



REPUBLIC OF KENYA



KENYA LAW
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**Kibue (Acting as legal representative on behalf of the Estate of Joseph Wanjau Kanure - Deceased)
v Majani (Civil Appeal 15 of 2024) [2024] KEHC 13796 (KLR) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13796 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 15 OF 2024**

H NAMISI, J

NOVEMBER 7, 2024

FORMERLY KIAMBU HCCA NO. E087 OF 2021

BETWEEN

**SIMON KAMURE KIBUE (ACTING AS LEGAL REPRESENTATIVE
ON BEHALF OF THE ESTATE OF JOSEPH WANJAU KANURE -
DECEASED) APPELLANT**

AND

CATHERINE MWIKALI MAJANI RESPONDENT

*(Being an Appeal from the judgement of Hon. Ekhubi B.M, Principal Magistrate
delivered on 30 April 2020 in Thika Chief Magistrate Court Civil Case No. 632 of 2014)*

JUDGMENT

1. The appeal herein arises from a claim filed in the Magistrates Court at Thika by the Respondent against Joseph Wanjau Kanure (now deceased) seeking the following reliefs:
 - i. General damages for instigating wrongful arrest, malicious prosecution and unlawful imprisonment;
 - ii. General damages for loss of reputation and/or malicious injurious falsehoods;
 - iii. Exemplary/punitive and/or aggravated damages;
 - iv. Loss of business credit and special damages;
 - v. Costs of the suit;
 - vi. Interest on damages and costs;
 - vii. Any further or other relief this Honourable Court may deem fit and just to grant



2. The Respondent's case was that on 19th December 2012, the Defendant, Joseph Wanjau Kanure (now deceased) caused the Officer Commanding Station (OCS) Ruiru to instruct one Constable Mohamed Rono to arrest her, pursuant to a complaint lodged by the Defendant at Ruiru Police Station. The Respondent was arrested and locked up at the Police Station. She was arraigned in Court on 20th December 2012 charged in Criminal Case No. 5290 of 2012, Republic vs Catherine Mwikali Majani, with the offence of stealing contrary to Section 275 of the Penal Code. The Respondent was later acquitted under section 215 of the Criminal Procedure Code.
3. It was the Respondent's case that the complaint against her by the Appellant was actuated by malice, for which she claimed damages.
4. The Appellant entered appearance and filed his Statement of Defence, denying the Respondent's case.
5. At the hearing, the Respondent testified that on 19 December 2012, the Deceased, who was her landlord, accused her of stealing doors. The Respondent was subsequently arrested and charged. The criminal case was, however, dismissed due to lack of evidence. She produced a bundle of documents which included the Charge Sheet and Judgement from the criminal case. It was the Respondent's testimony that following her arrest, she was persecuted, which affected her business. She was forced to move her business and incurred losses.
6. On his part, the Deceased testified that he had no malice or bad blood against the Respondent. The only reason he reported the matter was because doors were stolen. The Deceased suspected the Respondent because she was the only one with the keys to the main gate at the time. The steel doors disappeared immediately the Respondent moved houses. It was his testimony that he did not force the police to arrest the Respondent.
7. In its judgement, the trial court addressed itself on two issues; (i) whether the Respondent's claim was proved on a balance of probabilities; and (ii) whether the Appellant was liable for the Respondent's unlawful arrest, wrongful detention and malicious prosecution. The court entered judgement in favor of the Respondent and awarded damages as follows:
 - i. Special Damages - Kshs 10,320/=
 - General Damages for malicious prosecution - Kshs 600,000/=
 - Total - Kshs 610,320/=
 - ii. Interest on the special interest from the date of filing suit until payment in full.
 - iii. Interest on general damages from date of judgement until payment in full
 - iv. Costs of the suit.
8. Aggrieved by the judgement of the trial court, the Appellant lodged an appeal on the following grounds:
 - i. That the learned Magistrate erred in fact and law by entering judgement in favor of the Respondent when there was no evidence to prove that the reporting of the matter to the investigating authorities against the Respondent in Criminal Case No. 5290 of 2012, Republic versus Catherine Mwikali was malicious and without probable cause and further failed to take into consideration the totality of the evidence presented before him;
 - ii. That the learned Magistrate erred in fact and law in disregarding pleadings, testimony and evidence adduced by the Appellant in its defence at the trial;



