



**Mbuko & another v Inspector General of Police & another (Civil Suit 13 of 2016) [2023] KEHC 953 (KLR) (15 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 953 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL SUIT 13 OF 2016  
LM NJUGUNA, J  
FEBRUARY 15, 2023**

**BETWEEN**

**JAMLICK MUTHIKE MBUKO ..... 1<sup>ST</sup> PLAINTIFF**

**ESTHER GICHUGU MUTHIKE ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**INSPECTOR GENERAL OF POLICE ..... 1<sup>ST</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiffs herein filed the plaint dated the 5.01.2015 and amended on 08.01.2018 and wherein they sought for orders;
  - i. Damages for loss of income from the date of arrest until release.
  - ii. General damages for unlawful arrest, illegal confinement as well as malicious prosecution.
  - iii. Costs of the suit
  - iv. Any other relief that this Honourable Court may deem fit and just to grant.
2. The plaintiffs' case is on a claim for malicious prosecution that on or about 06.09.2009, the 1<sup>st</sup> defendant through his agents, the police officers from Kerugoya Police Station arrested the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs and detained them until 09.09.2009 when they were charged with three counts in Kerugoya Criminal Case No. 1070 of 2008. That after a trial, the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs were convicted and sentenced to serve three years imprisonment. It was their case that they were held in prison from 14.11.2011 until 07.12.2011 when the High Court released them on bail pending appeal while the 2<sup>nd</sup> plaintiff was acquitted at the end of the trial. The plaintiffs contended that their arrest was without basis



and that the same was done following poor investigations and thereafter they were unlawfully detained. They urged the court to grant their prayers as enumerated on the amended plaint.

3. The matter proceeded for hearing and at the conclusion of the trial, parties filed written submissions.
4. The plaintiffs submitted on three issues to wit: whether the plaintiffs made a case for malicious prosecution against the defendants; whether the plaintiffs are entitled to the reliefs sought herein and the costs of the suit.
5. On whether the plaintiffs made out a case for malicious prosecution, it was submitted that going by the evidence herein, it is clear that the arrest of the plaintiffs was instigated by the police whose actions the defendants are entirely responsible for. That on whether the plaintiffs were acquitted, it was submitted that going by the judgment delivered on 14.10.2009, the 2<sup>nd</sup> plaintiff was acquitted under section 215 of the CPC while the 1<sup>st</sup> plaintiff was acquitted by the High Court at Embu in Criminal Appeals No. 13 and 14 of 2010 (consolidated) on 17.11.2011. It was submitted that the same was terminated in favour of the plaintiffs. On the third principle of whether there was a probable/reasonable cause, it was submitted that the arrest and detention was without basis in law as it was based on poor investigations as there was no legal grounds for arresting, prosecuting and unlawfully detaining them. Further, that the arrest was actuated by malice given that the plaintiffs are a couple and that the only evidence was that the complainant was able to link them with the registration number of the motor vehicle that kidnapped her.
6. On whether the plaintiffs are entitled to the reliefs sought, it was submitted that the plaintiffs pleaded loss of income of Kshs. 30,000/= and Kshs. 40,000/= for the 1<sup>st</sup> and 2<sup>nd</sup> plaintiff respectively but was not strictly proven by way of evidence due to their mode of operation/business. That, however, the plaintiffs were earning from their businesses and there was clear evidence that their income was affected after their arrest and detention. Reliance was placed inter alia on the case of *Daniel Njuguna Muchiri v Barclays Bank of Kenya Ltd & Another* [2016] eKLR where the court awarded Kshs. 200,000/= as general damages to the plaintiff who worked as a general manager in the bank. An amount of Kshs. 1,000,000/= was proposed in the case herein given that the plaintiffs were business people.
7. On costs, it was the plaintiffs' case that the defendants should shoulder the burden of the suit herein. In the end, the plaintiffs prayed that this court grants the prayers as enumerated on the amended plaint.
8. On the other hand, the defendants submitted on two issues to wit; whether the tort of malicious prosecution was established in the given scenario, and whether the plaintiffs should be awarded the cost of the suit. The defendants submitted that a tort of malicious prosecution is committed in circumstances where a defendant causes the arrest and prosecution of the plaintiff or claimant without reasonable or probable cause. Reliance was thus placed on the cases of *Muringa vs The Attorney General* and *John Ndeto Kyalo vs Kenya Tea Development Authority & Another* [2005] eKLR. That the plaintiffs herein were required to prove all the four elements of malicious prosecution but instead, only one limb was proved. That the second principle was not proved as the plaintiffs were not acquitted as they were only released on bail pending the determination of appeal. As to whether the prosecution was instituted without a reasonable and probable cause, it was submitted that the plaintiffs were arrested and charged with the offence of kidnapping contrary to section 260 of the *Penal Code* and conspiracy to commit felony contrary to section 393 of the Penal Code to which the court found that they had a case to answer and consequently found them guilty; as such, prosecution was instituted with a reasonable cause.
9. As to whether the plaintiffs proved that the prosecution was actuated by malice, it was submitted that the plaintiffs were unknown to the defendants before the arrest and, therefore, there was nothing that



