**Kimama v Attorney General & another (Civil Appeal E086 of 2021) [2023] KEHC 66 (KLR) (16 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 66 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CIVIL APPEAL E086 OF 2021**

**RE ABURILI, J**

**JANUARY 16, 2023**

**BETWEEN**

**JOHN KIMAMA ..... APPELLANT**

**AND**

**ATTORNEY GENERAL ..... 1ST RESPONDENT**

**KENYA PIPELINE COMPANY LIMITED ..... 2ND RESPONDENT**

***(Being an appeal from the judgement of Hon E.M. Onzere PM in Tamu PMCC No. 65 of 2018 delivered on 8th June, 2021)***

## JUDGMENT

1. The appellant sued the respondents for malicious prosecution seeking compensation arising therefrom. In his plaint, he pleaded that he was arrested at Nairobi Central Business District by police officers who took him to Central Police Station using the 2nd respondent's motor vehicle. On the same night, he was transferred to Muthangari Polie Station and further to Ahero Police Station the following day.

2. From Ahero Police Station, he was taken to Kisumu Police Station on July 9, 2017 from where he was informed that he was being held for operating an illegal petroleum business which he had no idea about. He was shown documents *inter alia* a lease agreement and a Transnational Bank cheque book and ordered to append his signature on a piece of paper 30 times and to write a cheque book. After this, he was taken to Koru Police Station and later to court on July 10, 2017. Upon request by the prosecution, the appellant was detained in the cells until July 17, 2017 when he was formally charged and subsequently released on bond.

3. It was his case that the confinement in police cells subjected him to serious stomach complications, general body complications, weakness, ill health, anguish, stress and trauma. He further pleaded that

he appeared in court severally until discharge when the prosecution admitted it had no evidence. He termed the entire prosecution capricious, unwarranted, false and malicious.

4. The respondents entered appearance and filed their separate statements of defence. The 1st respondent on his part denied the claim and averred that if the appellant was arrested and arraigned, the same was due to reasonable and probable offence.

5. On the 2nd respondent's part, the claim was denied and contended that the charges preferred against the appellant were lawful and made after investigations showed that the appellant had engaged in siphoning petroleum products leading to massive spillage. That this was informed by the fact that his identity card had been found at the scene. That the police acted within the powers bestowed by the law.

6. In the ensuing testimony before the trial court, the appellant testified as PW-1 stating that he was arrested by 4 police officers while travelling to Mombasa. That he was ferried by a motor vehicle belonging to the 2nd respondent to Central Police Station and later to various police stations. He denied engaging in oil business or operating a bank account at transnational bank. That as a result of the arrest, he developed typhoid and H-pylori due to drinking dirty water while incarcerated. He blamed the police for arresting him before investigations had been done.

7. Wilkinson Kithinji Gitwiga, the 2nd respondent's senior security officer testified as DW-1 stating that on June 26, 2016, one Grace Akinyi, a resident of Koru was awakened by smell of petroleum products. She went out and found her house surrounded by leaked petroleum products leaking from a nearby petrol station owned by one Polycarp Ochola who had leased to the appellant. Upon investigations, an illegal connection was discovered on a line carrying diesel to Kisumu. The police launched investigations which led to the appellant's arrest on the basis of a lease agreement he had allegedly entered into with the owner of the petrol station. The appellant's identity card was used in executing the lease and opening the bank account.

8. The learned trial magistrate considered the evidence and dismissed the appellants claim thus this appeal in which the appellant raises the following grounds of appeal:

    a. The learned trial magistrate erred in law and fact by holding that a discharge of the appellant under Section 87(a) of the *Criminal Procedure Code* was not a justification to pursue a claim of malicious prosecution against the respondents.

    b. The learned trial magistrate erred in law and fact by holding that it was lawful for the police to arrest the appellant, arraign and charge him in court with a criminal offence and thereafter commence investigations into the offence.

    c. That the learned magistrate erred in law and fact by speculating on how the police conducted investigations into the arrest of the appellant when no evidence to support such conclusions form the court was led by the 1st respondent.

    d. The learned trial magistrate erred in law and fact by generally misapprehending the principles surrounding the tort of malicious prosecution.

9. By directions of the court, the appeal was disposed of by way of written submissions. Both parties filed their submissions.

10. For the appellant it was submitted that the 2nd defendant set the law in motion, acted without reasonable and or probable cause and finally that the criminal prosecution was instituted maliciously. That the piece of evidence linking the appellant to the offence was the identity card which he claimed had gotten lost and the loss was reported at Buru Buru Police Station, Nairobi.

11. That the respondents failed to appreciate that at the time of the offence, he was in Nairobi and not at the scene of crime. It was further submitted that the 2nd respondent took an active role in the investigations and failed to adduce reasons before the court why it discontinued the criminal prosecution.

12. It was further submitted that Kshs 800,000/- is sufficient exemplary damages and Kshs 2,000,000/- general damages.

13. The appellant cited the following cases: *Mbowa v East Mengo District Administration* [1972] EA 352, Brutus Nandwa Wa Ambunya v Inspector General of Police & another [2018]eKLR, *Gitau v Attorney General* [1990] KLR 13, Kagane & others v A G & another [1969]EA 643 and *K L v Standard Limited* [2014] eKLR.

14. The 1st respondent on his part submitted on the 1st ground of appeal that for one to succeed in an action based on malicious prosecution, he has to establish the grounds set out in Kagane & others (*supra*) and that an acquittal is not enough to prove the claim.

15. On whether there existed a reasonable and probable cause, it was submitted that the process was set in motion on the basis of suspicion that the appellant engaged in dealing in petroleum products without a license which information, the 2nd respondent passed to the 1st respondent leading to his arrest. That the evidence on record did not establish that the respondents acted without reasonable and probable cause. On this issue, the 1st respondent relied on the cases of *Stephen Gachau Githaiga & another v Attorney General* [2015]eKLR, *Simba v Wambani* [1987] KLR 601, *Susan Mutheu Muia v Joseph Makau Mutua* [2018]eKLR, *Music Copyright Society of Kenya v Tom Odhiambo Ogowl* [2014]eKLR and *Nzoia Sugar Company Limted v Fungututi* [1988] KLR 399.

16. On the 2nd ground of appeal, it was submitted that the police have powers under Section 58 of the *National Police Service Act*, 2011 and Section 75 of the *Criminal Procedure Code* to make arrest without any order or warrant. That the appellant's arrest was informed by the use of his identification card in leasing the petrol station. Further, that the police officers were not aware that his identity card had been stolen.

17. The 2nd respondent submitted on the issue of whether criminal proceedings had been instituted by the 2nd respondent, that the decision to arrest and prosecute the appellant was made by the police officers and the director of public prosecutions of which the 2nd respondent is neither of the two entities. That there was no malice on the 2nd respondent's part.

18. On whether the respondents acted without reasonable and or probable cause, the 2nd respondent relied on the cases of *James Karuga Kirru v Joseph Mwamburi & 3 others* (2001) eKLR and S*imba v Wambani* (*supra*) for the proposition that the appellant failed to show that in reporting the incident to the police, it was actuated by malice.

19. On the issue of whether the 2nd respondent acted maliciously, it was argued that the appellant failed to show how the court process was abused and how his rights were undermined by the arrest. That there was no proof that his trial was not fair. In support of this position, the cases of James Karuga (*supra*) and *Joseph C Mumo v Attorney General & Another* [2008]eKLR were cited.

**Analysis and determination**

20. The duty of this court in a first appeal is to scrutinize the evidence afresh with a view of arriving at its own independent conclusion but giving due allowance to the fact that it did not see or hear the witnesses testify. This is the thread running across many decisions from the High Court and the Court of Appeal such as *United India Insurance Co Ltd, Kenindia Insurance Co Ltd & Oriental Fire*

*& General Insurance Co Ltd v East African Underwriters (Kenya) Ltd*[1985] eKLR, where Madan J sitting on appeal from a trial by the High Court held that:

> "The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

21. The parties' respective cases in the trial court is as summarized in the preceding paragraphs. In considering this appeal, I have paid attention to the evidence adduced by both parties and submissions from the trial court, the grounds of appeal and the rival submissions filed herein, for and against the appeal.

22. My duty therefore is to ascertain whether from the available evidence, the appellant adduced sufficient evidence to warrant the entry of judgement in his favour. It is common ground that his claim was dismissed for want of proof.

23. The tort of malicious prosecution as an actionable tort was summarized in *Mbowa v East Mengo District Administration* [1972] EA 352, where it was stated:

> "The action for 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 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."

24. The above case went further to establish the essential ingredients that one has to establish in order to succeed in such a claim as follows:

    a. 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 for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority;

    b. 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;

    c. 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

    d. 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...

25. These pre-requisites have been restated in several cases following this decision for example in *Stephen Gachau Githaiga & Another v Attorney General* [2015] eKLR, Mativo J gave the following conditions to be met by the claimant in a claim for malicious prosecution:

    a. Malicious prosecution is an intentional tort designed to provide redress for losses flowing from an unjustified prosecution. Under the first element of the test for malicious prosecution, the plaintiff must prove that the prosecution at issue was initiated by the defendant.

    b. This element identifies the proper target of the suit, as it is only those who were actively instrumental in setting the law in motion that may be held accountable for any damage that results.

    c. The second element of the tort demands evidence that the prosecution terminated in the plaintiff's favour. This requirement precludes a collateral attack on a conviction properly rendered by a criminal court, and thus avoids conflict between civil and criminal justice. The favourable termination requirement may be satisfied no matter the route by which the proceedings conclude in the plaintiff's favour, whether it be an acquittal, a discharge at a preliminary hearing, a withdrawal, or a stay.

    d. The third element which must be proven by a plaintiff – absence of reasonable and probable cause to commence or continue the prosecution – further delineates the scope of potential plaintiffs. As a matter of policy, if reasonable and probable cause existed at the time the prosecutor commenced or continued the criminal proceeding in question, the proceeding must be taken to have been properly instituted, regardless of the fact that it ultimately terminated in favour of the accused.

    e. Finally, the initiation of criminal proceedings in the absence of reasonable and probable grounds does not itself suffice to ground a plaintiff's case for malicious prosecution, regardless of whether the defendant is a private or public actor. 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. 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.

26. Applying the above settled principles, in disposing of this appeal, I will deal with the elements afore stated in that order.

27. The first is that the process was instituted by the defendant, in this case the respondents. This is not in controversy here. The genesis of the appellant's arrest is a complaint lodged by the 2nd respondent upon receiving a report from a resident of Koru One Grace who complained on smell of petroleum products on June 16, 2016. A report DExh 1 was produced detailing the steps taken by the company to the time of lodging a report with the police officers. Their investigations at the Kenya Power and Lighting Company showed the owner of the premises from where the spillage was reported as one Polycarp who had leased it to the appellant thus the arrest and his prosecution.

28. It is these set of facts that informed the arrest and the subsequent prosecution of the appellant. Obviously, the 2nd respondent would need the help of the National Police Service to conduct proper and conclusive investigations and determine whether it had gathered enough evidence to charge.

29. The report further details that upon further investigations, it was found out that the appellant's national identity card had been stolen and used by another person to further his criminal enterprise thus the withdrawal of the criminal charges against him.

30. The second element is that the defendant must have acted without reasonable or probable cause. The definition of reasonable and probable cause was given in the Kagane Case (*supra*) where it was held that:

> "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 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 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 insofar as that material is based on 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…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 judges 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…Inasmuch 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 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."

31. Having stated earlier that the report as made to the police officers emanated from a lease agreement where the appellant's identity card had been used was availed, I find that there was evidence from Kenya Power and Lighting company and the bank as well as the advocate who drafted the lease agreement which all showed that the appellant had allegedly leased the premises from which the fuel product was siphoned illegally. At that time, there was no evidence that the appellant's identity card had been stolen.

32. The evidence on record, all pointed to the appellant as a possible suspect. No evidence was availed to the contrary to sway the mind of the investigator so that it can be said that he acted without evidence and or ignored material evidence which would exonerate the appellant or that he acted with malice.

33. The third element is that the defendant must have acted maliciously in that he must have acted, in instituting criminal charges against the appellant herein, with an improper and wrongful motive.

34. From the available evidence, the charges were instigated after investigations showed massive spillage of petroleum products which led to huge losses. Initial investigations showed that the appellant allegedly owned the premises. The respondents therefore intended to punish the wrong-doer and curtail the occurrence of such conduct in future.

35. To succeed in this limb, the appellant was duty bound to show that the respondents and the police officers had some other motive other than to prevent the commission of a crime. Having perused the evidence and the legal underpinnings on the subject, I do not find evidence of such motive on the respondent's part.

36. The fourth element is that the prosecution terminated in the claimant's favour. This limb is not in issue in that the proceedings terminated in the appellant's favour after the charges against him were withdrawn under the provisions of Section 87(a) of the Criminal Procedure Code. Dexh 1 details that the matter was withdrawn when it was discovered that the appellant's identity card had been stolen earlier and used to commit the offence.

37. However, it has been stated time and again in judicial circles that the termination of criminal charges alone cannot be a proof of malicious prosecution, it was held in *Nzoia Sugar Company Ltd v Fungututi* [1988] KLR 399 it was held that:

> " Acquittal person 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.

38. Having stated as above, I find that from the evidence adduced and circumstances of this case, the respondents had every reason to believe that the appellant committed the offence, after investigations linked him to the offence, leading to his arrest. It was only after discovery that his national identity card had been used without his consent to enter into transactions that the prosecution sought to withdraw the charges against him, which act I find to have been in order. There is no evidence that the respondents acted maliciously and or that the process leading to the appellant's arrest and prosecution before termination of the charges was actuated by malice. There is evidence by the appellant that the real perpetrators of the offence were arrested and charged.

39. The upshot of the above is that I find this appeal to be devoid of any merit. I dismiss it and uphold the trial court's order on dismissal of the suit.

40. I however order that each party shall bear their own costs of this appeal and of the case before the trial court. This is because the respondents are public entities and, in my view, the appellant already suffered

enough following the evens leading to his arrest and prosecution, due to acts of another criminal who stole his national identity card and used it to commit crimes.

41. File closed.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 16TTH DAY OF JANUARY, 2023**

**R E ABURILI**

**JUDGE**