- iii. That the learned trial Magistrate failed to appreciate the totality of the evidence before him and erred in finding fault in the Appellant for institution criminal proceedings without taking into consideration the existence of a probable cause by the Appellant against the Respondent herein which cause informed the Appellant to report the crime to the relevant authorities which subsequently led to the criminal proceedings against the Respondent;
 - iv. That the learned Magistrate erred in law and fact by failing to properly analyse the evidence on record and find that the key ingredients of the tort of malicious prosecution had not been proved on a balance of probabilities;
 - v. That the learned Magistrate erred in law by awarding special damages when there was no documentary evidence to prove the Respondent has incurred and/or suffered special damages;
 - vi. That the learned Magistrate erred in law and fact and misdirected himself to awarding the Respondent an amount of Kshs 610,320/= as damages for malicious prosecution by the Appellant which amount is unjustifiable, exorbitant and arbitrary and not based on any judicial precedent and/or submission by Counsel;
 - vii. That the judgement of the learned Magistrate is a miscarriage of justice and an affront on the constitutional right to the Appellant to enjoy the protection of the law.
9. Parties were directed to canvass the appeal by way of written submissions.

Analysis & Determination

10. The Court of Appeal for East Africa set out the duty of the first appellant court in the case of *Selle – Vs- Associated Motor Boat Co.* [1968] EA 123 as follows -
- “An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.”
11. An appeal to the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. 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.
12. 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.
13. I have considered the appeal in terms of the judgement of the trial court, the record of appeal, submissions by the learned counsel both written and oral as well as the authorities placed before me. In my view, the Appellant’s main complaint is that the Respondent did not prove her case on a balance of probabilities and is not entitled to the damages awarded.
14. In *Daniel Waweru Njoroge & 17 Others v Attorney General Civil Appeal No. 89 of 2010* [2015] eKLR the court held:
- “False arrest which is a civil wrong consists of an unlawful restraint of an individual’s personal liberty or freedom of movement by another person purporting to act according to the law.



The term false arrest is sometimes used interchangeably with the tort of false imprisonment, and a false arrest is one method of committing a false imprisonment. A false arrest must be perpetuated by one who asserts that he or she is acting pursuant to legal authority, whereas a false imprisonment is any unlawful confinement. Thus, where a police officer arrests a person without probable cause or reasonable basis, the officer is said to have committed a tort of false arrest and confinement. Thus, false imprisonment may be defined as an act of the defendant which causes the unlawful confinement of the plaintiff. False imprisonment is an intentional tort.”

15. In *Sylvanus Okiya Ongoro vs. Director of Criminal Investigations & 4 others* [2020] eKLR, the court said:

“What I gather the petitioner to be complaining about is that his prosecution was malicious as it was unjustified.

The principles governing a claim founded on malicious prosecution were laid down by Cotran, J in *Murunga vs. Attorney General* (1979) KLR, 138 as follows: -

- (a) The Plaintiff must show that the prosecution was instituted by the Defendant, or by someone for whose acts he is responsible;
- (b) The Plaintiff must show that the prosecution terminated in his favour;
- (c) The Plaintiff must demonstrate that the prosecution was instituted without reasonable and probable cause;
- (d) He must also show that the prosecution was actuated by malice.

The four principles were adopted in similar matters as follows: -

- (i) J. B. Ojwang, J (as he then was) in *Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another* (2005) elk;
- (ii) Ruth N. Sitati, J in *Patrick Muriithi Kukuha vs. Edwin Warui Munene & 5 Others* (2005) eKLR;
- (iii) Anashir Visram, J (as he then was) in *Kiragu vs. Muriuki & Another* (2004) eKLR;
- (iv) D. K. Maraga, J (as he then was) in *Zablon Mwaluma Kadon vs. National Cereals & Produce Board* (2005) elk.”

