



**Maro v Attorney General (Civil Appeal 78 of 2022)
[2023] KEHC 23889 (KLR) (23 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23889 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 78 OF 2022
SM GITHINJI, J
OCTOBER 23, 2023**

BETWEEN

ATHMAN ADE MARO APPELLANT

AND

ATTORNEY GENERAL RESPONDENT

(Being an appeal from the judgment and Decree of the Chief Magistrates' Court delivered by Hon. E. K. Usui on the 26th day of August, 2022 at Malindi in CMCC No. E27 of 2021)

JUDGMENT

CORAM: Hon. Justice S. M Githinji

Richard O. & Co. Advocates for the Appellant

The Attorney General for the 2nd Respondent

- 1 Before the trial court was a claim commenced by a plaintiff filed on February 21, 2021, in which the appellant herein (the plaintiff in the trial court) sued the respondents herein in the trial court seeking general damages, special damages together with costs of the suit and interest thereon for allegedly having been arrested and prosecuted in a manner that was malicious, aimed at harassing and subjecting him to an unnecessary criminal process.

The Appeal

2. The appeal before this court is against the case in the lower court having been dismissed. The judgment was delivered in August 26, 2022. Aggrieved by the judgment, the appellant filed a memorandum of appeal on the 2nd day of September, 2022. The grounds of appeal are that: -
 1. That the Learned Trial Magistrate erred on both points of law and fact by shutting off her eyes on the evidence of malice on the part of the Investigating officer in the Criminal case.



2. That the Learned Magistrate erred on both point of law and facts by failing to note that the police knew or ought to have known that the complainant had made false report but proceeded to charge the Appellant herein.
 3. That the Learned Trial Magistrate erred on both point of law and fact by failing to consider the Appellant's submissions.
 4. That the Learned Trial Magistrate erred on both facts and law by failing to appreciate the evidence as tendered by the Appellant.
 5. That the Learned Trial Magistrate erred on both point of law and fact by dwelling on the merit of the concluded criminal case which she was not called for as such acted like an appeal court.
 6. That the Learned Trial Magistrate decision and judgment was harsh, unfair, unreasonable as the same did not give any reasonable grounds why the negligence on the part of the investigating officer was ignored making the entire charge and trial malicious.
3. He sought to have the decision and finding of the Chief Magistrate's court in Malindi CMCC No. 27 of 2021 set aside and substituted with a decision of this court allowing the Plaintiff's case and evaluate damages payable to the Appellant.

Summary of the Evidence

4. PW1 Athman Ade Maso told the court that he recorded a statement on 2nd February, 2022 which was adopted as his evidence in chief. He further told the court that on or about the 12th day of July, 2017, the police officers from Malindi Police Station without any colour of right, acted on baseless and false information from the 1st Respondent which they knew or ought to have known was false, malicious and intended to embarrass him. That he was arrested before his students, teachers and other members of the society on allegation that he had committed the offence of rape.

It was his testimony that he was retained in custody for a total of twenty-four (24) days during which period he suffered great damage. That he was arraigned in court and maliciously charged of the aforementioned offence which the prosecution knew was baseless. According to him, the arrest and subsequent prosecution was malicious and aimed at embarrassing him and subjecting him to unnecessary criminal process with an intention to lower his reputation in the society. In addition, that he has spent sums of money in terms of legal fees for his defence during the entire trial which amount he claimed as special damages.

5. DW1 PC Marian Hussein No. 92913 the Investigating Officer informed the court that the case was about Sexual Offence No.25/2017 which she had investigated. She told the court that she had recorded her statement on 8th December, 2021 which was adopted as her evidence in chief. She further stated that on the 18th day of June, 2017, the 1st Respondent reported at the station that she had been raped by her then school principal.

She stated that the investigation into the matter took her a whole month and pursuant to the investigations, she arrested the appellant on the 12th July, 2017, booked him into custody and on the next day, she took him to court under a miscellaneous application where she sought leave to hold the appellant for fourteen days to conclude her investigations.

6. That in the course of her investigations, she visited the school and recorded statements from various would be witnesses and she also offered the appellant a chance to tell his side of the story which he did through a recorded statement. She also stated that the statement was recorded without undue force or coercion. That upon completion of her investigations, the appellant was duly charged on the 21st



July, 2017 for the offence of rape and the alternative charge of indecent act. Further, that based on her investigations, the prosecution called eleven (11) witnesses to testify in the case.

She also informed the court that her investigations were not actuated by any malice, bad faith or any ulterior motives and although the prosecution was found not to have proved its case beyond reasonable doubt, the appellant was found culpable for the offence during an independent disciplinary proceeding by the Teachers Service Commission where the standard of proof is lower as compared to the one in criminal cases.

7. The appeal was heard via written submissions with the appellant filing their written submissions on the 20th day of July, 2023 and the 2nd Respondent having filed theirs on the 11th day of July, 2023. This court has read and considered those submissions.