would have made the defendants complain against the plaintiffs. Reliance thus was placed on the case of *John Ndeto Kyalo vs Kenya Tea Development Authority & Another* [2005] eKLR.

10. It was further submitted that *the constitution* under Articles 245 and 157 gives powers to the National Police Service to investigate crimes and to the Director of Public Prosecution to prosecute criminal cases respectively and therefore, a mere acquittal does not necessarily impute malice on the agencies. Reliance was accordingly placed inter alia on the cases of *James Karuga Kiiru vs Joseph Mwamburi & 3 Others*, Nairobi C.A no. 171 of 2000 and *James Kabindi Simba vs Director of Public Prosecution & 2 Others* [2020] eKLR. It was contended that the plaintiffs failed to present receipts before this court to support their claim on special damages and as such, the same ought not to be awarded. On costs, it was their case that special damages must be pleaded and proved before the same can be awarded by the court. The respondents relied on the case of *Hahn v Singh*, Civil Appeal No. 42 of 1983 [1985] KLR 716; therefore, this court was urged to dismiss the suit herein for the reason that the plaintiffs failed to prove their case on a balance of probability.
11. I have considered the evidence herein, and the written submissions by the parties, and I find that this court has been called upon to determine the following:
  - i. Whether the claim for damages for malicious prosecution was proved on a balance of probability.
  - ii. Whether the plaintiffs are entitled to the damages sought.
12. It is not in dispute that the complaint culminating in the prosecution of the plaintiffs was instituted by the 3<sup>rd</sup> defendant. It is also not in dispute that the appeal terminated in the plaintiffs' favour.
13. The threshold for establishing a claim for malicious prosecution was laid down in the case of *George Masinde Murunga vs Attorney General* [1979] KLR 138 as follows: -
  - i. The plaintiff must show that the prosecution was instituted by the defendant, or by someone for whose acts he is responsible.
  - ii. The plaintiff must show that the prosecution terminated in his favour.
  - iii. The plaintiff must demonstrate that the prosecution was instituted without reasonable and probable cause.
  - iv. He must also show that the prosecution was actuated by malice.”
14. As to what constitutes reasonable and probable cause, the law is clearly restated in *Simba vs Wambari* [1987] KLR 601 as follows:

“The plaintiff must prove that the setting 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”
15. It is trite that the mere fact that a person has been acquitted of the criminal charge does not necessarily connote malice on the part of the prosecutor. In the case of *James Karuga Kiiru vs Joseph Mwamburi and 3 Others*, Nrb C.A No. 171 of 2000, it was held that to prosecute a person is not prima facie tortuous, but to do so dishonestly or unreasonably is. The burden of proving that the prosecutor did not act honestly or reasonably is on the person prosecuted. [Also see *Stephen Gachau Githaiga & Another vs Attorney General* [2015] eKLR].



16. Rudd, J in the Kagane case (supra) adopted the definition of Hawkins, J in *Hicks vs Faulkner* (1878) 8 QBD 167 where reasonable and probable cause was defined as follows:

“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 any ordinary prudent and cautious man placed in the position of the accused, to the conclusion that the person charged was probably guilty of the crime imputed. This definition was relied upon also in the case of *Thomas Mboya Oluoch & another – Vs- Lucy Muthoni Stephen & another* (2005) eKLR (appellant’s list of authorities). The prosecutor must himself honestly believe in the case which he is making. The defendant (in this case the respondent) is not required to believe that the accused is guilty: it is enough if he believes there is reasonable and probable cause for a prosecution. He need only be satisfied that there is proper case to lay before the court. If the prosecution is based on information received, it was held in the Kagane case cited above that, “..... 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.”

17. In *James Karuga Kiiru vs Joseph Mwamburi & 3 Others* (2001) eKLR 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 reasonably lies on the person prosecuted.”

