



REPUBLIC OF KENYA



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**Kamau v Kamau & 2 others (Civil Appeal 165A of 2018)
[2023] KEHC 18556 (KLR) (16 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18556 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 165A OF 2018
JRA WANANDA, J
JUNE 16, 2023**

BETWEEN

JOSEPH MUKUNGA KAMAU APPELLANT

AND

VERONICA WANGUI KAMAU 1ST RESPONDENT

PHILIP KAMAU 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

1. This Appeal arises from the Judgment delivered in Eldoret Chief Magistrates' Civil Suit No. 555 of 2013 on 30/11/2018. In the said suit, the Appellant was the Plaintiff and the Respondents were the Defendants
2. The background of the matter is that by the Plaint filed on 22/08/2013, subsequently amended and filed on 21/10/2015 through Messrs J.K. Birir & Co. Advocates, the Appellant pleaded that he is the owner of the parcel of land known as plot No. 827 situated at Kampi Thomas in Eldoret and measuring 0.23 acres, the 1st Respondent is his sister and the 2nd Respondents is the 1st Respondent's son (thus the Appellant's nephew), the two encroached into his said plot, the 2nd Respondent built a structure on the land without the Appellant's consent, the 2nd Respondent is the one who caused the 1st Respondent to build the structure, the 2nd Respondent has built a septic tank on the land, the Respondents were the complainants in Eldoret Chief Magistrate's Court Criminal Case No. 284 of 2011 in which the Appellant was the accused person, the Appellant was acquitted, the Appellant's claim is for wrongful arrest and malicious prosecution for trespass, the Appellant was wrongfully charged and it was malicious in the sense that the Appellant could not have trespassed into his own land.



3. It was pleaded further that the Appellant's claim against the 3rd Respondent was for defamation, wrongful and malicious prosecution, mental torture and anguish and for making the Appellant to appear before the ordinary normal thinking person as a disobedient citizen and a criminal, the Appellant's claim against the 1st and 2nd Respondents is for the losses he suffered, namely, cost of typed proceedings at Kshs 1,200/-, lunch and transport at Kshs 2,400, loss of work at Kshs 40,000/-, loss of fencing posts, barbed wire and wire mesh at Kshs 6,700, demand notice at Kshs 3,000/-, pit latrine digging, floor plaster, iron sheets, timber and labour at Kshs at Kshs 40,000/-. It was then pleaded that the aggregate amount of these figures is Kshs 93,300/-. The Appellant pleaded that he prays for an injunction to restrain the Respondents from interfering or encroaching into the said parcel of land.
4. In his prayers listed in the Complaint, the Appellant sought Judgment against the Respondents for the said sum of Kshs 93,000/-, general damages for wrongful and malicious prosecution, general damages for constructing a structure and a safety tank on the Appellant's said parcel of land, costs and interest.
5. In his Witness Statement, the Appellant recounted more or less the same matters above.
6. The 1st and 2nd Respondents filed their joint Statement of Defence on 23/12/2013 through Messrs Ngigi Mbugua Co. Advocates. The same was subsequently amended and filed on 2/12/2015. In the defence, the Respondents denied the Appellant's claims, denied that the Plaintiff was the owner of the said parcel of land, averred that the same is family land having been purchased jointly by family members, the Appellant holds the property in trust for the 1st and 2nd Respondents and they could not have encroached into the property as they are proprietors thereof.
7. On its part, the 3rd Respondent filed its Statement of Defence on 16/01/2014. It too denied the Appellant's claims and denied that the Appellant was the owner of the said plot. The 3rd Defendant then averred that acting on a complaint, the police proceeded to investigate the same whereupon it was revealed that there was a reasonable and probable cause that the Appellant committed an offence of trespass, upon completion of the investigations, the Appellant was lawfully and legally prosecuted, he was acquitted under Section 215 of the Criminal Procedure Act after a full hearing, the acquittal under the said section was not a declaration of his innocence to entitle him to a cause of action on malicious prosecution, all the actions the police took were in execution of statutory duties bestowed upon them
8. The matter then proceeded to full hearing. The Appellant and 1st and 2nd Respondents each called 2 witnesses in support of their respective cases. On its part, the 3rd Respondent did not call any witness.

