



REPUBLIC OF KENYA



**Ptios v John & another (Civil Appeal E005 of 2022)  
[2024] KEHC 13419 (KLR) (25 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13419 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPENGURIA  
CIVIL APPEAL E005 OF 2022  
RPV WENDOH, J  
OCTOBER 25, 2024**

**BETWEEN**

**EMMANUEL PTIOS ..... APPELLANT**

**AND**

**MUDANG LIMAKORI JOHN ..... 1<sup>ST</sup> RESPONDENT**

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

**JUDGMENT**

1. By a plaint dated 3/2/2020, the appellant, Emmanuel Ptios (formerly plaintiff) filed a suit against Mudang Limakori John and the Honourable Attorney General (formerly the defendants) for the following,
  1. Special damages of Kshs.59,700/=
  2. General, aggravated and exemplary damages for malicious prosecution.
  3. Costs of the suit and interest.
2. The 1<sup>st</sup> Respondent filed a defence dated 26/2/2020 denying the claim and put the appellant to strict proof.
3. The second respondent also filed a defence dated 6/2/2020, denied liability, put the appellant to strict proof and whatever the police did was within their mandate under the Constitution and the law.
4. The matter proceeded to full hearing after which the trial court dismissed the appellant's claim. Aggrieved by the dismissal, the appellant filed this appeal listing eight grounds of appeal which are as follows
  1. That the trial court erred by failing to find that the case had been proved on a balance of probability;



2. That the trial court erred by failing to take into account the fact that the appellant was acquitted in criminal case no.762 of 2017; where he was found to have no case to answer which formed the basis of Civil case no. 1 of 2020
  3. That the court erred by finding that proper investigations were carried out yet witnesses were not credible since they were not witnesses to the alleged assault;
  4. That the trial court erred by not taking into account the fact that the P3 form was not produced in Criminal case no. 762 of 2017 hence no proof of assault by the appellant
  5. That the Magistrate erred by not finding that malice was proved against the 1<sup>st</sup> Respondent
  6. That the trial court erred by failing to consider the appellants exhibits P. exhibit 1 and 2 which were proceedings and ruling dated 13/6/2019 which demonstrated that the 1<sup>st</sup> Respondent had malice.
  7. That the trial court erred in finding that the second respondent carried out proper investigations whereas the respondents constitutional right had been infringed;
  8. That the court erred by failing to take into account the evidence and cross-examination of the Investigating Officer which proves that he did not carry out any investigations.
5. The appellant therefore prays for Judgement as had been prayed for in the lower court.
  6. The firm of Katina Advocates, Counsel for the appellant filed submissions dated 1/11/2023. I have perused the court file and note that neither the first nor the second respondent filed their submissions.
  7. In their submissions, the appellant's Counsel condensed the grounds into two (grounds 1-6) whether malice was proved and whether the appeal has merit.
  8. Counsel submitted that for a case of malicious prosecution to succeed, the appellant has to prove the following
    1. That the prosecution was instituted by the defendant or someone for whose acts he is responsible;
    2. That the prosecution was terminated in his favour;
    3. That the prosecution was instituted without reasonable or probable cause.
    4. That the prosecution was actuated by malice.
  9. It is the appellant's submission that the trial magistrate failed to take into account the fact that the appellant had been acquitted in Criminal case no. 762 of 2017 with the Ruling being in favour of the appellant; that PW2 denied seeing the appellant and the 1<sup>st</sup> Respondent fight, PW4 was not at the scene, PW5 admitted to the appellant and 1<sup>st</sup> respondent having bad blood over land thus confirming that the criminal case was actuated by malice; Counsel further submitted that the mandate of the police is to receive and act on valid complaints, investigate, interrogate and pursue credible evidence; that the prosecution did not produce the P3 form, did not call the Doctor who examined the complainant and hence no evidence to confirm that the appellant assaulted the 1<sup>st</sup> Respondent; that the appellant was acquitted in the lower court; that if the Investigating Officer had carried out proper investigations, he would not have charged the appellant with the offence; that the institution of the charges against the appellant was without reasonable and probable cause.



