



REPUBLIC OF KENYA



**Ongayi & another v Muyeyeli & 3 others (Civil Appeal E133 of 2022)
[2024] KEHC 14280 (KLR) (18 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14280 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E133 OF 2022
JK NG'ARNG'AR, J
NOVEMBER 18, 2024**

BETWEEN

ALBERT OYIEGO ONGAYI 1ST APPELLANT

CHARLES OMOKE SONGONI 2ND APPELLANT

AND

LYDIA SHIMULI MUYEYELI 1ST RESPONDENT

ERICKSON IGADWA 2ND RESPONDENT

MOSES OMONDI DALMUS 3RD RESPONDENT

VICTOR OTIENO OBONYO 4TH RESPONDENT

(Being an appeal against the Judgment of Hon. J. Nyariki (SRM) delivered on 23rd August 2022 in Mombasa Chief Magistrate's Court Civil Suit No. 399 of 2019, Lydia Shimuli Muyeyeli, Erickson Igadwa, Moses Omondi Dalmus, Victor Otieno Obonyo v Albert Oyiego Onyayi, Dickson Omunanga (Now deceased), Charles Omoke Songoni)

JUDGMENT

1. The background of the appeal is that on 1st August 2013 at about 12.00 pm, the Respondents were at Tudor PAG Church compound waiting for keys from Dickson Omunanga when he and the 2nd Appellant went with police officers in a GK land rover from Makupa Police Station and arrested the Respondents and took them to the station where they were questioned and confined in the police cells for one day. That they were then arraigned in court on 2nd August 2013 on a charge of creating disturbance in a manner likely to cause breach of peace contrary to Section 95 (1) (b) of the [Penal Code](#) in Mombasa Chief Magistrates Court Criminal Case No. 1841 of 2013. The Respondents claimed that they were unlawfully detained, falsely charged and maliciously prosecuted with the said offence without any reasonable or probable cause. That as a result, they suffered their reputation, fame and



were shunned by members of the public which affected their personality and they suffered loss and damage. The Respondents prayed for damages against the Appellants for special damages of Kshs. 130,000, general damages, costs of this suit, interest and any other relief that this court deems fit and just to grant.

2. The suit was heard in the trial court and judgment delivered on 23rd August 2022 where the court found that from the judgment of the criminal court which indicated that there was no evidence of violence that accompanied or ensued the alleged abuse of the Complainants by the Accused Persons, the trial court found that prosecution of the Respondents was unwarranted and therefore malicious and without any justifiable, reasonable or probable cause, and that the Respondents proved all the elements necessary to establish the tort of malicious prosecution. The trial court awarded each Respondent Kshs. 400,000 as general damages, special damages were not awarded as they were not evidenced by receipts, costs of the suit were awarded and they were to be taxed and shared proportionately against the Appellants, and the Respondents were also awarded interest on general damages at court rates to accrue from the date of the judgment until payment in full.
3. Being dissatisfied, the Appellants appealed against the judgment through the Memorandum of Appeal dated 31st August 2022 on grounds that the trial court erred in law and in fact in: denying the Appellants an opportunity to be heard through no fault of their own as their previous advocate was indisposed; unprocedurally proceeding with the case of the 2nd Defendant who was deceased without substitution by a legal representative, awarding damages which are inordinately high as to represent an entirely erroneous assessment; totally ignoring a validly filed defence in spite of being aware of it and making reference to it severally; and analyzing the facts so erroneously and ending up making an erroneous and/or mistaken finding.
4. The Appellant prayed for orders that the judgment delivered on 23rd August 2022 be overturned and be substituted with the judgment of this court by allowing the appeal.
5. The appeal was canvassed by way of written submissions. The Appellant in their submissions dated 18th April 2024 argued on whether the trial court denied the Appellants an opportunity to be heard that the firm of J. A. Abuodha & Co. Advocates initially represented the Appellants until some time in 2021 when they stopped receiving communication from their advocate. That they inquired about it and found that their advocate was indisposed and the offices were closed. That the Appellants instructed the current advocate but the case had proceeded ex parte and the defence case closed. That the Appellants filed an application dated 17th September 2021 seeking to set aside the proceedings and that the application was heard and ruling delivered on 14th June 2022 dismissing it. That the trial court heard and determined the matter without hearing the Appellants despite having filed a defence.
6. The Appellants submitted that the trial court heard and determined the suit against the three Defendants including the 2nd Defendant who died on 27th July 2021 and was not substituted in the proceedings by a legal representative contrary to Order 24 Rule 4 of the [Civil Procedure Rules](#). On whether the DPP should have been enjoined in the suit, the Appellants submitted that the DPP conducted prosecution of the criminal case but the Respondents did not sue the DPP in the matter contrary to the holding in the case of [Douglas Odhiambo Apel & Another v Telkom Kenya Limited](#), Civil Appeal No. 115 of 2006. The Appellants prayed that the judgment delivered on 23rd August 2022 by the trial court be overturned and substituted with judgment of this court allowing the appeal. They also prayed that the security deposited in court be released to the depositor.
7. The Respondent in their submissions dated 3rd May 2024 relied on authorities in *Mohamed Amin v Jogendra Kumar Bannerjee & Others*, House of Lords (1947) Privy Council at Calcutta and [Joseph Njogu Kamunge v Charles Muriuki Gachari](#) (2016) eKLR, and submitted that the Respondents fully