18. In the instant case, the plaintiffs herein were charged with the offence of Kidnapping contrary to Section 260 of the Penal Code, personating a public officer contrary to Section 105(b) of the Penal Code and conspiracy to commit a felony contrary to Section 393 of the Penal Code. They were tried and thereafter found guilty of the offences and thereafter sentenced to imprisonment for a period of three years. On appeal, their conviction was quashed and sentence set aside. The learned judge found that the evidence that the trial court relied on in convicting the plaintiffs herein could not form the basis for their conviction on the respective charges. The complainant testified on how she was kidnapped from her house on the 4.09.2008 at 5.30 a.m. The same was corroborated by PW3 and PW5, the investigating officer who testified that indeed PW1 was kidnapped at Kaitheri by four men in a motor vehicle registration number KAU 322Z and the alleged kidnappers kept her in their custody for 14 days when she managed to escape and thereafter reported at Kigumo Police Station. That while in their custody, she was gang raped by the gang members who she referred to, as Cpl. Wachira, Cpl. Gitonga and Ben Kanyi and that she recorded a statement at CID Headquarters; a P3 Form was filled and the degree of injury was assessed as harm. It was alleged that the 1<sup>st</sup> plaintiff’s motor vehicle was used by the kidnappers. The 1<sup>st</sup> plaintiff in his testimony admitted being the owner of motor vehicle KAU 322Z but stated that on the material day, he had not given it to anybody.
19. The 2<sup>nd</sup> plaintiff testified that she was arrested when she went to see the 1<sup>st</sup> plaintiff at the police station. That she had previously lent PW2 some money and that the complainant herein was unknown to her. The trial magistrate in his judgment noted that the complainant identified the 2<sup>nd</sup> plaintiff as the lady who was called at Embu Estate and that she came to the vehicle where the complainant was, but did not talk to the complainant. That the 2<sup>nd</sup> plaintiff had previously visited the home of PW2 and had threatened him together with his family if he did not pay back her money. The court noted that the data from Safaricom having not been admitted in evidence, the court could not attach any weight to



it in as much as the same showed communication with some numbers which PW2 had used to receive calls from during the time the complainant had been kidnapped.

20. It is trite that the police are expected to be professional in the conduct of their investigations and they ought not to be driven by malice or other ulterior motives. It is trite that the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate a complaint before they prefer charge(s) against a person suspected of having committed an offence. Starting from the above premise, can it be said that there was no probable cause in the arrest and subsequent prosecution of the plaintiffs herein? The trial magistrate in his judgement noted that PW1 and PW3 had ample time to see the plaintiffs herein and that the complainant could not have been so wrong in identifying the persons who kidnapped her. Further, he noted in his judgment that from the entire evidence, he was convinced that the 2<sup>nd</sup> plaintiff herein was the mastermind of the whole saga.
21. It is not required of the police that they must have tested every possible relevant fact before action is taken against a suspect. Their duty is not to ascertain whether there is evidence to convict a suspect, but whether there is a reasonable and probable case for prosecution. In the present case, I hold the view that the arrest and arraignment of the plaintiffs herein was justified; I say so for the reasons already stated in the judgment herein in particular the testimony of the complainant PW3 and that of the investigating officer. While presenting the case herein, the plaintiffs did not prove any malice on the part of the police or that there was lack of probable or reasonable cause in their prosecution. The mere fact that they were released on appeal is not an express ticket to prove their case of malicious prosecution. An acquittal is just but one of the elements of the tort of malicious prosecution.
22. In the premises, therefore, I hold the view that there was reasonable and probable cause for the arrest and prosecution of the plaintiffs.
23. On whether the prosecution was actuated by malice, In *Joseph C. Mumo vs Attorney General & Another* (2008) eKLR 'malice' was defined as;

“... prosecution for a reason other than the vindication of justice...”
24. Malice is hence demonstrated when an action is taken for some improper and wrongful purpose or interest to use the legal process in question for some other reason than its legally appointed. Malice, however, can either be express or can be implied from the circumstances surrounding the prosecution by imputation. This was so rightly held in the Kagane case (supra) thus:-

“.....want of reasonable and probable cause to be taken into consideration as being some evidence of malice...”
25. Having found that there was reasonable and probable cause that led to the arrest, confinement and prosecution of the plaintiffs, it naturally follows that there was equally no malice that was demonstrated on the part of the respondents or the relevant government agencies in undertaking the arrest, confinement and prosecution of the plaintiffs.
26. Having found that the claim for malicious prosecution has not been proved on a balance of probabilities, I find no reason to determine whether the appellants herein deserve the prayers on damages and costs as prayed.
27. The upshot of the above is that the suit herein is devoid of any merit and it is hereby dismissed with costs to the defendants.



28. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 15<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**L. NJUGUNA**

**JUDGE**

..... Applicant

..... Respondents

..... Ex Parte Applicant