10. This being the first appellate court, it is incumbent upon this court to re-examine all the evidence on record, evaluate it and arrive at its own conclusion as was held in the case of *Selle & Another v. Associated Motors Boat Ltd* (1968) EA 123. It is also settled law that the appellate court will not ordinarily interfere with the findings of fact by the trial court unless they are based on no evidence at all or was based on misapprehension of it or the court has shown demonstrably to have acted on wrong principles of law in arriving at its findings; -

" In *Jabane v. Olenja* (1986) KLR 66, the court stated thus PP 66 "more recently, however, this court has held that it will not lightly differ from the findings of fact of a trial Judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did."

11. See also *Ephantus Mwangi v. Duncan Mwangi Wambugu* (1982-88) I KAR 278.

12. I have duly considered the pleadings on record, the proceedings, the grounds of appeal, and submissions by the appellant. The law places the legal burden of proving his case on the appellant. Section 107 of the *Evidence Act* provides that whoever alleges is under an obligation to prove, on a balance of probabilities.

13. In *Murunga v. A.G* 1979, KLR 13A the elements to be proved in a case of malicious prosecution are well settled;

- i. That the prosecution was instituted by the defendant or someone for whose acts he is responsible;
- ii. That the prosecution terminated in the plaintiff's favour;
- iii. That the prosecution was instituted without reasonable or probable cause;
- iv. That it was actuated by malice!

14. In the instant case, there is no dispute that the appellant was charged in Kapenguria Criminal Case no. 762/2017 for the offence of assault causing actual bodily harm contrary to section 251 of the *Penal Code*.

15. The complainant was the 1<sup>st</sup> Respondent who made a report to the police and the police took up the investigation and prosecution of the case.

16. The appellant was acquitted of the charge under Section 210 of the *Criminal Procedure Code*. The 1<sup>st</sup> and 2<sup>nd</sup> elements have therefore been established.

#### **Whether the prosecution lacked reasonable and probable cause;**

17. The appellant's contention is that had the police investigated the case, he would not have been charged and further that PW5 confirmed that there was bad blood between the appellant and the 1<sup>st</sup> respondent.

18. PW1, the 1<sup>st</sup> Respondent testified to how the appellant attacked and hit him with a stick or club severally and then hit him with the head as a result of which he suffered injuries. PW2 did not witness the incident. The only other witness was PW3, the 1<sup>st</sup> Respondent's daughter aged twelve (12) years who stated that she saw the appellant and Respondent holding each other, engaged in a scuffle, they slapped each other but she did not see the appellant hit the 1<sup>st</sup> Respondent with a stick because both



had placed their sticks aside. She heard a noise ‘tuu’ but could not tell who headed the other. It follows that the two witnesses to the alleged offence gave totally contradictory evidence as to what actually happened.

19. In *Samson John Nderitu V. AG* (2010) eKLR, Nambuye. J. held as follows; -

“It is trite and this court, has judicial notice of the fact that before an accused person is taken to court, and arraigned in court for criminal prosecution, the prosecuting authority namely the police or whatever unit, whose functions fall under the office of the Defendant, usually carry out investigations, record statements from potential witnesses, analyze the facts to determine if the facts disclose an offence before arraigning such a person in a court of law.”

20. In this case, there were two versions of what happened, an assault or a fight. The 1<sup>st</sup> Respondent went ahead to complain and was issued with a P3 form indicating the 1<sup>st</sup> Respondent was injured. Though it was not produced in evidence, it was part of the evidence that was supposed to be produced. Although the appellant was put at the scene of alleged offence, he did not complain of either assault or a fight.

21. In the Kagane case *Supra* the court used the phrase “satisfied a prudent and cautious man that the plaintiff was probably guilty of the offence.”

22. It is evident that once the 1<sup>st</sup> respondent made a report to the police, they did carry out investigations because they recorded witness statements and the witnesses testified in court as, PW 2,3 and 4. Apart from the 1<sup>st</sup> Respondent PW3 is the only one who witnessed the incident. The 1<sup>st</sup> Respondent was examined by a Doctor and a P3 form filled indicating that he had suffered harm. The said P3 was not produced in evidence because the Doctor did not testify. That is why the trial court found no medical evidence to support the allegations of assault. In my view, the police did carry out some investigations.

