied liability, arguing that he made a report to the police, which was genuine and justified, and the same was investigated and charges preferred. He averred that the decision to prefer charges entirely rested with the police, and not him, and that the suit was orchestrated by the appellant in a bid to intimidate him from pursuing justice. The 2nd respondent, in its defence, averred that a complaint was filed with the police, it was investigated, a probable and reasonable suspicion was drawn, that the appellant had committed an offence, the police exercised their statutory duties in arresting him and arraigning him in court, and that his subsequent prosecution was without any malice.



3. A formal hearing was conducted, where only the appellant testified. The respondents called 2 witnesses. In the end, a judgment was delivered on 22nd November 2022, where the suit was dismissed, on grounds that the case was not proved on a balance of probability.
4. The appellant was aggrieved, hence the instant appeal. The grounds, in the memorandum of appeal, dated 15th December 2022, revolve around the trial court delivering a judgment that was against the weight of the evidence tendered; failing to find that the appellant had proved his case to the required standard; extraneous matters were considered; and pertinent issues were not considered.
5. Directions were given on 26th February 2024, for disposal of the appeal by way of written submissions. There has been no compliance, for neither of the parties filed written submissions.
6. The case before the trial court was founded on the tort of malicious prosecution. Case law, as stated in *Egbema vs. West Nile District Administration* [1972] EA 60 (Sir William Duffus P, Law Ag. VP & Lutta JA), *Kagane and others vs. Attorney-General and another* [1969] EA 643 (Rudd, J), *Katerregga vs. Attorney General* [1973] EA 287 (Mead, J), *Murunga vs. Republic* [1976-80] 1 KLR 1251 (Cotran, J), among others, is to the effect that the ingredients for the tort of malicious prosecution, and which any claimant for damages or compensation for that tort must prove, are: the prosecution was initiated by the defendant or defendants, it terminated in favour of the plaintiff, it was initiated without reasonable and probable cause, and it was instituted with malice.
7. In *Kagane and others vs. Attorney-General and another* [1969] EA 643 (Rudd, J) and *Murunga vs. Republic* [1976-80] 1 KLR 1251 (Cotran, J) the court defined about what constitutes reasonable and probable cause. It was said that it is about the guilt of the accused person being based on reasonable grounds, and that there would be absence of reasonable and probable cause where a reasonable and cautious person would not have been satisfied that there was a proper case to be put before the criminal court. The person alleging malicious prosecution, must place evidence or facts before the civil court, to demonstrate that the case that the defendants had placed before the criminal court did not have any reasonable or probable cause, and that it was on that account that the prosecution failed. An acquittal by itself is not adequate proof of lack of a reasonable and probable cause. The plaintiff must go beyond the acquittal, and present material designed to explain why the prosecution terminated with his acquittal. The mere fact that the prosecution failed, without more, will not do.
8. The foundation for the tort of malicious prosecution is malice. There ought to be evidence to demonstrate that the prosecution was not about pursuit of justice, but was designed to achieve some wrongful or improper intent or motive. The standard meaning of malice is spite, invective, ill-will, wrongful motive, wickedness, among others. It refers to an intent to commit a wrongful act, or to act with reckless disregard of the law or the legal rights of another. Malicious prosecution is the institution of proceedings against a person for an improper purpose, or from wrongful and improper motives. See [*Black's Law Dictionary*](#), Tenth Edition, Thomas Reuters, 2009, 1101, and 1102; [*Nzoia Sugar Company Limited vs. Fungututi*](#) [1988] KLR 399 (Platt, Apaloo JJA & Masime Ag JA); [*Gitau vs. Attorney General*](#) [1990] KLR 13 (Trainor, J); [*Standard Chartered Bank Kenya Ltd vs. Intercom Services Ltd & 4 others*](#) [2004] eKLR (Gicheru CJ, Githinji & Onyango-Otieno JJA) and [*Peter Kituku Ngilu vs. Attorney General*](#) [2021] eKLR (Riechi, J).
9. So, what happened here? Did the appellant demonstrate that his prosecution was not for probable cause, and was actuated by malice? I have perused both the plaint, the witness statement and the oral testimony in court, and I have noted that the appellant made no effort to demonstrate that the criminal prosecution was malicious, in terms of it being driven by spite or ill-will, or some other wrongful or improper motive, or that it was designed to serve some improper or wrongful purpose, and that the criminal prosecution did not have any probable or reasonable cause. He merely presented evidence of



a criminal prosecution that terminated in his favour, and because the prosecution witnesses did not testify. He did not lead any evidence of the circumstances of the case which could have exhibited malice in the action taken by the respondents. He needed to do more than just prove that he had been arrested, charged and acquitted.

10. The burden of proof of malice and of lack of probable and reasonable cause, in cases of this nature, lies with the plaintiff, and shifts to the defendants only after the plaintiff has presented evidence of malice and of lack of probable or reasonable cause, for the defendants to explain themselves. See *Karugi & another vs. Kabiya & 3 others* [1983] eKLR (Hancox JA, Chesoni & Platt Ag JJA) and *Gichinga Kibutha vs. Caroline Nduku* [2018] eKLR (JG Kemei, J). The trial court was not in error. From the facts of this case, the appellant did not discharge that burden, and did not establish any case against the respondents to warrant any orders being made in his favour. The trial court came to the right conclusion, for the appellant had failed to establish his case to the required standard.
11. In the end, I find that the appeal herein is not merited, and I hereby disallow it. The consequence is that the appeal is dismissed in its entirety. Each party shall bear its own costs. It is so ordered.

JUDGMENT IS DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 3RD DAY OF SEPTEMBER 2024

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Ashioya, instructed by Ashioya & Company, Advocates for the appellant.

Mr. Wangalwa, instructed by Wangalwa Oundo & Company, Advocates for the 1st respondent.

Mr. Tarus and Mr. Juma, instructed by the Honourable the Attorney General, for the 2nd respondent.

