



**Ngoro v Mathembe & 2 others (Civil Appeal E056 of 2022)
[2024] KEHC 11737 (KLR) (1 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11737 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL APPEAL E056 OF 2022**

RK LIMO, J

OCTOBER 1, 2024

BETWEEN

PHILIP KILONZO NGORO APPELLANT

AND

MARING'O MATHEMBE 1ST RESPONDENT

TITUS MUSYIMI MARING'O 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

1. This Appeal arose from the Judgement of Hon. M. Nasimiyu Principal Magistrate in Kyuso PM's Court Civil Case No. E010 of 2021. In that case the appellant had sued the respondents for malicious prosecution vide Kyuso PM's court Cr. Case No. 171 of 2010 where the trial court found that the prosecution had not proved its case against him to the required standard and acquitted him.
2. The trial court in the subsequent suit in the civil case found that he had not proved that the complainants (1st & 2nd respondent and the A.G) had no reasonable and probable cause to commence criminal proceedings. The trial court then dismissed the case resulting to this appeal.
3. Before I delve on the grounds raised in this appeal, I will highlight the background of the case in the lower court.
4. The appellant herein was charged with the offence of threatening to kill contrary to Section 223 of the Penal Code vide Kyuso PM's Court Cr. Case No. 171 of 2019. The particulars of the charge state that on 27th August 2019 at Sumoni Village in Tseikuru Sub County within Kitui County without lawful excuse uttered threatening words in Kikamba threatening to kill the 1st respondent (Marigo Mathembe). The appellant denied the charge and the matter proceeded to full trial. The appellant was placed on his defence. What became apparent during trial is that a land dispute was central to the whole



- saga. The appellant and the 1st & 2nd respondents are relatives. The 2nd respondent in fact is the son of the 1st respondent and was sued in the civil case for being a witness in the criminal matter.
5. The criminal case proceeded and the criminal court evaluated the evidence and found that the prosecution's case had not been proved to the required standard and acquitted the appellant.
 6. Upon acquittal, the appellant commenced civil proceedings against the respondents for malicious prosecution pleading inter alia that the 1st respondent fabricated evidence against him in the criminal case and reported him to Kyuso Police Station on false information. The appellant also faulted the 3rd respondent for prosecuting him on what he termed as baseless & malicious accusation. He claimed that he suffered loss and damage in defending himself in the criminal case.
 7. The 1st & 2nd respondent defended themselves that the complaint/report made to the police was genuine and justified. They further pleaded that the acquittal under Section 215 of the Criminal Procedure Code did not mean that they had baseless and unfounded basis to book a report and record statements with the police.
 8. The A.G (3rd respondent) on its part defended itself against the claims of malicious prosecution. It pleaded that the State acted on a valid complaint received and upon investigations the same revealed that there was reasonable and probable cause to commence prosecution because they found that the appellant was guilty of culpable offence and they preferred charges in good faith in performance of their statutory duty and for administration of justice.
 9. During trial, the appellant stated that the 1st respondent is his grandfather while the 2nd respondent is an uncle to him. He stated that he attended a clan meeting on 27th July 2019 over a land dispute and did not threaten the 1st respondent. He further revealed that the dispute over a parcel of land involved him and the 2nd respondent that is why he sued him in the case for malicious prosecution. He insisted that though other independent witnesses testified during the criminal trial, he believed they were instigated to frame him.
 10. The 1st respondent on his part testified that the appellant threatened to kill him with arrows after issues emerge after the area was declared an Adjudication Area.
 11. The 2nd respondent also testified and stated that the appellant was his nephew and that he had a dispute with him over Land Parcel No.272. He stated that his father (1st respondent) reported to the police when the appellant issued threats to him. He claimed that he was just a witness having been present during a clan meeting called to resolve the dispute.
 12. The State on their part called CPL Paul Rotich (DW4) who testified that the police acted on the complaint made by the 1st respondent and recommended that the appellant be charged. He testified that the criminal case collapsed because the threatening words were uttered in Kikamba and no Kamba translator was available at the trial to provide translation.
 13. As observed above the trial court evaluated the evidence tendered and found that;
 - i. The 2nd respondent did not participate in instituting the criminal proceedings against the appellant,
 - ii. That the Investigating Officer had honest belief that a crime had been committed and instituted criminal charges against the appellant and
 - iii. That malice was not established and dismissed the suit.
 14. The appellant aggrieved by the Judgement filed this appeal raising the following grounds namely;



- i. That the learned Magistrate erred in law and fact by failing to make necessary consideration on the evidence tendered in totaling the evidence adduced by the appellant (sic).
 - ii. That the trial Magistrate erred in law and fact by considering deeply the issues of land case between the parties than considering that the appellant incurred huge expenses for attending court in criminal case (171 of 2019).
 - iii. That the learned trial Magistrate erred in law and fact in considering irrelevant factors and failing to consider relevant factors in considering the conclusion (sic) in criminal case which the appellant was acquitted under Section 215 of the Civil Procedure Code.
 - iv. That the learned trial Magistrate erred in law and in fact in basing his judgement on repealed law and failings to consider that the appellant was prosecuted and put in prison for no good reasons and or grounds.
 - v. That the learned trial Magistrate erred in law and fact in failing to consider and analyse reasons for the previous criminal case and plaint as set out in the appellant's pleadings and evidence hence coming to the wrong conclusion.
 - vi. That the trial Magistrate erred by failing to record all the proceedings especially the evidence tendered by the appellant in the civil suit (sic)
 - vii. That the trial Magistrate erred in law and fact in failing to consider the prayers sought by the appellant.
 - viii. That the trial magistrate erred in law and fact by showing open bias against the appellant hence failing to give the appellant a fair hearing.
 - ix. That the learned Magistrate erred in law and fact in failing to consider that the respondent herein had overriding interest in the appellant's piece of land which was the cause of the criminal case.
 - x. That the learned trial Magistrate erred in law and fact in failing to consider that the appellant's huge expenses which he incurred during the criminal case by paying his advocate to defend him in the case.
 - xi. That the learned trial Magistrate erred in law and fact in failing to consider and apply legal principles as set out in the plaint filed by the appellant hence reaching a wrong conclusion in law.
15. In his written submissions dated 29th May 2024, the appellant contends that he tendered documents to prove his case at the lower court and faults the trial court for dismissing his case.
 16. He faults the trial court for failing to consider that he incurred huge expenses in defending himself in the criminal case where he was eventually acquitted after trial.
 17. He prays that he should be allowed to enjoy fruits of judgement in the criminal case and believes that he proved his case at the trial to the required standard. He says he was prosecuted without sufficient grounds and that the respondents' defence in the lower court were mere denials.
 18. He also avers that he was arrested over a land dispute and that he had previously been arrested several times adding that the actions to arrest him were malicious.
 19. He contends that he was not accorded a fair chance to be heard and has asked this to relook at the documents tendered.



