



REPUBLIC OF KENYA



KENYA LAW
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**Masoso v Attorney General & 4 others (Civil Appeal 49 of 2021)
[2023] KEHC 18245 (KLR) (12 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18245 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 49 OF 2021
PJO OTIENO, J
MAY 12, 2023**

BETWEEN

FELIX INDAMANGEYO MASOSO APPELLANT

AND

THE HON. ATTORNEY GENERAL 1ST RESPONDENT

**PRINCIPAL SECRETARY, MINISTRY OF INTERIOR & CO-
ORDINATION 2ND RESPONDENT**

IP FREDRICK OKUTA 3RD RESPONDENT

BENARD MUGANDA MUNYENDO 4TH RESPONDENT

THEDDEUS MUNGWANA 5TH RESPONDENT

*(Being an appeal from the Judgment of Hon. Marcella A.
Onyango RM in Mumias CMC Civil Suit No. 46 of 2020)*

JUDGMENT

1. In a suit initiated by way of a plaint dated 29th July, 2020, the appellant sued the respondents before the Senior Principal Magistrate's Court in Mumias seeking both General damages as well as Special damages of Kshs. 75,000/- on account of alleged wrongful arrest, false detention and malicious prosecution. He also prayed for interest upon the damages and costs of the suit.
2. The cause was pleaded to be that on 18th December, 2017, at the instigation of the 4th and 5th respondents, the appellant was arrested by the 3rd respondent, locked up in the cells and subsequently charged with the offence of malicious damage to property contrary to section 339(1) of the penal code and causing obstruction in a public way contrary to section 249 of the penal code, in Mumias Senior Principal Magistrate's Court Criminal Case No. 1279 of 2017. He stood his trial and was ultimately acquitted under section 210 of the Criminal Procedure Code Laws of Kenya. In the plaint and the



single witness statement filed, the assertion is that the 4th and 5th respondents, without any colour of right, instigated the arrest of the appellant by the 3rd respondent and subsequent prosecution. Very little was said about the 1st and 2nd and what part was played by them in the acts said to found the cause.

3. In a statement of defence filed in court on 9th May, 2022, the 1st, 2nd and 3rd respondents, while admitting the arrest and prosecution of the appellant, denied the allegations by the appellant alleging malice in their conduct and stated that after a report was lodged with the police and investigations carried out, it revealed the existence of reasonable and probable cause that an offence had been committed by the appellant, hence the arrest and consequent prosecution.
4. In a statement of defence filed in court on 9th May, 2022, the 5th respondent asserted that he made a genuine report to the police since the appellant together with others had caused obstruction by digging trenches on a public road. Even though an appearance was entered by the 4th respondent, no defence is on record by him.
5. In the trial that ensued, the appellant gave evidence as the only witness then closed his case. For the respondents, 3rd, 4th and 5th respondents gave evidence. In a reserved judgment delivered by the trial court on 20/9/2021, the appellant's suit was dismissed on the basis that the appellant had failed to prove lack of reasonable and probable cause as well as malice on the part of the respondents.
6. Aggrieved by the Judgment, the appellant filed a Memorandum of Appeal dated 18/10/2021 and premised the appeal on the grounds that:-
 - a. That the honourable magistrate erred both in law and fact in holding that the appellant did not prove the pre-requisites for a charge of malicious prosecution against the respondents when overwhelming evidence was tendered in support of the appellant's claim.
 - b. That the learned trial magistrate erred both in law and fact in failing to appreciate that the appellant attained the requisite standard of proof (on a balance of probabilities) thereby resulting in the miscarriage of justice.
 - c. That the learned trial magistrate erred both in law and fact in failing to appreciate that the prosecution of the appellant was instituted without reasonable and probable cause and was actuated by malice.
 - d. That the learned trial magistrate erred both in law and fact in failing to consider evidence on record and analyze the same in line with the appellant's claim thus leading to a misdirection in law and fact.
 - e. That the learned trial magistrate erred both in law and fact in failing to consider the appellant's submissions on factual issues raised from evidence tendered at the trial, the principles canvassed and authorities attached thus leading to a misdirection of law and fact.
 - f. That the learned trial magistrate's findings were against the weight of evidence produced by the appellant and have led to a miscarriage of justice."
7. It was directed that the appeal be canvassed by way of written submissions pursuant to which directions all have filed written submission, which submissions the court as enjoyed the benefit of reading. Upon exercise of the mandate of a first appellate court, the court takes the view that all the grounds are collapsible into one posing the question whether, the appellant, at trial, did prove his case on a balance of probabilities.



