



Kenya Power & Lighting Company Limited & another v Onsare (Civil Appeal 78 of 2021) [2023] KEHC 1885 (KLR) (16 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1885 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL 78 OF 2021
WA OKWANY, J
MARCH 16, 2023**

BETWEEN

KENYA POWER & LIGHTING COMPANY LIMITED 1ST APPELLANT

THE ATTORNEY GENERAL 2ND APPELLANT

AND

ISAIAH NDEGE ONSARE RESPONDENT

(Being an Appeal against the Judgment/Decree of Hon. W. C. Waswa (Mr.) – RM Nyamira dated and delivered at Nyamira on the 13th day of September 2021 in the original Nyamira Chief Magistrate’s Court Civil Case No. 33 of 2020)

JUDGMENT

1. The Respondent herein, Isaiah Ndege Onsare, who was the Plaintiff before the Lower Court, sued the Appellants herein through the Plaint dated 5th March 2020 seeking both General and Special Damages for malicious prosecution together with costs.
2. The Respondent’s case, before the Lower Court, was that at the instance of the 1st Appellant and upon the legal advice from the 2nd Appellant, he was on 4th July 2014 arrested and arraigned in Nyamira Court vide Criminal Case No. 748 of 2014 where he was charged with the offence of malicious damage to property, unqualified disconnection of electrical power and theft. The Respondent states that he was on 2nd March 2017 acquitted under Section 210 of the Criminal Procedure Code.
3. The Respondent’s case was that his arrest, detention, torture and subsequent prosecution was actuated by malice with the intent to portray him as a crook, a criminal and thief so as to scare his family members, associates and friends from associating with him.
4. The Defendants/Appellants filed a joint Statement of Defence dated 10th February 2021 wherein they denied all the allegations made by the Respondent in the Plaint. The Appellants maintained that if



indeed the Respondent was charged, prosecuted and later acquitted, then the charge was based on a reasonable and probable cause following the filing of a formal complaint with the police. It was the Appellants' case that mere acquittal does not connote that the prosecution was malicious as the 1st Appellant had a constitutional right to lodge a complaint to the police when its right to property was infringed.

5. The Appellants further opposed the Respondent's suit on the grounds that:-

“(a) The suit offends the provisions of section 13A of the *Government Proceedings Act*, Cap 40 of the Laws of Kenya in that notice of intention to sue was never served upon the Defendants.

(b) The suit offends the provisions of section 3 (1) of the *Public Authorities Limitation Act*, Cap 39 of the Laws of Kenya in that the suit is time barred.”

6. The hearing of the case proceeded after the close of the pleadings. The Respondent tendered his evidence and did not call any witnesses while the Appellants presented the evidence of 2 witnesses.

7. On 13th September 2021, the Lower Court rendered a judgment in favour of the Respondent on the claim of malicious prosecution and awarded him General Damages in the sum of Kshs. 400,000/=, Special Damages of Kshs. 1,200/= together with costs and interest.

8. The said judgment triggered the instant appeal wherein the Appellants listed the following grounds in their Memorandum of Appeal: -

“1. That the learned trial Magistrate erred in law and fact when he failed to uphold the challenge at trial by the Appellants that the Respondent's suit was statute time barred and ought to have been dismissed.

2. That the learned trial Magistrate erred in fact and law when he held that the Appellants did not have a reasonable and probable cause and were actuated by malice for lack of corroborative evidence of a second eye witness when prosecuting the Respondent and as a result are liable for malicious prosecution.

3. The learned trial magistrate erred in his analysis of the facts, law and evidence in finding the 1st Appellant liable for malicious prosecution without taking into account that he had a duty to report to the police the suspected crimes.

4. The learned trial magistrate erred in his analysis of facts, law and evidence in finding the 2nd Appellant liable for malicious prosecution without taking into account that the police have a duty to aid the administration of justice, were not malicious and had a reasonable and probable cause that the Respondent was guilty of the commission of the crimes he was charged with.

5. The learned trial magistrate erred wholly in failing to dismiss the suit against the Appellants.”

9. The Appellants urge this court to allow the appeal by reversing and setting aside the impugned judgment in Nyamira CMCC 33 of 2020. The Appellants also pray for the costs of the appeal.

