



**Tuku v Matano (Civil Appeal E107 of 2022)
[2023] KEHC 23353 (KLR) (25 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23353 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E107 OF 2022
DKN MAGARE, J
SEPTEMBER 25, 2023**

BETWEEN

OMAR HUSSEIN TUKU APPELLANT

AND

FAHAD LAUSI MATANO DEFENDANT

*(Being an Appeal from the Judgement of the Senior Principal Magistrate's
Court at Mariakani, Olivia Koranje, Senior Resident Magistrate
delivered in Mariakani SPMCC No. E008 of 2022 on 3rd November 2022)*

JUDGMENT

1. This is a fairly straight forward Appeal. The Court, Olivia Koranje, SPM in her well-reasoned judgment given on 3/11/2022 delivered judgment where she dismissed the Appellant's suit in Mariakani SPMCC No E008 of 2022.
2. The Appellant had filed a claim against the Respondent claiming for malicious prosecution. I had to look at the Plaintiff twice. The police were not sued, and neither was the director of public prosecution. I have perused the entire, and cannot find an application to institute private prosecution.
3. I have perused a humongous 12 paragraph Memorandum of Appeal. It is prolixious, repetitive, and unseemly. The proper way of filing an Appeal is to file a concise Memorandum of Appeal without arguments, cavil or evidence. The rest of the King's language should be left to submissions and academia. Order 42 Rule, 1 provides as doth: -

“ 1. Form of appeal –

1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
(2) The memorandum of appeal shall set forth concisely and



under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively."

4. The Court of Appeal had this to say in regard to Rule 86 (which is *pari materia* with Order 42 Rule 1) in the case of *Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat* [2020] eKLR: -

"We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of Rule 86 of the *Court of Appeal Rules*. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See *Abdi Ali Dere v Firoz Hussein Tundal & 2 others* [2013] eKLR) and *Nasri Ibrahim v IEBC & 2 others* [2018] eKLR. In the latter case, this Court lamented:

"We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

5. Further in *Kenya Ports Authority v Threeways Shipping Services (K) Limited* [2019] eKLR, the court of appeal observed that: -

"Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In *William Koross v Hezekiah Kiptoo Kimue & 4 others*, Civil Appeal No 223 of 2013, this Court stated:

"The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

6. The Memorandum of Appeal raises only one issue, that is,
The leaned magistrate erred in properly appraising the evidence and the law regarding the case for malicious prosecution.
7. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time. The question this court will have to deal with is whether the Magistrate's court had jurisdiction to hear and determine this dispute. This is the only issue addressed in submissions before the court below and before this court.



8. I have read the Appellant’s submissions and Memorandum of Appeal. I have not sighted the Respondent’s submissions. The Appellant’s submissions are a study on how not to write submissions. The first 2 pages are basically a repetition of the Memorandum of Appeal. He then addresses the duty of the court as settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the *locus classicus* case of *Selle and another v Associated Motor Board Company and others* [1968] EA 123, where the law looks in their usual gusto, held by as follows:-

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

9. The Appellant maintains he was wrongly prosecuted. He forgot the tenor of:-

“ Article 157 (6) of the [Constitution](#), which states: -

- “ 6. The Director of Public Prosecutions 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.
 - b. take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and...”

10. There is no way therefore the Respondent prosecuted the Appellant, whether malicious or otherwise.

11. They relied on the case of [Gitau v Attorney General](#) [1982] eKLR, where Justice J.P. Trainor, as then he was stated as doth: -

The Plaintiff also claims damages for malicious prosecution. To succeed on that claim the Plaintiff must first establish that the Defendant or his agent set the law in motion against him on a criminal charge. “Setting the law in motion” in this context has not the meaning frequently attributed to it of having a police officer take action, such as effecting an arrest. It means being actively instrumental in causing a person with some judicial authority to take action that involves the plaintiff in a criminal prosecution. An example would be where a person prefers a criminal charge against another before a magistrate. Secondly he who sets the law in motion must have done so without reasonable and probable cause.....

The first question to be answered is: who set the law in motion? I have been told and I accept that the responsibility for that rests entirely on the Officer-in-Charge of the police station, and Inspector Kimani accepts that he is the person responsible. That then raises the second matter that I said the plaintiff must prove: that the setting of the law in motion by the Inspector, was without reasonable and probable cause. It is with some hesitation that I find that the plaintiff has failed to discharge the onus. I have summarised the evidence of the Inspector and what



DW1 and DW3 told him. If the Inspector believed what the witnesses told him then he was justified in acting as he did, and I am not satisfied that the plaintiff has established that he did not believe them or alternatively, that he proceeded recklessly and indifferently as to whether there were genuine grounds for prosecuting the plaintiff or not. I do not consider that the plaintiff has established animus malus, improper and indirect motives, against the witness.”

12. I have sadly noted that the excerpts are not a true reflection of the decisions of the court but a coloured mix and match. It is crucial for the solicitors to be true to their oaths in representing the tenor of case.
13. Consequently, they state they proved their case on 100% basis and pray that I award judgment.

