



REPUBLIC OF KENYA



KENYA LAW
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**Chege & 2 others v Attorney General (Civil Appeal E053 of 2021)
[2023] KEHC 958 (KLR) (15 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 958 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E053 OF 2021
PJO OTIENO, J
FEBRUARY 15, 2023**

BETWEEN

JAMES MWANGI CHEGE 1ST APPELLANT

FRANCIS KABUGI MWANGI 2ND APPELLANT

WANDAGI CHEGE 3RD APPELLANT

AND

THE ATTORNEY GENERAL RESPONDENT

*(Being an appeal from the Judgment of Hon. B. Ochieng (CM) in
Kakamega CM's Civil Case No. 230 of 2008 delivered on 1st October 2021)*

JUDGMENT

1. Before the trial Court was a suit by the Appellants seeking both general and special damages on account of alleged damage suffered when they were arrested, charged and arraigned in court facing the charges of murder. The three stood that trial and were subsequently acquitted and set free after a full trial. It was pleaded that the arrest, detention in custody and the prosecution was accentuated by malice and particulars therefore given to include pursuing the arrest and prosecution without a probable cause and without having carried out proper investigation.
2. The claim was resisted by the Defendant by a statement of defence dated October 3, 2016 in which only the description of the parties was admitted but all other allegations of arrest, detention, prosecution, acquittal and the effect of such unlawful acts were denied and Appellants invited to very strict proof thereof. In the alternative it was pleaded that if the Appellants were arrested, charged and prosecuted but later acquitted, the arrest and prosecution were a consequence of a complaint lodged with the police which was investigated and a probate and reasonable belief made that a cognizable offence had been committed and therefore the actions were devoid of malice in that the police and prosecution



- were conducting lawful and legal duty of maintaining order and preventing crime. It was therefore urged that the claim had no merit and deserved being dismissed with costs.
3. Before the trial at the magistracy, only the Appellants gave evidence by adopting the witness statements filed, producing the documents file and being cross-examined. The record at trial show that the evidence by the three was identical and similar that all were arrested on the same day, arraigned in court and were remanded for a period of two months before they were released for purposes of an inquest being conducted. After the inquest they were re-arrested and charged afresh but the prosecution ended in their favour by being acquitted. The documents produced were:-
 - i) Charge Sheet dated 25/2/2003 – P.Exh. 1
 - ii) Assessors Summing Up Report dated 21.2.2003 – P.Exh. 2
 - iii) Judgment dated 17.5.2007 – P.Exh. 3
 - iv) Notice to the A.G. – P.Exh. 4 (a) and
 - v) Second Notice dated 13.3.2008 – P. Exh. 4 (b)
 4. On cross-examination PW1, 1st Appellant, told the Court that the charge and prosecution resulted from investigations in which a total of eleven (11) witnesses were called and that prior to the case he had not met the police officers involved in the case and lastly, that there was indeed a complaint lodged with the police.
 5. He added that as a consequence of the arrest and prosecution he was in custody for a period in excess of four years. He concluded by saying that in the Judgment acquitting him the Judge blamed the prosecution.
 6. The evidence by 2nd and 3rd Appellants were a reiteration of that by the 1st with the variation being that the 2nd Appellant did not know who made a complaint to the police and was not told the reason for the arrest but he admitted that he was represented by an advocate to whom he paid Kshs 26,000/= as fees. For the 3rd Appellant he said that he was related to the other Appellant, was a business man selling second hand shoes and also a part-time student. As a result of the arrest and prosecution, he was cast in the bad light of having killed another.
 7. In cross-examination, 3rd Appellant told the Court that a complainant made a report to the police leading to the arrest and prosecution and that his advocate at the trial was paid by Government. As a consequence of the prosecution, he asserted that his reputation had been damaged and was denied Certificate of good conduct. The Respondent did not lead any evidence on the date set on account of inability to trace witnesses.
 8. Both sides then filed submissions which the trial Court evidently gave regard in the Judgment now challenged by this appeal. In the Judgment, the trial Court isolated five (5) issues for determination and in the end found as a fact that the fact that the Respondent initiated criminal proceedings which ended in favour of the Appellants had been proved but that whether the prosecution was actuated by malice had not proved hence Appellants were not entitled to damages sought.
 9. It was the finding by the trial Court that the Appellants had not proved that the Respondent acted against them without reasonable and probable cause but to the contrary the evidence showed that there was a reasonable and probable grounds to believe that the Appellants had committed the offence of murder hence the critical ingredient of the tort of malicious prosecution and false imprisonment had not been proved. It was also the conclusive finding by the trial Court that the tort of defamation had not been proved.