10. The appeal was canvassed by way of written submissions which I have considered.



11. As the first appellate court, the duty of this court is to re-consider and re-evaluate the evidence tendered before the Lower Court with a view to arriving at its own decision while bearing in mind the fact that it neither heard nor saw the witnesses testify.
12. The Respondent, Pw1, testified that the 1st Defendant's officers filed a report of theft/malicious damage of property with the police based at Nyamira Police Station. He stated that he was thereafter arrested and charged with the offence of malicious damage to property and theft but was later acquitted. Pw1 accused the Appellants of manifest negligence, and breach of law. He produced the following documents as exhibits: -
 - (a) A court order as Exhibit No. 1
 - (b) Notice of intention to institute suit as Exhibit No. 2
 - (c) Demand letter as Exhibit No. 3
 - (d) Copy of proceedings in Criminal Case No. 748 of 2014 as Exhibit No. 4
 - (e) Copy of the Judgment in Case No. 748 of 2014 as Exhibit No. 5
 - (f) Copy of the charge sheet as Exhibit No. 6; and
 - (g) Copy of receipts for Kshs. 1,200.00 as Exhibit No. 7.
13. The Appellants presented the evidence of the 1st Appellant's Security Officer, DW1, Jonathan Masinde, who testified that the 1st Appellant lodged a genuine complaint against the Respondent who was seen tampering and damaging its property. He further stated that the Plaintiff was acquitted on legal technicalities following the failure, by the investigating officer to testify at the trial. DW1 stated that he did not witness the commission of the offence.
14. DW2, Corporal Dominic Murene, testified that he was the investigator in the criminal case upon receiving a report of damage to power lines from DW1. He stated that he recorded statements from two (2) eye witnesses who alleged that they saw the Respondent disconnecting the power system.
15. I have carefully considered the Record of Appeal and the parties' respective submissions. I find that the main issues for determination are as follows: -
 - a. Whether the Respondent's suit was time barred by dint of Section 3 (1) of the *Limitation of Actions Act*.
 - b. Whether the Appeal is merited."

Time

16. The Appellants submitted that the Respondent's suit was time barred having been filed outside the statutory timelines of one (1) year from the date when the cause of action accrued being 2nd March 2017 when the Respondent was acquitted.
17. The Appellant argued that the reasons advanced, by the Respondent, for the delay in filing the suit were not plausible as the suit was initiated at least 3 years after the said acquittal. It was the Appellant's case that the delay in filing the suit was inordinate and inexcusable.
18. On his part, the Respondent submitted that extension of time is an equitable remedy reserved for deserving applicants. He added that he duly sought and obtained an order for extension of time to file



the suit and that the Appellant did not raise any preliminary objection before the Lower Court over the order extending time to file the suit and neither did they appeal against the order to extend time.

19. It was not disputed that the Respondent sought and obtained an order to extend time to file the suit before the Lower Court. A perusal of the Record of Appeal shows that on 16th December 2019 Nyamira Chief Magistrate's Court issued the Respondent with an order enlarging the time within which to file the suit in Miscellaneous Civil Application No. 21 of 2019.
20. I note that even though the Appellants, in their statement of defence, raised the issue of the suit offending the provisions of Section 3 (1) of the Public Authorities *Limitation of Actions Act*, the order extending time was not challenged or canvassed at the trial, on an appeal or in submissions before the trial court. I therefore find that the said issue of limitation of time cannot be the subject of this appeal in the face of a valid court order extending time to file the suit.

Merit

21. Turning to the merits of the appeal, the issue that the court has to grapple with is whether the Lower Court arrived at the correct decision in finding that the Appellants did not have a reasonable or probable cause in prosecuting the Respondent. In other words, were the charges levelled against the Respondent by the Appellants actuated by malice?
22. The Appellants argued that the mere fact that the evidence against the Respondent in criminal case was not corroborated by a second eye witness did not make them liable for malicious prosecution. They relied on Section 143 of the *Evidence Act* which stipulates that no particular number of witnesses shall, in the absence of any provision of law to the contrary, shall be required for the proof of any act.
23. On his part, the Respondent argued that since the alleged theft occurred during the day at a market centre that had many people, the prosecution was expected to call at least more than one eye witness to the alleged crime. According to the Respondent, the mere fact that neither the investigating officer nor a second eye witness was called to testify in the criminal case was sufficient proof of malice and vendetta against him.
24. In its judgment in the criminal case, the trial court made the following remarks over the issue of the single eye witness: -

“I have very carefully analysed the evidence on record. Of note is that the accused person had disconnected and stole KPLC wires a top KPLC pole at a buying centre. Only one prosecution witness testified of having seen the accused a top the pole. I cannot fail to understand why the prosecution side did not call any other witnesses to corroborate PW1's testimony, considering the alleged crime occurred at a centre. Further the court was told by PW2 that the police and KPLC personnel visited the scene and indeed confirmed the theft. None of them testified on what was disconnected at the scene.

