



REPUBLIC OF KENYA



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**Oduor v CFC Stanbic Bank Limited & another (Civil Appeal E806 of 2021)  
[2023] KEHC 27655 (KLR) (Appeals) (30 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 27655 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**APPEALS**

**CIVIL APPEAL E806 OF 2021**

**HI ONG'UDI, J**

**MAY 30, 2023**

**BETWEEN**

**CHRISPINE DOLLAH ODUOR ..... APPELLANT**

**AND**

**CFC STANBIC BANK LIMITED ..... 1<sup>ST</sup> RESPONDENT**

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

*(Being an appeal from the Judgment delivered by Mr. P. Muholi Principal Magistrate  
on 19th November, 2021 in Nairobi Chief Magistrate's CMCC No. 1636 of 2018.)*

**JUDGMENT**

1. Chrispine Dolloh Oduor the appellant herein was the plaintiff in the trial court while the respondents were the 1<sup>st</sup> and 2<sup>nd</sup> defendants respectively. The appellant first filed the plaint dated 7/03/2018, and later the amended plaint dated 20/7/2018, seeking special and general damages plus costs and interest arising from malicious prosecution. The case was heard and Judgment dismissing suit was delivered on 9/11/2021. The learned trial Magistrate assessed and found the sum of Ksh 2,000,000/= to be reasonable compensation had the suit been successful.
2. Being aggrieved by the judgment, the appellant filed the appeal dated 8/12/2021 citing the following grounds:
  - i. The learned trial Magistrate erred in law and in fact in holding that the Plaintiff/Appellant has not proved his case on a balance of probabilities.
  - ii. The findings and judgment of the learned trial Magistrate goes against the evidence adduced by the plaintiff and the law as relates to malicious prosecution.



- iii. The learned trial Magistrate failed to appreciate, and therefore erred in law and in fact, that the plaintiff's evidence on his arrest and incarceration was neither challenged in cross-examination nor rebutted by any evidence from the defence.
  - iv. The learned trial Magistrate failed to appreciate that the 2<sup>nd</sup> Defendant never called any witnesses in rebuttal to the plaintiff's evidence with the consequence that the plaintiff's testimony as against it was uncontroverted and unchallenged.
  - v. The learned trial Magistrate erred in law and in fact in failing to take into account the fact that the police never carried out any investigations, never interrogated the plaintiff and merely arrested him and the circumstances therefore pointed to malice on the part of both the police and the complainants.
  - vi. The learned trial Magistrate erred in law and in fact in awarding the sum of Ksh 2,000,000/= as general damages in circumstances where general damages should have been double the awarded amount.
3. The claim before the trial court arose from a criminal case Chief Magistrate's Court Milimani Nairobi Criminal Case No. 892 of 2013 where the appellant was on 20<sup>th</sup> June, 2013 charged with the offence of stealing contrary to section 275 of the *Penal Code*. Later on, 8/03/2017 he was acquitted under section 210 of the *Criminal Procedure Code*.
  4. When the Civil case came for hearing the appellant (PW1) was the only one who testified. He testified that he used to work for CFC Stanbic Bank since 2012 as a sales representative and his duties included opening accounts and personal loans. On 19/6/2013 he was arrested in respect of account opening issues in the name of Jecinta Ireri, at their Kenyatta branch. The issue was that money had been accessed from that account. His services were later terminated in October, 2013 while he was in prison. He produced various documents namely: letter of appointment, charge sheet, receipt for proceedings, receipt for legal fees, proceedings demand notice (Pexb 1-6). Legal fees was Ksh 800,000/=.
  5. In cross examination he said upon his arrest on 19/6/2012 he was detained for two (2) weeks.
  6. The respondent also called one witness, Sylvester Ojiambo (DW1) who is a senior company Human Resource (HR) Partner at the respondent. He stated that there was fraud at the said bank involving an account opened by the appellant. A report was made to the police who conducted investigations.
  7. In cross examination he said when the incident occurred he had not joined the bank, but he believed that the right procedure had been followed, in handling this matter.
  8. The appeal was canvassed by way of written submissions

### **Appellant's Submissions**

9. These were filed by Ochieng Omolo & Company advocates and are dated 24/10/2022. Counsel submitted that the defences by both respondents were mere denials with no substance. He pointed out discrepancies in the dates of arrest and appearances in court as shown at pg 32 of the record of appeal. Secondly that the evidence against the appellant was actuated by malice aforethought and was baseless. He argued that the appellant's evidence was never challenged in cross examination and it was clear that he was never informed of the reasons for his arrest despite being in cells for two (2) weeks. According to him no investigations were conducted in this case. That the bank (1<sup>st</sup> Respondent) never informed the appellant of any mishap at the bank before reporting to the police which was unusual.