Appellant's Submissions

8. The appellant submits that four elements of malicious prosecution as established in the case of *Murunga Vs Attorney general (1979) KLR* were proved by the appellant. On the first limb he argues that it is not disputed that Mumias Criminal Case No. 1279 of 2017 which had the appellant as the accused person was instigated by the 4th respondent as a complainant, the 5th respondent as a witness and the 3rd respondent as the investigating officer. He further submits that it is not disputed that Mumias Criminal Case No. 1279 of 2017 terminated in his favour and that he was acquitted on the basis of a no case to answer. It is of note however, on that issue the trial court did find the two elements proved hence same are not in dispute in this appeal.
9. On whether the prosecution was instituted without reasonable and probable cause, the appellant submits that he was charged with the offence of malicious destruction of property contrary to section 339(1) of the penal code yet there was no destruction of property. He claims that he ought to have been charged with damage of agricultural property contrary to section 249 of the Penal Code. On the second charge of obstructing in a public way contrary to section 249 of the penal code, he submits that the 5th respondent testified that he knew that there was a road problem and there was a matter pending at the high court in Kakamega and that the area map did not allow the existence of a public road access in the land occupied by the appellant. He argues that the respondents harvested their cane and purported to transport it through a road that does not exist thereby disturbing the peace of the appellant.
10. On whether the prosecution was actuated by malice, the appellant submits that the fact that the charge was framed under a wrong provision of the law and that the investigating officer did not testify in the criminal proceedings demonstrate malice since the complainant and the investigating officer conspired and instituted criminal proceedings while they knew that the land parcel had a dispute pending in court. On damages due, the decision in *Anti counterfeit Agency vs Peter Mbaria Kariuki (2021) eKLR* was cited for the proposal that a global sum of Kshs 3,000,000 is commensurate. The decision in *Patrick Nyamuke Etori vs National Police Service Commission (2019) eKLR* was cited for the proposition that a claimant for malicious prosecution must prove that the prosecution was out of personal interests and spite rather than for public benefit in administering criminal justice while that in *Murunga vs AG (1979) KLR* was cited on the need to establish the four ingredients of the tort of malicious prosecution.

1st, 2nd and 3rd Respondents' Submissions

11. It is their submission that the appellant has failed to demonstrate that he was maliciously arrested without reasonable and probable cause adding that the period from 16/11/2017 and 27/11/2017 when the appellant and others jointly committed the offences of malicious damage to property and causing obstruction in a public way, and when they were arrested on 18/12/2017 and subsequently arraigned in court on 22/12/2017 indicates that time was taken to conduct investigations before the arrest was effected with the assistant chief informing the 3rd respondent that the 5th respondent had harvested sugarcane from his farm and when he had loaded them on tractors, his cousins dug trenches on the road preventing the tractors from leaving and that the appellant and his brothers caused disturbance and chased the 5th respondent tearing his clothes. It was stressed that the statement of the 4th respondent dated 18/12/2017 was to the effect that on 16/11/2017 at about 14hrs while at his home he saw about 10 people including the appellant at his sugarcane farm cutting down the canes and when he approached him they said that they were opening up the road. It was then argued that the police are always entitled to arrest a suspect if there be reasonable suspicion that one has committed a crime and cited the decision in *James Kahindi Simba vs Director of Public Prosecution & 2 others (2020) eKLR*.



12. In concluding the submissions, it was asserted that the arrest, charge and subsequent prosecution of the appellant was lawful and not actuated by malice but was prompted by the report made by the 4th and 5th respondents.

4th Respondent's Submissions

13. He submits that he made a genuine report at Shianda Police station against the appellant, his step brother, who together with his other brothers destroyed sugarcane from his piece of land. He claims that the land belonged to their father and succession had not been concluded so all the brothers used the same land with everyone knowing their respective portions.

5th Respondent's submissions

14. He submits that he is a cousin of the appellant and that on 18/12/2017 he made a report at Shianda Police Station against the appellant after he dug trenches on a public road which he was using to transport sugarcane to Butali factory thus obstructing his trucks.

Issues for Determination

15. The court has considered the grounds of appeal, the pleadings and proceedings of the lower court and the submissions by the parties and, as said before, discerns the only issue for determination by the court to be whether the tort of malicious prosecution was proved by the appellant against the respondents.
16. since *Murunga vs. Attorney General* (1979) KLR, 138 and subsequent innumerable decisions by the superior court in Kenya, and in comparable jurisdictions, on the subject, every claimant pursuing a claim for malicious prosecution has the singular and unshifting duty to prove and establish for ingredients of the tort, for the claim to succeed. The four ingredients are; the prosecution was instituted by the Defendant, or by someone for whose acts he is responsible; that the prosecution terminated in his favour; that the prosecution was instituted without reasonable and probable cause; and, that the prosecution was actuated by malice.
17. It is not in dispute that criminal proceedings against the appellant in Criminal Case No. 1279 of 2017 were initiated by the 4th and 5th respondents after they made formal complaints with the police at Shianda Police Station. It is also not in contention that the criminal proceedings culminated with the acquittal of the appellant under section 210 of the Criminal Procedure Code Laws of Kenya. What was in contention at trial and persists here is whether there was or there wasn't reasonable and probable cause to set the law into motion and if the setting of the law into motion and the subsequent steps taken to activate and pursue prosecution was propelled by malice, spite or ill-will and not the genuine and honest pursuit of the objects of criminal prosecution.
18. On the question whether the prosecution of the appellant was instituted and pursued without reasonable and probable cause, the claimant must prove to the satisfaction of the court, but on a balance of preponderance, that there were never in existence, facts that would lead the defendant, acting reasonably and with discernment, to believe that a criminal act has been committed by the person complained about. In *Gachau Githaiga & Another -vs- Attorney General* [2015] eKLR reasonable and probable cause was defined to mean : -

“...existence of facts which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified... reasonable and probable case is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence 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..."