Appellant's evidence before the trial Court

9. The Appellant testified as PW1 and adopted his Witness Statement. He insisted that the 1st Respondent was the complainant in the criminal case and it is her, together with one Kabu Rono who reported to the police. He denied that he bought the plot jointly with others.
10. PW2 was one Anne Keya, a clerical officer from the trial Court who simply produced the trial Court file.

Respondents' evidence before the trial Court

11. The 1st Respondent testified as DW1. She testified that the Appellant is her brother and the 2nd Respondent is her son. She insisted that she was only a witness in the criminal case and not the complainant.
12. DW2 was the 2nd Respondent. He testified that the 1st charge sheet was cancelled and substituted with a 2nd charge sheet.



Judgment of the trial Court

13. Upon considering the testimonies of the witnesses, the evidence presented and the Submissions by the parties, the trial Court, vide the Judgment delivered on 30/11/2018 dismissed the suit with no orders as to costs.

Appeal

14. Being aggrieved by the Judgement, the Appellant filed the present Appeal vide the Memorandum of Appeal filed on 20/12/2018. The same was filed through Messrs Mathai Maina & Co. Advocates who had since come on record for the Appellant. The grounds preferred were as follows:
 - i. That the Learned Magistrate erred in law and in fact when he held that the Plaintiff failed to prove his case.
 - ii. That the Learned Magistrate erred in law and fact by applying the wrong principles in deciding the suit.
 - iii. That the Learned Magistrate erred in law and fact in making a finding that the Appellant ought to have sued the witness, one Samson Kamau but not the Defendants on record, in Criminal case No. 284 of 2011.
 - iv. That the learned magistrate erred in law and in fact in dismissing the plaintiff's case.

Hearing of the appeal

15. It was then directed that the Appeal would be canvassed by way of written Submissions. Pursuant thereto, the Appellant filed his submissions on 18/01/2023 and the 1st and 2nd Respondents on 21/03/2023. The 3rd Respondent filed on 24/04/2023 through Principal State Counsel Winnie Jebet Cheruiyot.

Appellant's Submissions

16. Counsel for the Appellant submitted that the Court dismissed the Appellant's suit on the ground that he did not enjoin one Samson Kamau who was the alleged complainant in the criminal case hence the Court concluded that the Appellant failed to discharge his burden of proof. Counsel argued that the Appellant told the Court that he was charged with the offence of trespass, he produced the charge sheet, the 1st Respondent was the complainant, the 2nd Respondent who is a son of the 1st Respondent was the witness, the 1st Respondent acknowledged that the charge sheet had her name as the complainant, therefore the finding by the trial Court that the 1st Respondent was not the complainant was erroneous hence arriving at a wrong finding.
17. Counsel further submitted that in his evidence, the 2nd Respondent had stated that he constructed a house foundation, a toilet, septic tank, damaged a toilet and fenced on the piece of land. He cited Section 3(1) of the *Trespass Act*, Cap. 294 and added that trespass is an intrusion by a person into the land of another who is in possession and ownership, therefore, the 2nd Respondent's acts amounted to trespass and the Appellant was entitled to general damages. He cited the case of *Philip Ayaya Aluchio vs Crisoinus Noavo (2014)* eKLR.



1st and 2nd Respondent's Submissions

18. Counsel for the 1st and 2nd Respondents submitted that the decision whether or not to arrest and prosecute falls squarely within the ambit of the National Police Service with a mandate to investigate crimes and apprehend offenders. He cited Article 157(6) of *the Constitution* and the case of *Mbowa v East Menyo District Association*, CA No. 6 of 1972 and submitted that the law remains clear that the mere fact that a person has been acquitted of criminal charges does not necessarily connote malice on the part of the prosecution. He cited the case of *Nzoia Sugar Company Limited v Fungututi* (1988) KLR 399 and stated that although criminal proceedings were instituted against the Appellant and were terminated in his favour, the Respondents neither instituted the criminal proceedings nor acted without reasonable or probable cause in the prosecution of the case, the complainant was one Samson Kamau as indicated on the charge sheet, the elements for malicious prosecution have not been met and liability should not attach to 1st and 2nd Respondents.
19. On proof on a balance of probabilities, Counsel cited Section 107(1) of the *Evidence Act*, Murphy on Evidence 11th Edition (2009) and the cases of *Re B-Children* (2009) 1 AC 1 and *Margaret Ndege & 3 others v Moses Oduor Ademba [2021]* eKLR. He then submitted that the criminal proceedings were neither instituted by the 1st nor the 2nd Respondents, there was every reasonable and probable cause that led to the arrest, confinement and prosecution of the Appellant, it is safe to hold the view that the Appellant failed to prove the elements of his case, there was prima facie evidence from the charge sheet that the complainant in the criminal case was neither of the Respondents, the Appellant did not present any evidence to support his allegation.