23. What amounts to reasonable and probable cause was discussed in the case of *Hicks v. Faulkner* (1878) 8 Q B D 167 at page 174, where the court said “ I should define reasonable and probable cause to be an honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds of the existence of a state of circumstances which, assuming to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accused to the conclusion that the person charged was probably guilty of the same imputed.”

24. In the case of *Kagane and others v. Attorney General* EA 643 the court said “..... the test whether the prosecution was instituted without reasonable and probable cause is whether the material known to the prosecution would have satisfied a prudent and cautious man that the plaintiff was probably guilty of the offence”. 2

25. At paragraph 11 of CA E090/2023. *Secretary, Board of Management Lugulu Mixed and Boarding Primary School v. AG* the court said

“ ...the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of an objective test. That is to say, to constitute reasonable and probable cause, the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material consisted of facts discovered by the prosecutor or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty. If and so far as that material is based upon information, the information must be reasonably credible, such that an ordinary reasonable prudent



and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for the prosecution.”

26. From the above quotes, the word used is ‘probably guilty’ meaning that it should not be full proof that the person charged would be found guilty. In this case, from the testimony of PW1 and 2, there was an altercation between the 1<sup>st</sup> respondent and the appellant, following which the 1<sup>st</sup> respondent seems to have been injured. There is no evidence that the Investigating Officer did not honestly believe in the truth of the prosecution. In my view, I would agree with the trial court that there was reasonable and probable cause for the decision to prosecute the appellant.

#### **Whether there was malice;**

27. The main reason for alleging malice is because the appellant was acquitted and further that PW5 testified to there being bad blood between the appellant and the 1<sup>st</sup> respondent. There is no law that provides that every charge by the Director of Public Prosecutions must end up in a conviction. This is because a case may result in an acquittal due to the manner in which evidence is tendered or failure to adduce all the evidence like in this case. It also follows that an acquittal in itself is not evidence of malice. In *Nzoia Sugar Company Ltd v. Fungututi* (1988) KLR 398, the Court of Appeal had this to say “Acquittal per se on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecutor. The mental element of ill will or improper motive cannot be found in an artificial person like the appellant but there must be evidence of spite in one of its servants that be attributed to the company”
28. Again, in *Susan Muthau v. Joseph Makau Mutua* (2018) eKLR, the court held “it must always be remembered that the element of malice is material on the part of the prosecution and not the complainant unless there is collusion between the two”.
29. The appellant alleges that PW5 knew of the bad blood between him and 1<sup>st</sup> Respondent. I have seen the Investigating officer’s testimony. Indeed, he became aware of the land dispute between the appellant and 1<sup>st</sup> respondent during investigations but he denied knowing the 1<sup>st</sup> respondent there before. It was the appellant’s duty to prove that the said Investigating Officer acted out of spite or malice or that he colluded with the 1<sup>st</sup> respondent which he has not done. Malice cannot be deduced from the circumstances.
30. In *GBM Kariuki v. Attorney General* (2016) eKLR the judge said ... “Malice however can be express or can be gathered from the circumstances surrounding the prosecution. A prosecution can either be mounted based on an offence committed in the presence of law enforcement officers or by way of a complaint lodged by a person to the said officer or agencies”.
31. The other witnesses, PW2 and 4 denied knowledge of any dispute.
32. The Investigating Officer learnt of the land dispute during his investigation of the case and that does not mean he was influenced by that knowledge to charge the appellant. Indeed, bad blood can result in assault.
33. Having evaluated the evidence, submissions and grounds of appeal, I come to the same conclusion as the trial court, that the prosecution had reasonable cause to charge the appellant and no malice has been proved. The appeal is unmerited and it is hereby dismissed. The Respondent did not participate in the appeal and will not be entitled to costs of appeal

**DELIVERED, DATED, AND SIGNED AT KITALE THIS 25TH DAY OF OCTOBER, 2024.**

**R. WENDOH**



## **JUDGE**

Judgment delivered virtually in the presence of

Appellant – Ms. Sugut

Respondent – N/A

Juma/ Duke – Court Assistants