19. Applying that principle, and now established position of the law, to the evidence setting out the events leading up to the appellant being charged in Criminal Case No. 1279 of 2017, and bearing in mind the testimony David Munyendo that on 16/11/2017, at about 2PM the appellant and others invaded his land and cut down sugar cane purporting to create a way, a fact reiterated by the 5th respondent, does it become obvious that, there was a scheme between the 4th and 5th to falsely incriminate the appellant! The damage caused by the destruction was assessed by PW3, an agricultural officer, to amount to a sum of Kshs. 14,400/-. PW2, Thaddeus Mungwana testified that he had cut sugarcane at his farm and traders from Butali used trailers to collect the sugarcane. He stated that the appellant and others dug holes on the road preventing the trailers from moving and sugarcane stayed at the farm for 9 days. PW4, Nelson Onzeni Makokha testified that he witnessed the appellant and others digging the road claiming that PW1's sugarcane would not pass through the road. When such reports were made to the 3rd respondent, he conducted on investigations and recommended charges. It is to be noted that the 4th and 5th respondents could only lodge a complaint with the police, who then had the statutory duty to carry out investigation and make recommendations to the office of the Director of prosecutions. Since the dawn of the new constitution, the police lost the power of prosecution and it is now not enough to accuse the police of bad faith in investigations and prosecution without taking note of the controlling part played by the directorate of prosecutions.
20. In this matter the pleadings were drawn and evidence led as if the power to prosecute entirely rested with the police. It is the view of the court that more would have been done to plead and implead the prosecution if the cause was intended to be limited to malicious prosecution.
21. The appellant argues that the element of prosecution without reasonable and probable cause was proved by the appellant since he was charged with the offence of malicious destruction of property contrary to section 339(1) of the penal code yet there was no destruction of property. He claims that he ought to be have charged with damage of agricultural property contrary to section 249 of the penal code. On the second charge of obstructing in a public way contrary to section 249 of the penal code, he submits that the 5th respondent testified that he knew that there was a road problem and there was a matter pending at the high court in Kakamega and that the area map did not allow the existence of a public road access in the land occupied by the appellant. He argues that the respondents harvested their cane and purported to transport it through a road that does not exist thereby disturbing the peace of the appellant.
22. The fact that there was a defect in the charge sheet does not, in itself without further evidence, denote malice and lack of reasonable and probable cause on the part of the police or the 4th and 5th respondents. It was sufficient that some crops were damaged and a road of access, in common use was blocked by creation of trench. Once the two incidences took place, it was the civic duty of the 4th and 5th respondents to report to the police rather than cause a brawl, and it was the duty of the police to conduct investigations and make recommendation for prosecution. Since such recommendations do no bind on the prosecution, the civilian who lodges a complaint and the police who investigates that complaint ought not to be blamed for the prosecution itself but for setting the law in motion. In the context and evidence in this matter, there was no demonstration of bad faith, spite, ill-will or malice on the part of the respondents but the court is satisfied as the trial court was that the appellant failed to prove malice and absence of reasonable and probable cause. It is the view and finding of the court that the actions of the appellant and others as per the evidence tendered would have led any prudent person to take the same action the respondents took.



23. On the fourth element of whether the prosecution was actuated by malice, ill-will or spite, the court takes the view that one acts without reasonable or probable cause when they act recklessly, negligently or when propelled by ulterior motive rather than the genuine motive to undertake an action. Malice as an ingredient of the tort of malicious prosecution is the state of mind that an accuser entertains when pursuing the accusation with the sole object to harass or punish the accused unfairly or by misusing the legal process. It is the element of malice that underscores the tort as the name suggests. For a claimant to succeed, all the four ingredients must fuse to let the tort crystallise. Not only some, will suffice. Hence, where there is no proof of malice, the cause must founder. At the close of the case there was no material pointing towards proof of malice, the very foundation of the tort, hence, the conclusion by the trial court that the appellant failed to prove his case was soundly made and deserves no interference on appeal.
24. The court finds no merit in the appeal and orders that it be dismissed with costs to the respondents.

DATED, DELIVERED AND SIGNED AT KAKAMEGA THIS 12TH DAY OF MAY 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Mr. Iddi for the Appellant

No appearance for 1st – 3rd Respondents

4th and 5th Respondents present in person

Court Assistant: Polycap