10. Counsel dismissed DW1's evidence since he had not joined the bank at the time this incident took place. On the prosecution of the case counsel submitted that it was done in a shoddy way. He further referred to pg 149 of the record of appeal saying the trial Magistrate erred in what he stated from line 5 of the judgment.
11. Counsel submitted that the prosecutor in the criminal case failed to avail evidence to support their claims including the amounts allegedly stolen. Further the complainant never recorded any statement. He referred to the case of *William Kabogo Gitau v George Thuo & 2 others* [2010] eKLR where Kimaru J (as he then was) stated.

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred”

12. Finally, he submitted that there was no probable cause for arrest, arraignment and trial of the appellant. On the principles governing a claim for malicious prosecution he relied on the case of *Murunga v Attorney General* [1979] KLR 138 where the same were set out as follows:
  - a. The plaintiff must show that the prosecution was instituted by the defendant.
  - b. The plaintiff must show that the prosecution was terminated in his favour.
  - c. The plaintiff must show that the prosecution was instituted without reasonable and probable cause.
  - d. He must show that the prosecution was actuated by malice.

He prayed for general damages of Ksh 5,000,000/= in place of the Ksh 2,000,000/= suggested by the trial court.

### **1<sup>st</sup> Respondent's submissions**

13. These were filed by Wamae and Allen advocates and are dated 8/12/2023. Counsel submitted that the appellant was never held longer than the law allows. He referred to the pleadings, appellant's witness statement and responses and submissions before the lower court.
14. It is counsel's submission that the case for malicious prosecution has not been made out by the appellant. That there has not been shown any probable or reasonable cause. Reliance to prove this was placed on the cases of:
  - i. *Kagame & Others v Attorney General and another* [1969] EA 643
  - ii. *Tobias Moinde Kengere v Postal Corporation of Kenya & 2 Others* [2019] eKLR.
  - iii. *Stephen Gachau Gitthaiga & another v Attorney General* [2015] eKLR.

On the ingredients for malicious prosecution counsel relied on the case of *Isaac Ribiro Kamere v Patrick Nganga Kamau & 5 others* [2018] eKLR.

15. Counsel further argued that the role the 1<sup>st</sup> respondent played was to make a complaint to the relevant authorities and was not responsible for setting the law in motion to prosecute the appellant. To support this argument, he relied on the cases of: *Wanjiku Kariuki v Attorney General and another* [2011] eKLR; *Nyaga v Muchike* 1987 *G.B.M. Kariuki v Attorney General* [2016] eKLR.



16. It was further submitted that there was justification for prosecuting the appellant as there was reasonable and probable cause. Moreover it is the role of the police to investigate and thereafter hand over the matter to the ODPP to institute criminal charges. He referred to section 5(1) (b) of the *DPP Act* No 2 of 2013 which gives the DPP exclusive powers to prefer charges. He contends that the acquittal of the appellant of the charges in Criminal Case No. 892/2013 does not necessarily connote malice, falsehood spite, or ill-will.
17. He referred to the case of *Johnson Muendo Waita v Odillah Mueni Ngui* [2018] eKLR where the court held as follows:

“On whether the making of the said complaint by the Appellant was malicious, the law is clear that the mere fact that a person has been acquitted of the criminal charge does not necessarily connote malice on the part of the prosecution”

Counsel additionally referred to the cases of:

- i. *Robert Okeri Ombeka v Central Bank of Kenya* Civil Appeal No. 105 of 2007 [2015] eKLR
  - ii. *Socfinaf Kenya Ltd v Peter Guchu Kuria & another* Civil Appeal No. 595 of 2020 [2022] eKLR.
18. Finally, counsel submitted that the 1<sup>st</sup> respondent simply did what he is expected to do as a citizen of this country by reporting this issue to the police. He referred to the case of *Catherine Wanjiku Kariuki v Attorney General and another* 2011 eKLR where the court stated as follows:

“It is the duty of every citizen to report to the police any crime suspected, upon reasonable ground, to have been committed, or being committed. Once that civic duty is done, it is the business of the police to independently investigate the matter and arrive at their own conclusion on whether to charge anyone with such crime”.