Further, none of the exhibits if any was produced in court to establish that indeed the crime took place. No photos were availed/produced before court despite the fact that the court was informed that KPLC officials and the police visited the scene.

The investigating officer was not called to testify. The court was never told whether the case was ever investigated.

In the circumstances and without going further to analyze the including matter prosecution's case, it is my finding that the prosecution has absolutely failed to establish a



prima facie case against the accused and it is therefore followed that he is acquitted under Section 210 of the Criminal Procedure Code.”

25. When analyzing the decision/judgment in the criminal case, the Learned Magistrate who heard the malicious prosecution case stated as follows: -

“Since in criminal cases corroboration is mandatory, a reasonable person would not have charged the plaintiff herein unless there was corroborative evidence. This was the finding of the trial court in the criminal case. In the circumstances therefore, this court finds that there was no no reasonable, probable and justifiable cause to charge the plaintiff herein.”

26. The question that still begs an answer is whether the Appellants had a reasonable or probable cause to believe that the Respondent had committed an offence.

27. In the case of *Kagane & Others v Attorney General & Another* (1969) EA 643, the court discussed the subject of reasonable and probable cause in malicious prosecution case 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 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 no 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 in so far 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 evidence 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 judged 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. In as much 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 possible, an unexplained failure to call an essential witness who provided a basic part of the information upon which the prosecution was based.”

28. In the present case, I have perused the evidence presented by the sole prosecution eye witness before the trial court in the criminal case which was, in part, as follows: -

“...I was seated at around 30 meters from the place. The place was in front of me. We both saw that Ndege, Onsare’s son was on the pole. What I have stated is true. I asked Borisi Magicho first who they were. I know both the accused person and the person who collected the wires. All the wires were four. One was black. 3 were white. They were about 30 feet. I saw Isaiah Tai’s son had rolled the 4 wires. The accused came down. The accused had clippers and Kenya Power overall. I saw him with the Kenya Power Uniform and I thought he works for Kenya Power. The other man had no uniform. He was in civilian. The accused came with knobs from up. He dropped the wires down which were rolled by the person who was down. He had dropped the wires. The son of Isaiah Tai was waiting for wires. He went with the wires...”

29. My finding is that in the circumstances of this case and in the face of irrefutable evidence from an eye witness to show that the Respondent disconnected and carried away the electricity wires, the prosecution cannot be said to have acted without any reasonable or probable cause in charging the Respondent with the offence of theft.
30. I agree with the submission by the Appellants, that the mere fact that the Respondent was acquitted in the criminal case did not necessarily connote that there was malice on the part of the prosecution.
31. I am guided by the decision in *James Karuga Kiiru v Joseph Mwamburi & Others* Nrb CA No. 171 of 2000 where it was held: -

“to prosecute a person is not prima facie tortious, but to do so dishonestly or unreasonably is the burden of proving that the prosecutor did not act honestly or reasonably being on the person prosecuted. Malice, however, can either be express or can be gathered from the circumstances surrounding the prosecution. A prosecution can either be mounted based on an offence committed in the presence of law enforcement officers or by way of a complaint lodged by a person to the said officers or agencies. However, 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 the complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. I say ordinarily because the mere fact that the version of one of the parties is not considered does not make the subsequent prosecution malicious. However, where the police deliberately decide not to take into account the version of the suspect and acts on a story that eventually turn out to be improbable and which no ordinary prudent and cautious man would have relied upon that failure may constitute lack of reasonable and probable cause for the purposes of malicious



prosecution. On the other hand it would be obviously absurd to make a defendant liable because matters of which he was not aware put a different complexion upon facts, which in themselves appeared a good case for prosecution. But neglect to make a reasonable use of the sources of information available before instituting proceedings would be evidence of want of reasonable and probable cause and also malice. It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but where there is a reasonable and probable case for a prosecution. Circumstances may exist in which it is right before charging a man with misconduct to ask for an explanation but no general rule can be laid down. In the present case as already held hereinabove the circumstances from which the court can deduce that the arrest and arraignment of the plaintiff was probably justified have not been disclosed to the court. Was for example the plaintiff's version sought with regard to the complaints, if any, made against him? In the absence of any evidence as to the facts and circumstances upon which the defendants relied, the court can only conclude that there was no probable and reasonable cause for charging the plaintiff and that constitutes malice for the purposes of the tort of malicious prosecution."

32. For the reasons that I have stated in this judgment, I find that the appeal herein is merited and I therefore allow it and set aside the judgment of the Lower Court.
33. I award the costs of the appeal to the Appellants.
34. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS
THIS 16TH DAY OF MARCH 2023.**

W. A. OKWANY
JUDGE