3rd Respondent's Submissions

20. On her part, Counsel for the State cited the case of *Stephen Gachau Gitbaiga & another v Attorney General (2015)* eKLR which according to her, restated the four established elements of malicious prosecution that the Appellant must prove on a balance of probability to sustain his claim. She submitted that the complainant in the criminal case was one Samson Kamau, upon receiving the complaint and conducting investigations, the OCS Eldoret Police Station preferred charges against the Appellant, it is thus not in dispute that the criminal charges were instituted by the State, the point of divergence is on the fact that the Magistrate Court reached a determination that the Appellant sued a witness in the criminal case and not the complainant therein who was one Samson Kamau, she agreed with the position and determination of the Magistrate, the Submissions of the Appellant only addresses the testimony of the 1st Respondent in cross-examination and does not address the re-examination, the Appellant's Submissions do not address the fact that the Judgment indicated that DW2 testified and stated that another charge sheet was prepared and in which the said Samson Kamau was the complainant, no other evidence has been adduced to counter the charge sheet that was seen by the trial Court, the 1st and 2nd Respondents were not the complainants and hence they did not institute the criminal proceedings and hence ought not to have been enjoined in the civil suit, the charges were preferred against the Appellant based on considerations within the confines of the constitutional mandate of the police and not any other considerations, the complainant, the said Samson Kamau lodged a complaint in the police station against the Appellant, the police conducted their investigations and preferred charges against the Appellant. She too cited the case of *Mbowa vs. East Menyo District Administration* (1972) 1 EA 352 and submitted that the OCS Eldoret Police Station had legal reasons to prosecute the Appellant, there is no evidence that he did so in pursuit of a malicious cause, a report was lodged before the police, it was reported and charges preferred against the Appellant based on the report, the mere fact that the Appellant was charged does not ipso facto denote that the charges were



instituted out of spite, the Appellant must establish the existence of malice, the Appellant failed to discharge his burden of proof

21. Counsel submitted further that the prosecution of the Appellant was instituted with reasonable and probable cause and he was prosecuted in accordance with the law. She cited the case of *Kagane vs Attorney General* (1969) EA 643 and submitted that the police officers acted upon a complaint in discharging their duty to maintain law and order and upon carrying out further investigations they reasonably believed that it was legally proper to institute criminal charges against the Appellant, the matter was heard in Court, the Court determined that the Appellant had a case to answer, he was then put on his defence, later he was acquitted under Section 215 of the *Criminal Procedure* Act, such circumstances reflect a scenario whereby there was evidence against the Appellant which although may not have secured a conviction, was weighty enough to put the Appellant in his defence, the Record of Appeal does not establish any reason to reconsider the decision of the trial Magistrate. She cited the case of *Lokadongoy v Lokogy v Reuben Kiplagat Kiptarus* [2020] eKLR and submitted that it is evident that the trial Magistrate considered all the relevant evidence and issues in making the determination, including the parties respective Submissions and documents, the trial Magistrate was guided by the right principles of law, he rightly held that the Appellant had not proven his case against the 3rd Respondent.