He prayed for the dismissal of the Appeal.

19. The 2<sup>nd</sup> respondent (Attorney General) did not file any submissions. The record of appeal shows that the 2<sup>nd</sup> respondent filed a statement of defence to plaint. It is dated 10/08/2018. In it the 2<sup>nd</sup> respondent denied all the appellant’s claims.

### **Analysis and Determination**

20. Having carefully considered the grounds of appeal, record of appeal, parties submissions, authorities cited and the law I find one main issue falling for determination. The issue is whether the appellant has proved a case of malicious prosecution against the respondents.
21. This being a first appeal this court is duty bound to re-evaluate and re-consider the evidence on record and arrive at its own independent conclusion. It has also to bear in mind that unlike the trial court, it did not see nor hear the witnesses. This was stated in: *Selle & another v Associated Motor Boat Co. Ltd v others* (1968) E.A 123; *Peters v Sunday Post Limited* (1958) E.A 424 and *Kamau v Mungai & another* [2006] 1KLR 150, among others.
22. There is no dispute that the appellant was charged with the offence of stealing contrary to section 268 as read with section 275 of the penal code. The particulars being that the appellant on diverse dates between 3/6/2013 and 13/6/2013 at CFC Stanbic Bank Westgate branch in Nairobi within Nairobi county jointly with another not before court, stole Ksh 15,824,000/= the property of CFC Stanbic Bank.



23. He denied the charge and the matter proceeded to full hearing with the prosecution calling two (2) witnesses. Thereafter the trial court found the prosecution not to have established a prima facie case and acquitted the appellant under section 210 of the *Criminal Procedure Code*.
24. There is also no dispute that the appellant was employed by the 1<sup>st</sup> respondent and the incident in issue occurred while he was still in its employment.
25. It was after his acquittal that the appellant filed the Civil case No. 1636 of 2018, claiming general and special damages for malicious prosecution. What then is malicious prosecution? *Black's Law Dictionary* Tenth Edition at pg 1102 defines it as follows:
1. The institution of a criminal or civil proceeding for an improper purpose and without probable cause. The tort requires proof of four elements.
    - a. The initiation or continuation of a lawsuit
    - b. Lack of probable cause for the law suit's initiation
    - c. Malice
    - d. Favourable termination of the original law suit.
26. In the case of *Kasna Produce Store v Kato* 1973 E.A 190 Duffus VP at pg 191 laid down the ingredients for malicious prosecution to be as follows:
- i. The plaintiff was prosecuted by the defendant in that the law was set in motion against him by the defendant on a criminal charge. The test is not whether the criminal proceedings have reached a stage at which they may be correctly described as a prosecution, but whether they have reached a stage at which damage to the plaintiff results.
  - ii. The prosecution was determined in the plaintiff's favour
  - iii. It was without reasonable or probable cause. On the evidence the defendant did not believe in the justice of his own cause.
  - iv. It was malicious. The defendant had improper and indirect motives in bringing this false charge against the plaintiff.
27. I have read through the criminal case No 892 of 2013, where the appellant was acquitted. It is clear that in the three (3) years the case remained pending before the trial court only two (2) out of seven (7) expected witnesses gave evidence. The learned trial Magistrate pointed out some loopholes in the prosecution case since the expected witnesses did not appear to avail to the court the expected evidence.
28. I have read the judgment by the learned trial Magistrate in Civil case No. 1636 of 2018 and his reasons for dismissing the suit. I wish to clarify a submission by counsel for the appellant in respect to the said judgment. It relates to the following paragraph at pg 149 from line 5 of the Judgment which states:
- “Probable cause has been defined in the case of *Glinsk v Mclver* [1962] AC 726 where Lord Devlin held that:
- “reasonable and probable cause means that there must be sufficient ground for thinking the accused was probably guilty but not that the prosecutor necessarily believes in the probability of conviction.....”



“The learned trial Magistrate convicted the plaintiff and on appeal, the High Court noted that there were loopholes in the evidence of the prosecution. The Learned Judge quashed the conviction and set aside the sentence meted on the plaintiff”.