Analysis

14. This appeal must fail. The claim for malicious prosecution must be made against parties who did the prosecution. Secondly there must be no probable cause for instituting the case. In this case, the Court found, under Section 210 of the Criminal Procedure Code that the Defendants had a case to answer.
15. A *prima facie* case in civil terms was defined in the case of Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR as doth: -

“ 4. A *prima facie* case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

16. It means, upon the Court finding there is a case to answer, there is a probable cause. The Complainants are not trained to determine whether there is a probable case. They report for people who took 6 years learning where to find the law, to make decision on a probable cause and a decision to charge. A Complainant has no control over that.
17. In the case of Okiya Omtatab Okoiti v Director of Public Prosecutions; Inspector General of National Police Service & another (Interested Parties) International Commission of Jurists (Kenya Section) (Amicus Curiae) [2022] eKLR, justice W. Korir, stated as doth: -

“ 202. That the DPP has discretion on the decision to charge was indeed affirmed by the Court of Appeal in Diamond Hasham Lalji & another v Attorney General & 4 others [2018] eKLR when it stated at Paragraph 30 that:

“...The DPP has formulated The National Prosecution Policy 2015 which repealed the 2007 prosecution policy. The policy, amongst other things, stipulates the factors to be taken into account before a decision to prosecute or not to prosecute is taken including the application of evidential test and public interest test and also the factors to be considered before a review of the decision to prosecute or not to prosecute is made.”

203. I agree with the findings in the cited decisions that the investigating officer cannot under whatever circumstances usurp the role of the prosecutor.”
18. This means neither the Complainant nor the Investigator are responsible for prosecution. Once the Appellant was placed on his defence, his goose was cooked, fried and eaten. It will be pretentious to



analyse the rest of the evidence upon the finding that they had a case to answer. The surrounding circumstances, equally vindicate the court.

19. A mere fact that a person has been acquitted without more is not a ground to sue for malicious prosecution. This is because the test as set out, correctly in my view, relying on the case of *George Masinde Murunga v Attorney-General* [1979] eKLR, where justice E. Cotran, as then he was stated as doth: -

“As to malicious prosecution the plaintiff must prove four things:

- (1) that the prosecution was instituted by Inspector Ouma (there is no dispute as to this);
- (2) that the prosecution terminated in the Plaintiffs’ favour (there is also no dispute as to this);
- (3) that the prosecution was instituted without reasonable and probable cause; and
- (4) that it was actuated by malice.”

20. There was judicial determination that the Appellant had a case to answer. A case to answer, was held to mean, in the case of *Republic v Robert Zippor Nzilu* [2020] eKLR that:-

“I have considered the material on record as well as the submissions made on behalf of the accused in this ruling where the court is being called upon to decide whether or not the prosecution has made out a *prima facie* case against the accused that would warrant this court to call upon him to give their defence. In other words, does the accused have a case to answer? In *Republic v Abdi Ibrahim Owl* [2013] eKLR a *prima facie* case was defined as follows: -

“Prima facie” is a Latin word defined by Black’s Law Dictionary, 8th Edition as “Sufficient to establish a fact or raise a presumption unless disproved or rebutted”. “Prima facie case” is defined by the same dictionary as “The establishment of a legally required rebuttable presumption”. To digest this further, in simple terms, it means the establishment of a rebuttal presumption that an accused person is guilty of the offence he/she is charged with. In *Ramanlal Trambaklal Bhatt v R* [1957] E.A 332 at 334 and 335, the court stated as follows:

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one “which on full consideration might possibly be thought sufficient to sustain a conviction.” This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is “some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence”. A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence...It is may not be easy to define what is meant by a “*prima facie* case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”



21. In the case of *Ronald Nyaga Kiura v Republic* [2018] eKLR, the Court held follows:

“ 22. It is important to note that at the close of prosecution, what is required in law at this stage is for the trial court to satisfy itself that a prima facie has been made out against the accused person sufficient enough to put him on his defence pursuant to the provisions of Section 211 of the Criminal Procedure Code. A prima facie case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebuttal is offered by an accused person. This is well illustrated in the cited Court of Appeal case of *Ramanlal Bhat v Republic* [1957] EA 332. At that stage of the proceedings the trial court does not concern itself to the standard of proof required to convict which is normally beyond reasonable doubt. The weight of the evidence however must be such that it is sufficient for the trial court to place the accused to his defence.”

22. This means that the prosecution had evidence, which is not worthless or just a scintilla of evidence.

23. The termination in favour of the Appellant applies at the case to answer stage. It is not always that all cases terminated at the case to answer are to be taken as malicious. It could simply be because there was sloven prosecution.

24. I agree with the case of *Douglas Odhiambo Apel & another v Telkom Kenya Limited*, HCC 2547 of 1998. Unfortunately, that judgment referred was set aside by the Court of Appeal in Civil Appeal No 115 of 2006.

25. All said and done, the Appeal is without basis. The same is dismissed with costs.

Determination

26. The upshot of the foregoing is that I make the following Orders:

- a. The Appeal is hereby dismissed with costs of Ksh 75,000/= payable to the Respondent within 30 days.
- b. The file is closed.

DELIVERED, DATED AND SIGNED AT MALINDI, VIRTUALLY ON THIS 25TH DAY OF SEPTEMBER, 2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Waithera for the Appellant

No appearance for the Respondent

Court Assistant - Brian