20. The 1st & 2nd respondents opposed this appeal through oral submissions through their learned counsel Mr. Ngoro.
21. They deny the appellant's assertion that the trial court was biased against him. The respondents contend that the appellant's case at the trial was baseless and support the trial court in its Judgement.
22. The Respondent submits that the 1st respondent had a good cause to file a complaint with the police as there was a land dispute that gave rise to the threats made by the appellant.
23. They submit that the criminal case proceeded but failed because the trial court found that it was not proved to required standard.
24. They contend that the appellant filed a suit on malicious prosecution as a punitive measure against the respondents. They submit that the 1st respondent was a complainant while the 2nd respondent was a witness.
25. The 3rd Respondent through Mr. Ngumbi also made oral submissions in opposition of this appeal. The A.G submits that the police had a reason to charge the appellant with a criminal case and that it had statements from 3 witnesses.
26. The State contends that it was only acting on a complaint adding that the appellant was only kept at the station for one hour and given police bond. It denies that there was any malice.
27. This court has considered this appeal and the response made by all the respondents. This court has already laid out the background of this appeal and for the interest of judicial time I will go straight to the issue(s) for determination.
28. The singular issue is whether the appellant proved his case that he was maliciously prosecuted and therefore is entitled to damages.
29. This court has looked at the grounds raised in the memorandum of appeal and finds that the appellant majorly complaints about expenses incurred in defending himself in the criminal trial and the fact that the trial court in the civil case did not consider the evidence tendered.
30. The 1st ground of appeal raised is unclear and difficult to understand. But if he meant that the trial court did not consider the evidence, disagrees because the Judgement from the trial court is elaborate and comprehensive on all the issues raised in the suit.
31. It is quite apparent from the evidence tendered that a land dispute was central to criminal charges. The appellant and the respondents concur that there was a clan meeting held on 27th August 2019 which was aimed at finding a solution and from where the reported threats were made.
32. This court finds no merit therefore on the appellant's contention that the trial court placed too much weight on the land dispute. The land dispute was the main cause of the misunderstanding between two family members and there is dispute over that.
33. The appellant also faults the trial court for considering relevant irrelevant factors and not considers relevant ones. The appellant has however not indicated what irrelevant factors were considered and which relevant factors were left out.
34. He complains that he was acquitted under Section 215 of Criminal Procedure Code which in itself is not automatic that once acquitted under Section 215 you are entitled to a cause of action for malicious prosecution. A plaintiff must prove the element of malice to sustain a claim based on malicious prosecution.



35. It is sufficient for the defence to demonstrate there was reasonable and probable cause to institute criminal charges. The trial court addressed its mind well on this subject and was well guided in the decisions of Stephen Gachau Githaiga & Another –vs- Attorney General [2015] eKLR and Robert Okeri Ombeka –vs- Central Bank of Kenya [2015] eKLR. In both decisions the courts dwelt on what constitutes “probable cause” and held that unless a party can demonstrate that his prosecution was conducted without a probable cause, he cannot succeed. The fact that the appellant was placed on his defence means that the criminal court found that the prosecution had established a prima facie case sufficient to him to defend himself. When an accused is not found to have a case to answer in a criminal trial he may have a cause of action for malicious prosecution but where a person is acquitted under Section 215 Criminal Procedure Code he has a mountain to climb because it is difficult to prove the element of malice in that event.
36. This court finds that contrary to the appellant’s assertions, the trial Magistrate analyzed and evaluated the evidence placed before her well. I do not find evidence to support the contention that the Magistrate was either biased against the appellant or failed to record part of the proceedings.
37. The appellant contends that he spent huge sums of money in defending himself in the criminal case but that in itself could not and does not give rise to a cause of action. He was required to establish that his prosecution was done without reasonable or probable cause. It is evident that a complaint was lodged at Kyuso Police Station by the 1st respondent. The police carried out the investigation and found sufficient evidence to prefer charges. The 2nd respondent in fact was only a witness in the criminal case and never participated in any other manner.
38. The appellant has raised an interesting point that he ought to have been allowed to enjoy fruits of the Judgement in the criminal trial where he was acquitted but as I have found out above an acquittal in a criminal trial does not entitle one to automatic cause of action leave alone fruits of Judgement. He can enjoy the fruits of freedom and liberty that comes with the acquittal but fruits of a Judgement in a civil case can only come where a cause of action is established. In this matter the appellant failed to establish one.

In the end this court finds no merit in this appeal and the same is disallowed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT KITUI THIS 1ST DAY OF OCTOBER, 2024

HON. JUSTICE R. K. LIMO

JUDGE