29. In his submissions, counsel for the appellant contended that the trial Magistrate fell into error among others. For clarification the underlined words above refer to the cited case of *Glinsk v McIver* (*supra*) and not the criminal case in respect of the appellant as alleged by counsel. The learned Magistrate’s observation starts at the next paragraph of the Judgment where he states:

“I find that the plaintiff ..... the plaintiff in court”.

I believe this clarifies the position as the trial Magistrate did not make any error.

30. From the evidence of PW1 and PW2 in the criminal case, it is clear that there were issues related to theft of funds from the 1<sup>st</sup> respondent. Of course, they had suspicions and reported the matter to the police for investigations and necessary action. Upto that point what was the malice exhibited by the 1<sup>st</sup> respondent? Were they to remain silent after all that money had suspiciously gone missing?
31. The 1<sup>st</sup> respondent had a duty to report the matter since the money at the bank belongs to their customers and the Bank is accountable. It was therefore the duty of the appellant to prove that the 1<sup>st</sup> respondent acted maliciously in reporting the incident. He who pleads a fact has a duty to prove it.
32. Sections 107-109 of the *Evidence Act* provides as follows:

Section 107 Burden of proof

- i. Whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- ii. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Section 108 Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Section 109 Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

33. It is the appellant’s case that he should never have been charged in the first place. He therefore argues that the 2<sup>nd</sup> respondent acted with malice and there was no reasonable cause for charging him. At paragraph 3 of the plaint the appellant pleaded thus:

“The second defendant is the Attorney General and is sued on his behalf and on behalf of the department of police service and service of summons shall be effected through the plaintiff advocates offices”.

34. The Attorney General did not sue nor prosecute the appellant. It is the office of the Director of Public Prosecutions (ODPP) which recommended his prosecution and also conducted the prosecution.

Article 157(6) (a) of the *Constitution* which came into effect in 2010 provides thus:



- (6) The Director of Public Prosecution shall exercise State powers of prosecution and may
- (a) Institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.

34. In this case the appellant did not sue the ODPP yet that is the office that had him charged. The police whom the 2<sup>nd</sup> respondent represents only carried out investigations which were forwarded to the ODPP for recommendations.

35. The record in the criminal trial court shows that witness statements and documents were served on the defence. It turned out later that only two witnesses showed up to testify. Whose mistake was this? Is failure by witnesses to attend court, a sign of malice on the side of the police/or prosecution?
36. The complainant in this case the appellant had to prove that the police did not carry out proper investigations to warrant his being charged or they fabricated evidence out of malice to put him in trouble.
37. As has been held in several decisions an acquittal per se is not evidence of malicious prosecution. See (i) *James Karuga Kiiru v Joseph Mwamburi & 3 others* Nairobi Criminal Appeal No. 171 of 2000 (ii) *Simba vs Wambari* [1987] KLR 601.

Rudd J in *Kagane v Attorney General* (1969) E.A 643 set the test for reasonable and probable cause stating thus:

“Reasonable and probable cause is not 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 lead to 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”.

38. Further on the element of Malice the appellant has not set out evidence to show why the 2<sup>nd</sup> respondent would have maliciously set him up or planted this on him when there are witnesses who recorded statements in support of the charge. I find the element of Malicious prosecution not moved.
39. The appellant sought for damages claiming he had been kept for two weeks in police custody. This evidence is that he was arrested on 19/6/2013. The court record shows that he was arraigned in that court on 20/6/2013. There is an obvious error on the charge sheet showing his date of arrest was 14/8/2013, while it was 19/6/2013. Finally, on this allegation of having been detained for two (2) weeks in custody the same is not supported by any evidence. That prayer also fails.
40. The learned trial Magistrate in assessing damages had the suit been successful and while relying on the case of *Joseph Wamoto Karani v C. Dorman Ltd & another* [2018] eKLR found a sum of Ksh 2,000,000/= to be reasonable. The special damages claim was not proved as no receipts were produced. A special damage must always be strictly proved.
41. Based on the above conclusions, I find the Appeal to lack merit and I dismiss it with costs. The lower court Judgment is upheld.
42. Orders accordingly.

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 30<sup>TH</sup> DAY OF MAY, 2023 IN OPEN COURT AT NAKURU.**



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**H. O. ONG'UDI**

**JUDGE**

