



REPUBLIC OF KENYA



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**Matemba v Attorney General & 3 others (Civil Appeal 51 of 2021)
[2023] KEHC 17885 (KLR) (12 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17885 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 51 OF 2021
PJO OTIENO, J
MAY 12, 2023**

BETWEEN

COLLINS KIZITO MATEMBA APPELLANT

AND

THE HON. ATTORNEY GENERAL 1ST RESPONDENT

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

I.P ONYAPIDI 3RD RESPONDENT

OLIVER WANYANGA ANJIRA 4TH RESPONDENT

*(Being an appeal from the judgment of Hon. Eric Malesi
PM in Kakamega CMC Civil Case No. 236 of 2018))*

JUDGMENT

Background of The Appeal

1. The appellant, by way of a plaint dated July 31, 2018, sued the respondents at the Chief Magistrate's Court in Kakamega for General damages and Special damages of Kshs. 100,000/- together with interest and costs of the suit. The suit pleaded and prayed for damages for unlawful arrest, confinement, malicious prosecution and defamation.
2. It was the appellant's case that in the year 2014 and again August 1, 2016 at the instigation of the 4th respondent, the plaintiff was unlawfully arrested by the 3rd respondent, locked up in cells and subsequently charged with the offences of forcible detainer contrary to section 91 of the Penal Code and the offence of malicious injury to property contrary to section 339(1) of the Penal Code. The proceedings in Kakamega CM Criminal Case No. 2904 of 2016 in his favour with an acquittal under section 210 of the Criminal Procedure Code Laws of Kenya while those in Kakamega CMCCr. 1041



of 2014 were withdrawn under section 87A, Criminal Procedure Code. It was the contention by the appellant that the arrest and prosecution was propelled by malice whose particulars were given.

3. In a statement of defence by the 1st to 3rd respondents dated August 17, 2018 it was pleaded that the appellant was arrested after a reasonable and probable cause existed that he had committed a cognizable offence actionable in law, in due execution of the defendant's statutory duty, that there was no malice in doing so and lastly that merely that the appellant was acquitted is not by itself proof of malicious prosecution.
4. By a statement of defence dated October 29, 2018, the 4th respondent pleaded that he was the proprietor of property known as Isukha/shirere 15156 ("suit property"), upon which he erected structure intended for deployment as student hostels, and that on April 9, 2014 the appellant with other unknown persons, without any right or notice, demolished buildings erected on the suit property which prompted him to lodge a report with the police. He then added that it was the 1st to the 2nd respondents who conducted the investigation and prosecution of the appellant but failed in their duty and were negligent in allowing the appellant to walk scot free. He denied control over the prosecution nor malice on his part and pleaded that even though he made a report to the police leading to the first arrest, the second arrest was effected due to the appellant's failure to attend court.
5. The forth respondent therefore blamed the 1-3rd defendants for breach of duty of care owed to him and for the negligent handling of the prosecution leading to the acquittal adding that he discharged his duty in full as a citizen and cannot be held liable for the tort pleaded.
6. The matter proceeded to trial at which only the appellant and the 4th respondent gave own evidence with the 1st-3rd respondents closing their case without calling any witness. In a judgment delivered by the trial court on 21/9/2021, the appellant's suit was dismissed with costs to the 4th respondent. In dismissing the suit, the trial court said:-

"The police must have investigated the report made by the 4th defendant as among the documents tendered in evidence are witness statements of the persons the 4th defendant availed to the police. It also emerged that indeed the plaintiff was arrested and charged vide criminal case number 1014 of 2014 Kakamega Chief Magistrate's Court. To me therefore there existed reasonable and probable cause for the report made by the 4th defendant and thereafter the arrest and prosecution of the plaintiff.

According to the 4th defendant, the premature ending of the 2014 case was as a result of the plaintiff absconding. The plaintiff did not contest this position. These facts rob the actions by the 4th defendant of any malice.

The plaintiff was later re-arrested and the same charges as those in 2014 case reinstated vide criminal case number 2904 of 2016. Thereafter prosecution could not proceed as the police investigation was never availed to the prosecution counsel leading to the acquittal of the plaintiff under section 210 of the CPC. I can deduce lapses on the part of the police in availing the police investigation file to the prosecution counsel leading to the fate suffered by the second criminal case against the plaintiff.