Analysis & Determination

22. Being a first appeal, this Court is guided by the principles set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1 EA 123 where the duty of an Appellate Court was stated to be as follows:

“..... this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”
23. I note that while in the Plaintiff, the Appellant referred to his claim as being inclusive of defamation, no evidence on such cause of action was led at the trial and neither was it canvassed. Further, no claim of defamation was raised in the Memorandum of Appeal nor in the Appellant’s written Submissions. In the circumstances, I believe that I have justification to presume that the claim for defamation was abandoned by conduct.
24. Similarly, although in the Plaintiff the Appellant prayed for Judgment for a sum of Kshs 93,300/- being allegedly the quantum of loss caused to him by the actions of the 1st and 2nd Respondents including cost defending the criminal case, again no evidence on this cause of action was led at the trial and neither was it canvassed. Further, the claim was also never raised in the Memorandum of Appeal nor in the Appellant’s written Submissions. In the circumstances, I also believe that I am justified to presume that the claim was likewise abandoned by conduct.
25. I also note that in his Submissions, the Appellant’s Counsel submitted that the 2nd Respondent stated that he constructed a house foundation, a toilet, septic tank, damaged a toilet and fenced on the said piece of land and that trespass is an intrusion by a person into the land of another who is in possession and ownership. He therefore submitted that the 2nd Respondent’s acts amounted to trespass and the Appellant was entitled to general damages.



26. My view is that the above Submission has been made in a vacuum since there is no prayer in the Plaint for damages for trespass. For that reason, no evidence on this cause of action was led at the trial and neither was it canvassed. It is also not raised in the Memorandum of Appeal. In the circumstances, I will disregard the Submissions made on whether the 1st and 2nd Respondents are liable for the tort of trespass.
27. In the circumstances, upon considering the Memorandum of Appeal and Submissions by the parties, I find that the issue that remains for determination to be “whether the Appellant proved his claim for wrongful arrest and malicious prosecution”.
28. I now proceed to analyze and answer the said issue.
29. The tort of malicious prosecution has been extensively discussed by our Courts. The ingredients were reiterated Mativo J in the case of *Stephen Gachau Gitthaiga & Another vs Attorney General* [2015] eKLR where he held as follows;

“Malicious prosecution is an intentional tort designed to provide redress for losses flowing from an unjustified prosecution. Under the first element of the test for malicious prosecution, the plaintiff must prove that the prosecution at issue was initiated by the defendant. This element identifies the proper target of the suit, as it is only those who were actively instrumental in setting the law in motion that may be held accountable for any damage that results.

The second element of the tort demands evidence that the prosecution terminated in the plaintiff’s favour. This requirement precludes a collateral attack on a conviction properly rendered by a criminal court, and thus avoids conflict between civil and criminal justice. The favourable termination requirement may be satisfied no matter the route by which the proceedings conclude in the plaintiff’s favour, whether it be an acquittal, a discharge at a preliminary hearing, a withdrawal, or a stay.

The third element which must be proven by a plaintiff - absence of reasonable and probable cause to commence or continue the prosecution - further delineates the scope of potential plaintiffs. As a matter of policy, if reasonable and probable cause existed at the time the prosecutor commenced or continued the criminal proceeding in question, the proceeding must be taken to have been properly instituted, regardless of the fact that it ultimately terminated in favour of the accused.

Finally, the initiation of criminal proceedings in the absence of reasonable and probable grounds does not itself suffice to ground a plaintiff’s case for malicious prosecution, regardless of whether the defendant is a private or public actor. Malicious prosecution, as the label implies, is an intentional tort that requires proof that the defendant’s conduct in setting the criminal process in motion was fuelled by malice. The malice requirement is the key to striking the balance that the tort was designed to maintain: between society’s interest in the effective administration of criminal justice and the need to compensate individuals who have been wrongly prosecuted for a primary purpose other than that of carrying the law into effect.”



30. Further, in *Gitau vs East Africa Power & Lightning Co. Ltd* (1986) KLR 365, Schofield J held as follows:

“In order for a claim of malicious prosecution to succeed the plaintiff must not only show that he was prosecuted but that he was prosecuted upon the instigation of the defendants and that there existed malice and which malice he must prove.”

31. Additionally, the Court of Appeal, in the case of *Robert Okeri Ombeka v Central Bank of Kenya (2015)* eKLR guided as follows:

“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.”

32. The upshot of the foregoing is that the elements of malicious prosecution that the Appellant was required to satisfy were the following: The prosecution was instigated by the Respondents. The matter was finalized in the Appellant’s favour. The prosecution or its continuance was actuated by malice on the part of the Respondents.

