



**Mehta Electricals Limited v Kahaso & 2 others (Civil Appeal
E226 of 2023) [2024] KEHC 16977 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 16977 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E226 OF 2023
F WANGARI, J
OCTOBER 11, 2024**

BETWEEN

MEHTA ELECTRICALS LIMITED APPELLANT

AND

NICHOLAS S'NZANGA KAHASO 1ST RESPONDENT

THE OFFICE OF THE ATTORNEY GENERAL 2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION 3RD RESPONDENT

*(Being an appeal from the decision of the Chief Magistrate Court at Mombasa
(Hon. R.N. Akee) delivered on 27th July, 2023 and amended on 18th August, 2023)*

JUDGMENT

1. This Appeal arises from a Judgement and delivered on 27th July, 2023 and amended on 18th August, 2023 by Hon. R.N. Akee, Senior Resident Magistrate in Mombasa Civil Suit No. E055 of 2021.
2. The Appellant filed this Appeal and preferred the following grounds in the Memorandum of Appeal.
 - a. That Learned Magistrate erred both in law and in fact by failing to appreciate that the mere fact that the Appellant made a complaint to the police regarding the theft as its stores was not in itself evidence of malice on the Appellant's part;
 - b. The Learned Magistrate erred in law and in fact in failing to appreciate that the Appellant's complaint made to the police did not specifically target or identify the Plaintiff and could not therefore be construed in the circumstances to have been malicious;
 - c. The Learned Magistrate erred in law and in fact by considering but ultimately disregarding binding case law from Superior Courts which restated the legal position that the fact that a complaint had been lodged with the police must result in the prosecution of an individual as



this is an independent decision taken by the prosecutor upon evaluating the evidence gathered by independent police investigators and therefore, malice cannot be imputed on the Appellant for merely having made the complaint to the police;

- d. The Learned Magistrate erred in law and in fact by evaluating whether the Plaintiff had established the ingredient of malice as against the Appellant only as opposed to making the evaluation as against all the Defendants in the suit;
 - e. The Learned Magistrate erred in law and in fact by impliedly holding that the Appellant had acted maliciously in making the complaint to the police without any evidence to substantiate this finding;
 - f. The Learned Magistrate erred in law and in fact in completely disregarding all the testimony and evidence on record which disproved the allegation that the Plaintiff's prosecution was actuated by malice;
 - g. That the Learned Magistrate erred in fact and in law by finding the Appellant jointly with the 2nd and 3rd Defendants for malicious prosecution of the Plaintiff without any evidence to substantiate the Appellant's liability and after acknowledging that the Appellant played no role in the Plaintiff's prosecution;
 - h. That the Learned Trial Magistrate erred both in law and fact by finding that the Plaintiff had proved his case on a balance of probability against the evidence on record;
 - i. The Learned Magistrate erred in law and in fact by awarding the Plaintiff general damages for malicious prosecution in the sum of Kshs. 500,000/= which was exaggerated and exorbitant in any event.
3. It thus prayed that that the appeal be allowed and the judgement entered against the 1st Defendant (Appellant herein) in Mombasa CMCC No. E055 of 2021, Nicholas D'zanga Kahaso v Mehta Electricals Limited and 2 Others by the Honourable Noelene Akee on 27th July, 2023 and amended on 18th day of August, 2023 be and is hereby set aside and that the costs of the trial court be awarded to the Appellant together with interest at Court rates from 27th July, 2023 until payment in full.
 4. Directions were taken to have the appeal disposed of by way of written submissions. None of the parties complied with the court's directions and thus this judgement is being delivered in the absence of parties' submissions.

Analysis

5. This Court has carefully considered the Record of Appeal and the law and the following issues falls for this Court's determination: -
 - a. Whether malice was proved;
 - b. Whether the Trial Court erred in awarding Kshs. 500,000/= in general damages; and
 - c. Who bears the costs?
6. 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 issue or issues in controversy. Except however, that it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies.



7. This was aptly stated by the Court of Appeal in the case of *Selle & Another v Associated Motor Board Company Ltd.* [1968] EA 123 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.”