Having failed to prove the two preceding conditions, the mere fact that the plaintiff was acquitted does not make the plaintiff's claim to succeed. It has been said that these four conditions must unite to establish a cause of action. In *Clerk & Lindsell on Torts*, 18th Edition at page 823 it is written that:-



‘The onus of proving every one of this is on the claimant. Evidence of malice of whatever degree cannot be invoked to dispense with or diminish the need to establish separately each of the first three elements of the torts.’

Having failed to prove the pre-requisites for a charge of malicious prosecution, the issue of damages becomes moot. The plaintiff having failed in his claim shall bear costs of the suit as against the 4th defendant. I declined to order costs in favour of the other defendants because of the lapses on the part of the police highlighted above.”

7. Aggrieved by this Judgment, the appellant filed a Memorandum of Appeal dated 18/10/2021 mounting the following seven grounds:-
 - 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 which was not challenged and remains uncontroverted.
 - b) That the learned trial magistrate erred both in law and fact in failing to appreciate that the unchallenged/uncontroverted evidence meant 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 finding that there existed reasonable and probable cause in the arrest, detention and charging of the appellant when overwhelming evidence was tendered to the contrary.
 - d) That the learned trial magistrate erred both in law and fact in finding that there was no malice in the prosecution of the appellant when overwhelming evidence was tendered to the contrary.
 - e) 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.
 - f) 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.
 - g) 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.”
8. For the above reasons, the appellant prays that the judgment of the trial court be set aside and judgment entered for him with costs and that the costs of this appeal be to the appellant. The appeal was canvassed by way of written submissions which were then filed by all parties.

Appellant’s Submissions

9. The appellant identified four issues for determination, namely; a) whether the appellant satisfied the four (4) elements of a claim for malicious prosecution; b) whether the basis of the appellant’s claim was Kakamega CMC criminal Case No. 1012 of 2014 or Criminal Case No. 2904 of 2016; c) whether the lapses in prosecuting Kakamega CMC Criminal Case No. 2905 of 2016 can be termed operational in nature and; d) whether the appellant is entitled to damages.
10. On whether the appellant satisfied the four (4) elements of a claim for malicious prosecution, the appellant submits that reasonable and probable cause ought to have informed the actions of reporting, arresting, charging and prosecuting the appellant and this was not proved since the 4th respondent



was not present when the alleged destruction took place as he was informed by someone who saw the appellant demolish his structures yet his witness statement tells no such narrative. He submits that there was no evidential basis upon which the 4th respondent made a complainant against the appellant and upon which the appellant was charged and prosecuted.

11. On whether the basis of the appellant's claim was Kakamega CMC Criminal Case No. 1012 of 2014 or Criminal Case No. 2904 of 2016, the appellant submits that Kakamega CMC Criminal Case No. 1014 of 2014 was informed by non-attendance of witnesses and the trial court was wrong in associating itself with the assertions of the 4th respondent in Criminal Case No. 2904 of 2016 without the proceedings in Kakamega CMC criminal Case No. 1012 of 2014.
12. On whether the lapses in prosecuting Kakamega CMC Criminal Case No. 2904 of 2016 can be termed operational in nature, the appellant submits that failure to prosecute denied the appellant a chance to refute the allegations hence denying him a right to a fair and public trial and his right to adduce and challenge evidence.
13. On whether the appellant is entitled to damages, the appellant submits that he was treated with a degree of high handedness in Criminal Case No. 2904 of 2016 that entitles him to damages of Kshs. 6,000,000/- and places reliance on the case *Chrispus Karanja Njogu v Attorney General & another* (2008) eKLR.