33. On the first ingredient, whether the prosecution was instigated by the Respondents, I have perused the trial Court file in Eldoret Chief Magistrates’ Criminal Case No. 284 of 2011 which file was produced in evidence. There is only one charge sheet in the file, dated 19/01/2011. It is clear from that charge sheet that the only complainant named therein was one Samson Kamau. The 1st and 2nd Respondents are only listed as witnesses, not complainants. A perusal of the criminal case file also reveals that the said Samson Kamau testified in the trial as the first witness. He testified that he too is a member of the family of the parties herein and stated as follows:

“... on 16/01/2011, at about 9.00 am, I was in my mother’s plot on that day I found accused had erected a toilet on my plot/portion. I reported to the village elder and later at Baharini police post”

34. From the foregoing, it is clear that it is the said Samson Kamau who was the complainant in the criminal trial. It follows therefore that the trial Magistrate was right in his finding on this issue. I have carefully perused the record and find that the Appellant has not demonstrated or proved that, despite being mere witnesses, the 1st and 2nd Respondents played an active role that led to the prosecution. Indeed, the Appellant’s entire case was premised on the erroneous assumption that the 1st and 2nd Respondents were the complainants. Accordingly, I find that the first ingredient of the tort of malicious prosecution was not been satisfied by the Appellant.

35. Apart from being required to demonstrate that the prosecution was instigated by the Respondents and that the prosecution terminated in his favour, the Appellant was also under a duty to demonstrate that the prosecution was actuated by malice. Even in the absence of probable cause, it is not automatic that a Plaintiff’s case for malicious prosecution will be considered proved. Having failed to demonstrate that the 1st and 2nd Respondents were the complainants in the trial Court and also having failed to demonstrated that, despite being mere witnesses, the 1st and 2nd Respondents played an active role that led to the prosecution and considering that the Appellant’s entire case was premised on the erroneous



assumption that the 1st and 2nd Respondents were the complainants, I do not see how the Appellant can surmount this hurdle of demonstrating that the prosecution was actuated by malice.

36. I have considered the circumstances under which the prosecution was initiated and I am in agreement with the trial Magistrate that the Appellant failed to demonstrate that the initiation thereof was motivated by malice. The 3rd Respondent submitted that the police officers acted upon a complaint, as it is their duty to maintain law and order, they carried out investigations which found that there was reasonable and probable cause to prefer charges against the Appellant, as a result the decision to institute the criminal charges was reached. My finding is that the Appellant did provide any evidence to disprove or discredit this assertion made by the 3rd Respondent.
37. On the above finding, I am fortified by the decision of the Court of Appeal in *James Karuga Kiiru v Joseph Mwamburi & 2 Others [2001]* eKLR where the following finding was reached:

“(B) Malicious Prosecution. To prosecute a person is not prima facie tortious, but to do so dishonestly or unreasonably is. Malicious prosecution thus differs from wrongful arrest and detention, in that the onus of proving that the prosecutor did not act honestly or reasonably, lies on the person prosecuted.

In the present case, the appellant has not unfortunately discharged this onus as there is nothing to show that the prosecutor did not act honestly and reasonably.

It will be evident that we also think that there is no merit in the final and faintly argued submission that there was no reasonable and probable cause for the prosecution. It may well be that the appellant was innocent all the time, but there is no reason in the absence of necessary evidence for making a police officer liable when he had only done his duty in investigating an offence.”

38. In the premises, I have no reason to fault the trial Magistrate for his finding that the Appellant failed to prove the tort of malicious prosecution on a balance of probabilities. Since the claim for wrongful arrest was alleged to have arisen from the same transaction as the malicious prosecution, it suffers the same fate.
39. It therefore follows that among all the ingredients of the tort of malicious prosecution, the Appellant proved only one, namely, that the prosecution was terminated in his favour. In the absence proof of the rest of the ingredients, this Appeal cannot succeed.

Final Order

- i. The upshot of the above determination is that this Appeal is found to lack merits. It is accordingly dismissed.
- ii. To assist in creating a conducive environment for reconciliation within the family, each party shall bear his own costs of this Appeal.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 16TH DAY OF JUNE 2023

.....

WANANDA J.R. ANURO

JUDGE