16. In *Bethwel Omondi Okal vs. Attorney General & another* [2018] eKLR, it was stated:

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“21. The law on false imprisonment and malicious prosecution is now well settled. For one to succeed, he/she must prove four elements. First that the criminal proceedings were instituted by the defendant who was instrumental in setting the law in motion against the plaintiff, second, that the defendant acted without reasonable or probable cause. Otherwise there must exist facts which show that the defendant genuinely believed that the criminal proceedings were justified; third, that the defendant must have acted maliciously. That is the defendant in instituting the criminal proceedings acted with improper or



wrongful motive. and fourth, the criminal proceedings must have terminated in the plaintiff's favour having been acquitted of the charge laid against him. (See Egbema vs. West Nile District Administration [1972] EA 60)

22. From the above principles, it is therefore the law that a party who claims that he was unlawfully arrested falsely imprisoned and or maliciously prosecuted, bears the responsibility of proving that the arrest had no basis in law at all. It will not be enough for him to merely state that the arrest was unlawful. In the present case, the 2nd respondent's duty was to report that the accused was illegally connected to electric energy. The responsibility of investigating, charging and conducting prosecution was that of the police and the 1st respondent.

s.23. In this petition, it is true that the petitioner's wife was arrested, charged in Court and prosecuted. It is also true that the prosecution ended in her favour because she was acquitted of the charge. Even with these, there was a duty to prove that there was malice in making the report that lead to the arrest and prosecution. Acquittal alone cannot amount to proof of malice. There must be something more than just acquittal. In the case of Nzoia Sugar Company Limited vs. Fungutuli [1988] elk, the Court of Appeal observed;

"It is trite learning that acquittal, per se, on a criminal case 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 can be attributed to the company."

17. The Appellant submitted that although the first two ingredients were proved, the point of departure is on the third and fourth ingredients. The Appellant contended that the third ingredient requires absence of reasonable or probable cause, which wasn't the case in this instance. In its judgement, the trial court referred to the case of Kagame & Others -vs AG & Another (1969) EA 643 in which the court defined what amounts to reasonable and probable cause. Further, the trial court referred to the finding by the criminal court, in which the Respondent was acquitted, and agreed with the criminal court that the actions of the Appellant were proof of ill-will against the Respondent. The trial court opined thus:

"I find that the Defendant in lodging the complaint, in as much as it was genuine, he did so recklessly, spitefully and with ill-motive narrowing it to only the Plaintiff. It could have been instigated by their severed relationship. The complaint was not objective, instituted dishonestly with an impromptu motive to target the plaintiff, who was immediately arrested and arraigned in court the following day."

18. In the case of Zablon Mwaluma Kadori vs National Cereals & Produce Board (2005) e KLR Maraga J (as he then was) said,

It is enough if it can be shown that it (the defendant) was actively instrumental in putting the law in force.The defendant cannot therefore be heard to say it did not institute the prosecution of the plaintiff. I find that it did."

19. Similarly, in this case, I find that the Appellant's actions set the wheels in motion. He, therefore, cannot escape liability by tossing the blame to the Police and the Office of the Director of Public Prosecutions. That notwithstanding, the decision to charge and prosecute is not made by the complainant. In the



case of Captain (Rtd) Charles K. W. Masinde -vs- DPP & 2 Others [2021] eKLR, the court opined thus:

“The Police normally prosecute after the DPP allows them to proceed with the prosecution. The authority to prosecute emanates from the DPP and not the AG. If there is any claim of malicious prosecution, then the DPP is the correct party. In my view, if a party enjoins the DPP or the Attorney General or fails to enjoin one of them, the suit cannot be held as fatally defective to warrant its dismissal at the preliminary stage. At least the office which triggered the prosecution has to be enjoined and this office is usually that of the DPP.”

20. In the instant case, the Respondent enjoined neither the Attorney General nor the DPP. In fact, the trial court wondered as to the wisdom of the non-joinder. Without enjoining the right party, the suit was fatally defective and ought to have been dismissed by the trial court. In the premise, I find that the Appeal succeeds on this limb. I set aside the judgement and decree of the lower court and dismiss the suit with costs to the Appellant. The Appellant is also awarded costs of the appeal assessed at Kshs 40,000/=.

DATED AND DELIVERED AT THIKA THIS 7 DAY OF NOVEMBER 2024.

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

.Kabau h/b Gachau..... for the Appellant

.Mwangi h/b Muturi..... for the Respondent