1st, 2nd and 3rd Respondents' Submissions

14. These respondents identify the issue for determination to be whether the arrest, charging and subsequent prosecution of the appellant was unlawful and actuated by malice to which they submit that the 3rd respondent carried out investigations after receiving a complaint from the 4th respondent. They claim that sufficient evidence was produced vide photos showing demolished buildings and that according to the witness statement of Pius Museve, D4, a caretaker to an adjacent building, he stated that the appellant was responsible for the demolition of the buildings constructed on the suit property with the appellant arguing that the 4th respondent had constructed on his land. They claim that the 4th respondent produced evidence to show that he was the registered owner of the suit property.
15. They further submit that the appellant has not produced any evidence to show any collusion between the 3rd and 4th respondent leading to unlawful arrest, charging and prosecution actuated by malice and that the appellant has thus not met the threshold for the offence of malicious prosecution as set out in *Kagane vs Attorney General* (1969) E.A 643.

4th Respondent's Submissions

16. The 4th respondent submits on two issues with the first being whether the appellant satisfied the elements of a claim of malicious prosecution to which he submits that the appellant failed to prove that the 4th respondent had acted without reasonable and probable cause because he is the registered owner of the suit property on which he had constructed and that he had earlier received a notice from the appellant on his intention to bring down the construction. He claims that after received information that his construction was being brought down, he reported the appellant to the police as a suspect.
17. On the existence of malice in the prosecution of the appellant, he submits that the appellant was charged in Criminal Case No. 1014 of 2014 in which he was discharged under section 87(a) of the *Criminal Procedure Code* for his non-attendance to the matter and that he later re arrested and charged in Criminal Case No. 2904 of 2016 in which he was acquitted under section 210 of the *Criminal Procedure Code* because the police investigation was never availed to the prosecution and that this lapse on the police did not constitute malice. He claims that the mere fact that a person has been acquitted



of criminal charges does not necessarily entail malice on the part of the defendants and he cites the case of *James Karuga Kiiru v Joseph Mwamburi & 3 others* Nrb C.A No. 171 of 2000 in that regard. He asserts that the appellant has failed to demonstrate malice on the part of the respondents.

18. On the second issue of whether the lapses in prosecuting Kakamega Criminal Case No. 2904 of 2016 can be termed as malicious, the 4th respondent submits that the lapses were operational in nature and did not affect the substratum of the allegations against the plaintiff and the onus is on the appellant to prove that there was a sinister reason for the failure to avail the file to which he has not proven.

Issues Analysis and Determination

19. The court has considered the grounds of appeal, the proceedings of the lower court and the submissions by the parties and discerns the substantive issue for determination to be whether the tort of malicious prosecution was proved by the appellant against the respondents to the requisite standards.
20. The ingredients which a claimant must prove to the satisfaction of the court, on a balance of preponderance, to found and succeed on claim of malicious prosecution were laid down by Cotran, J in *Murunga v Attorney General* (1979) KLR, 138 and have always crystallised to be that: -
- a) The plaintiff must show that the prosecution was instituted by the defendant, or by someone for whose acts he is responsible;
 - b) The plaintiff must show that the prosecution terminated in his favour;
 - c) The plaintiff must demonstrate that the prosecution was instituted without reasonable and probable cause;
 - d) He must also show that the prosecution was actuated by malice.”
21. It is not disputed that CMC Criminal Case No. 1012 of 2014 and Criminal Case No. 2904 of 2016 were both initiated by the 4th respondent by making a formal complaint with the police. It is also not disputed that in Criminal Case No. 1014 of 2014, the appellant was discharged under section 87(a) of the *Criminal Procedure Code* while in Criminal Case No. 2904 of 2016, the appellant was acquitted under section 210 of the Criminal Procedure Code, the reasons for such acquittal as proved by the forth respondent and upheld by the trial court were that on the date scheduled the prosecution was not ready to proceed due to absence of police file and the appellant was thus acquitted. On that basis, the 1st and 2nd ingredients were duly proved. That however isn't all because the ingredients are cumulate and the absence of one is sufficient to have the matter fail.
22. On whether the prosecution of the appellant was instituted without reasonable and probable cause, what amounts to reasonable and probable cause was well explained by Rudd J in *Kagame & others v AG & another* [1969] EA 643 where it was held 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...”
23. The court only has the proceedings in Criminal Case No. 2904 of 2016 which it shall be making reference to hereinafter. According to the proceedings and the ruling in respect thereto, no witness testified in the case with the prosecution claiming that it did not have the police file.