8. 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 in its findings.
9. In his plaint dated 21st January, 2021 and filed on even date, the 1st Respondent sought for a raft of reliefs among them damages and costs for the reasons that he had been maliciously prosecuted by the Appellant and the 2nd and 3rd Respondents. The matter having been fully heard was determined in favour of the 1st Respondent and an award of Kshs. 500,000/= was made. This is what precipitated the present appeal.
10. The Plaintiff called one witness that is himself. He testified to the effect that he was the Appellant’s employee and was arrested over an alleged theft that occurred at the Appellant’s premises. He stated that he was not the person in charge of the structure where the theft took place and that he was arrested with two others. He equally produced documents in support of his case.
11. On cross examination, he confirmed that the investigations were not carried out by the Appellant but it was the police who conducted the investigations. That marked the close of the 1st Respondent’s case.
12. On its part, the Appellant called one witness, one Kiran Budha, its manager. He confirmed that he was aware of the criminal proceedings leading to the case before court. He stated that the Appellant did not carry out investigations but instead was done by the police. On cross examination, he stated that he only reported the theft to the police and denied instigating the 1st Respondent’s arrest.
13. He reiterated that the police carried out investigations before making arrests and that the police interrogated some of the employees. He confirmed that they did not have CCTV cameras on the premises and that the 1st Respondent was not found in possession of the stolen goods. On re-examination, he stated that the Appellant did not influence the 1st Respondent’s arrest.
14. On the first issue for determination, 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.
15. 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. The elements of



the tort of malicious prosecution have been discussed in various authorities including *Murunga v The Attorney General* (1976-1980) KLR 1251 where Cotran, J listed them as follows: -

- a. That a prosecution was instituted by the defendant or by someone for whose acts he is responsible.
 - b. That the prosecution terminated in the Plaintiff's favour.
 - c. That the prosecution was instituted without reasonable and/or probable cause.
 - d. That the prosecution was actuated by malice.
16. Instructively, all the elements apply conjunctively and must all be proven in order to successfully claim for damages for malicious prosecution. (See the case of *Attorney General v Peter Kirimi Mbogo & Another*, Meru Civil Appeal 52 & 56 of 2020 (Consolidated) [2021] eKLR).
17. On the first element, it is not in dispute that the Appellant through its representative made a complaint at Nyali Police Station concerning theft and it is from this complaint that the 1st Respondent was arrested and charged in Shanzu SPMC Criminal Case No. 264 of 2019.
18. On whether the prosecution terminated in the 1st Respondent's favour, though the judgement in the criminal case was not included in the Record of Appeal, it is evident from parties' submissions before the Trial Court that the 1st Respondent was acquitted under section 215 of the [Criminal Procedure Code](#). The court found that the prosecution failed to prove the case against the 1st Respondent and two others beyond reasonable doubt.
19. On whether the prosecution was instituted without reasonable and/or probable cause, in the case of *Hicks v Faulkner* [1878] 8 Q.B.D 167 at 171, Hawkins J held as follows with respect to 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...”
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. In his own testimony, the 1st Respondent confirmed that the Appellant did not carry any investigations. It is the police who investigated the matter and they were satisfied that an offence had been committed warranting the arraignment of the 1st Respondent and two others in court.
23. It is not in dispute that there was theft in the Appellant’s premises and which theft resulted to loss of cables valued at Kshs. 1,549,336.60/=. Therefore, I hold that there was reasonable or probable cause to lodge the criminal trial. The court placed the 1st Respondent and two others on their defence meaning that a prima facie case had been established.
24. On whether the prosecution was actuated by malice, in *Nzoia Sugar Company Ltd v Fungututi* [1988] KLR 399, the Court of Appeal held as follows: -
- “...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...”
25. At paragraph 16 of the Trial Court’s judgement, the court observed as follows: -
- “...I have not seen evidence that show malicious intent on the part of the 1st Defendant. In malicious, as the label implies, is an intentional tort that requires proof that the 1st Defendant’s conduct in setting the criminal process in motion was fueled by malice...”
26. Further, at paragraph 18 of the judgement the court observed as follows: -
- “...According to the facts of the case, the prosecution made the decision to file criminal charges against the Plaintiff. The averments by the 1st Defendant were not controverted; neither was proof adduced Plaintiff and the 1st Defendant was complicit in investigating the theft at the Defendant’s premises...”
27. I have produced the above excerpts of the judgement to demonstrate that the Trial Court having found as above, it was not open for it to make any award in favour of the 1st Respondent. The only order that rendered itself was a dismissal of the claim.
28. This is a reversible error which this court will proceed to correct. Based on the foregoing discourse, I find merit in the appeal and I proceed to allow the same.
29. On costs, the same follows the event. Though the appeal has succeeded, this court reserves its discretion as to the award of costs. I order that each party bear own costs.
30. The upshot of the foregoing is that the court renders itself as hereunder: -



- a. The Appeal has merits and the same is allowed in terms that the Trial Court's judgement delivered on 27th July, 2023 and amended on 18th August, 2023 is set aside and substituted with an order dismissing the 1st Respondent's case.
- b. Each party to bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 11TH DAY OF OCTOBER, 2024.

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F. WANGARI

JUDGE

In the presence of;

N/A for the Appellant

N/A for the Respondents

Ms. Salwa, Court Assistant

(File released to the High Court civil registry. Parties be notified)