Analysis and Determination

8. I have carefully considered the appeal herein, its grounds and the parties' submissions. The court is alive to the fact that it did not hear the witnesses testify nor did it observe their demeanor and therefore should make due allowance for that. This court is also alive to the fact that the appeal is in a way a retrial and the court must therefore reconsider the evidence, evaluate it afresh and draw its own conclusions. In *Peter M. Kariuki v Attorney General* (2014) eKLR the court held inter alia as follows:

“We have also, as we are duty bound to do as a first appellate court to reconsider the evidence adduced before trial court and re-evaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.”

In my view, the main issues for determination are whether the arrest and prosecution of the appellant was illegal and unlawful, or actuated by malice; whether there was inexcusable negligence on the part of the investigating officer in the matter; and what damages, if any, is the appellant entitled to; and if there is any other order the court may deem fit to grant.

9. The appellant contends that he was charged in a criminal court for the offence of rape contrary to section 3(1)(a)(c) as read with sub section 3 of the *Sexual Offences Act* No. 3 of 2006. He also contends that he was detained at Malindi Police Station for a total of 24 days and that the case took two years and seven months after which he was acquitted. According to him, the trial magistrate's decision was harsh, unfair and unreasonable as the same did not give any reasonable grounds why there was no negligence on the part of the Investigating officer in the entire trial process.

The Respondent on the other hand asserts that an acquittal does not in itself reflect his innocence in relation to the offence. That it is only after the appellant had been put to his defence that he was then acquitted which means that the court found that the appellant, based on the evidence tendered by the prosecution, had a case to answer and in fact there was enough factual basis warranting the prosecution of the appellant and thus the said prosecution cannot be termed as malicious.

10. According to the authors of Clerk and Lindsell on Torts, 18th Edition at page 823, the essentials of the tort of malicious prosecution are as follows:

“in an action of malicious prosecution the claimant must show first that he was prosecuted by the defendant, that is to say, that the law was set in motion against him on a criminal charge, secondly that the prosecution was determined in his favour, and thirdly that it was without reasonable or probable cause; fourthly that it was malicious. 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.”

I am well guided by the holding in the case of *Gitau vs. Attorney General* (1990) KLR 13 where the court stated that:

“To succeed on a claim for malicious prosecution 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 arrest. It means being actively instrumental in causing a person with some judicial authority to take action that involves the plaintiff in 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 responsibility for setting the law in motion rests entirely on the Officer-in-Charge of the police station. If the said officer believed what the witnesses told him then he was justified in acting as he did, and the court is 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.”

11. I have analyzed the record of appeal and in my view, the appellant has not presented before this court any evidence of malice, and there is equally no evidence of unlawful actions or manipulation of the court process in the entire trial, by the respondents. An acquittal perse is not evidence enough that the criminal proceedings were malicious. The onus is on the appellant to establish that the prosecution was without reasonable or probable cause.

Having carefully evaluated the record, I am of the finding that the arrest, confinement and prosecution of the appellant was not actuated without reasonable and probable cause. Further, the mere fact that the appellant herein was acquitted of criminal charges does not by itself, necessarily connote malice on the part of the prosecution. In the case of *Socfinaf Kenya Ltd vs Peter Guchu Kuria & Another*, Civil Appeal No. 595 of 2000 (2002) eKLR, Aganyanya, J (as he then was), observed as follows:

“Moreover, when there is a case of suspected theft the first step is to report the matter to police, who in their own way find out how to carry out investigations. And it is up to the police to take further steps like taking a suspect to court if they have sufficient evidence against such suspect to warrant such action. This then is the action by police and the state should be involved or joined in such suit and that the complainant should not be blamed for making such report to police. What is of great significance in such case is whether or not there is a reasonable and/or probable cause for the arrest and/or prosecution of the culprit. And the onus of proving that there was no reasonable and probable cause for the arrest and prosecution of the suspect lies on him/her who queries such arrest or prosecution. As to the prosecution of the respondents, the complainant could not force police to do so when there was no evidence to take them to court. Police carry out investigations before taking suspects to court and there are various incidents when police have declined to prosecute a suspect when investigations have disclosed no offence to warrant this. If the respondent’s case fell in the latter category, then I am sure they would not have taken him to court. That a suspect was acquitted of a criminal case is not sufficient ground for filing a civil suit to claim damages for malicious prosecution or false imprisonment. Evidence of spite, ill-will, lack of reasonable and probable cause must be established.”



12. From the foregoing consideration, it is vivid that for this appeal to succeed, the appellant had to prove that there was malice on the part of the respondents. He has not in any way established malice on the part of the respondents, and as such it is my finding and holding that the appeal lacks merit. It is accordingly dismissed with costs to the respondents.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 23RD DAY OF OCTOBER, 2023.

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S.M.GITHINJI

JUDGE

In the Presence of; -

Mr Bwanazir holding brief for Mr Otara for the Appellant

AG Representative is absent.