concur with the judgment of the trial court delivered on 23rd August 2022. They therefore prayed that the appeal be dismissed with costs.

8. The role of the first appellate court to reexamine and to reevaluate evidence to come up with its own findings was set out in *Selle v Associated Motor Boat Co.* (1968) EA 123 as follows: -

“... Briefly put they are that 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 ...”

9. I have considered the Record of Appeal and submissions by the parties. The issues for determination are: -

- a. Whether the DPP ought to have been enjoined in the suit
- b. Whether the trial court denied the Appellants an opportunity to be heard
- c. Whether the deceased 2nd Defendant ought to have been substituted by a legal representative
- d. Who should bear costs

10. On whether the DPP ought to have been enjoined in the suit, Order 1 rule 1 (2) of the [Civil Procedure Rules](#) provides: -

The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

11. This court finds that the parties ought to have moved the trial court for joinder of the DPP to the suit pursuant to the holding in *Kingori v Chege & 3 Others* (2002) 2 KLR 24 on the guiding principles of when an intending party is to be joined.

12. According to the evidence on record, the Appellants did not attend court when the matter was called out for hearing on 16th August 2021, the date having been taken by consent. The court therefore closed the defence case and gave directions for parties to file their submissions. However, the trial court in its judgment delivered on 23rd August 2022 comprehensively considered the Appellant’s defence and evidence on record. The grounds that the Appellants were denied an opportunity to be heard and that the trial court totally ignored their defence therefore fail.

13. On substitution of the deceased 2nd Defendant by a legal representative, Order 24 Rule 4 of the [Civil Procedure Rules](#) provides as follows: -

1. Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.
2. Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.



3. Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.
14. The deceased died on 27th July 2021 and having been survived by the cause of action in the trial court, he ought to have been substituted by a legal representative to join in the proceedings and defend the claim pursuant to Order 24 Rule 4 of the *Civil Procedure Rules*.
15. According to *Mary Wambugu Njuguna v William ole Nabala & 9 Others* (2018) eKLR, failure to substitute the deceased for continuance of a suit after his death is barred by law and the proceedings taken thereafter are a nullity.
16. In the upshot, this court makes the following orders: -
 - a. Judgment of the trial court delivered on 23rd August 2022 is null and void and the same is set aside.
 - b. The Appellants are at liberty to move the court for substitution of the deceased 2nd Defendant in the trial court and
 - c. The matter to proceed from the point of death of the deceased.
 - d. No orders as to costs.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 18TH DAY OF NOVEMBER, 2024.

.....

J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

No appearance Advocate for the Appellant

No appearance Advocate for the Respondent

Court Assistant – Mr. Samuel Shitemi