24. Nonetheless, the 4th respondent admits and asserts that he reported the appellant as the suspect after he received information that he was responsible for the demolitions of structures on his piece of land. The appellant on the other hand argues that this element was not proved since the 4th respondent was not present when the alleged destruction took place as he was informed by someone who saw the appellant demolish his structures yet his witness statement tells no such narrative. The court has had a keen look at the 4th respondent's witness statement in which he mentions the existence of a dispute between himself and the appellant over the suit property, brought to his attention by way of a notice served on him by Pius Museve. He stated that on 9/4/2014 he received a call from one Abiud Shisha who informed him that his house had been demolished. In the statement of Pius Museve, he stated that he received a letter from the appellant which he delivered to the 4th respondent and that on 9/4/2014 he received information that the 4th respondents house had been demolished. On 10/4/2014, he claimed that one Mzee Thomas informed him that he saw the appellant demolish the 4th respondent's house. That the 4th respondent's property was demolished was never in contention. Being uncontested, the 4th respondent had the right and, in fact, a civic duty to report a criminal act to the police for purposes of then executing the legal duty of investigations. Once he made the report and availed the witnesses to the police, the duty to prosecute rested upon the directorate of prosecutions based on the material availed by the police.
25. That said, I find that the 4th respondent had reasonable and probable grounds to lodge a report with the police who had a duty to conduct investigations and to recommend prosecution, but the ultimate decision was with the Office of the Director of Public prosecutions. On the totality of the material availed, going by the witnesses' statements filed in the suit, it is the finding of the court that the arrest, charge and prosecution of the appellant for the demolition of the structures belonging to the 4th respondent, was founded upon very probable and reasonable grounds, and merely that the appellant was acquitted does not necessarily found a cause of action in malicious prosecution. In *Robert Okeri Ombeka v Central Bank of Kenya* (2015) eKLR it was held that; -
- “29. Comparative judicial experience in other jurisdictions also shows an emerging legal principle that an acquittal or discharge in a criminal prosecution should not necessarily lead to a cause of action in malicious prosecution law suits. A malicious prosecution plaintiff cannot establish lack of probable cause based on having obtained in an earlier action an acquittal based on insufficiency of the evidence. Successfully defending a prosecution or a law suit does not establish that the suit was brought without probable cause.”
26. The last ingredient is the need to prove that the prosecution was actuated by malice, vendetta or ill-will. Where the evidence fails to prove malice, ill-will or an improper motive inconsistent with the genuine administration of criminal justice, the case for malicious prosecution founders, even where the prosecution ends in an acquittal. In *Nzoia Sugar Company v Fungututu* (1988) KLR, 399 the Court of Appeal underscored the importance and need for the claimant to prove malice when the court held: -
- “... the case of malicious prosecution must founder on the absence of proof of malice or ill-will. The only reason why the respondent claimed he was maliciously prosecuted, was because the prosecution terminated in his acquittal...
- It is trite learning that acquittal, per se, on a criminal case charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecutor.”



27. The appellant here has not demonstrated that the actions of the respondents, or any of them, in setting the law in motion and leading to the arresting and prosecuting him were out of sheer spite and not for the genuine administration of criminal justice.
28. In his own words in the course of cross examination, the appellant said:-
- “The complainant had a right to make a complaint. The power to prosecute is vested in DPP. I do not have any documentation to show that the 4th defendant was summoned to court and disobeyed.”
29. Sadly, that was the quality of the evidence on the part of the appellant. Even the witness statement filed and adopted as evidence in chief was equally scanty, almost flimsy. It is one of those cases where one can safely say that the appellant merely threw the pleadings and some documents at the court, without much effort to discharge the legal burden. It is thus the finding of the court that the element of malice was never proved at all. The consequence of that failure is that the cause was destined to failure and the trial court cannot be genuinely faulted in the determination it made. For the reasons set out above, this court finds that this appeal is bereft of merit and is thus 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

Wanyanga for 4th Respondent

No appearance for Attorney General for the 1st – 3rd Respondents

Court Assistant: Polycap