10. That Judgment aggrieved and dissatisfied the Appellants who filed the current appeal setting out twelve (12) grounds of appeal.
11. Even when so set out, the grounds pose the question whether the Appellants did discharge their burden of proof on a balance of probabilities and were thus entitled to the relief sought and not the dismissal order made by the trial Court.
12. Being a first appellate Court, the mandate is to proceed by way of rehearing and thus to re-examine and re-evaluate the evidence afresh with a view to coming to own conclusions but keeping in mind that, the Court lacks the advantage enjoyed by the trial Court of hearing and observing the witnesses testify¹. It is also to be remembered that an appellate Court ought not to disturb the factual findings by the trial Court but only where the finding is not supported by evidence or when there is a demonstrated departure or non observance of a clear and established principle of law².
13. The fact of arrest and detention as pleaded and captured in the witness statement by the Appellants was not in dispute. The only dispute was whether in effecting the arrest, the police and prosecution acted upon reasonable and probable cause or if they were actuated by ignoble, ulterior and malicious motives inconsistent with the public duty expected of their offices.
14. The termination of criminal trial by an acquittal is not, by self, a demonstration of absence of reasonable and probable cause to arrest and prosecute. The Claimant must prove spite or ill will against the prosecution or that the process was executed dishonestly and without genuine belief that the offence could have been committed. The prosecution in drawing a charge only need to believe that the facts gathered, as at the date, is sufficient to prove a case against the accused person. It is then for the Court to determine if the proof meets the standards the police are not expected to conduct a mini criminal trial before preferring charges.
15. In the proceeding at the murder trial, of the eleven witnesses who testified was PW3 who went to the scene on material day and allegedly met the 1st Appellant. There was also PW2 who testified to have recognized the voice of a member of the gang. Besides there was also the evidence by PW4 and 8 that they were at the scene and Appellant saw the 1st and 2nd Appellant there. To this Court if that evidence reflected what the witnesses told the police then a reasonable person would not be faulted for believing that an offence could have been committed.
16. In the Judgment acquitting the Appellant, the Judge said:-

“The deceased was brutally murdered. The police bungled the investigations. The evidence adduced fell short of the standard required to prove the accused guilty.”
17. Having analysed the evidence led before the Criminal Court, the court is not convinced that the prosecution’s case was unfounded. Rather the Court finds and holds that it was the required standards in a criminal trial that was not achieved. That the prosecution failed to prove the case against the Appellant beyond reasonable doubt did not by itself dictate that the accused were not in any remote way connected to the death or that the case was helplessly hopeless and was never grounded on evidence that could led a reasonable police officer in concluding that a criminal offence could have been committed.

¹ [Peter M. Kariuki v Attorney General](#) [2014] eKLR

² [Ephantus Mwangi v Dancan Mwangi](#) [1981 – 1988] 1 KAR 278



18. It is the finding of the Court that while it was the onus of the Appellants to prove that the prosecution was unreasonably pursued for motive other than vindication of criminal justice system, the three failed to discharge that burden. The effect is that the case was not proved and the fact that the Respondent opted not to lead evidence is of no help to the Appellants. The Respondents only had a duty to disprove a proved fact against it.
19. Consequently, the appeal is adjudged to have no merits and is thus dismissed with costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 15TH DAY OF FEBRUARY 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

No appearance for parties

Court Assistant: Polycap

