



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**

**CIVIL APPEAL NO 51 OF 2016**

*Arising from the judgment of Hon. D.W. Mburu, PM, delivered on*

*10<sup>th</sup> October 2016 in MERU CMCC NO 245 OF 2005.*

**(CORAM: GIKONYO J)**

**STEPHEN KABURU.....1<sup>ST</sup> APPELLANT**

**EPHENTUS MUJTHAMIA.....2<sup>ND</sup> APPELLANT**

**NANGA MÍTUAROGOJI.....3<sup>RD</sup> APPELLANT**

**M'MUGAMBI KAGUURU.....4<sup>TH</sup> APPELLANT**

**FESTUS KIMATHI MANYARA.....5<sup>TH</sup> APPELLANT**

**JAPHET KINYAMU GUANTAI.....6<sup>TH</sup> APPELLANT**

**-VERSUS-**

**THE ATTORNEY GENERAL & 7 OTHERS.....RESPONDENTS**

**JUDGMENT**

**Directions and duty of court**

[1] This appeal was canvassed by way of written submissions following the orders of the court made on 25<sup>th</sup> May, 2017. All parties except the 6<sup>th</sup> and 7<sup>th</sup> Respondent filed their respective submissions. On 12<sup>th</sup> October 2017, Mr. Munene had requested for 7 days to file his clients' submissions. He was granted 21 days to do so but he has not. The appeal was then scheduled for judgment on 5<sup>th</sup> February 2018 as the court was at the time engaged in election petitions. This being the first appeal, the court shall therefore evaluate the evidence adduced and come to its conclusions. Except, it shall give allowance due to the fact that it neither saw nor heard the witnesses. The court will also consider the submissions filed, the facts of the case and the law in determining the appeal.

**The appeal**

[2] Now I turn to the substantive matters. This appeal is against the judgment of Hon. D.W. Mburu, PM, delivered on 10<sup>th</sup> October 2016 in MERU CMCC NO 245 OF 2005. The grounds of appeal as stated in

the Memorandum of Appeal are as follows:

- 1. The Learned Trial Magistrate erred in law and in fact he failed to consider or sufficiently consider the material placed before him and as a result came to the wrong conclusion.**
- 2. The Learned Trial Magistrate having set out the conditions to be fulfilled in proof of malicious prosecution failed to apply the evidence before him or properly apply the evidence and make proper interpretation thereby coming to a wrong decision.**
- 3. The Learned trial Magistrate erred in Law and in fact in that he failed to properly or sufficiently apply the Law and case law on the subject of malicious prosecution.**
- 4. The Judgment of the Learned Trial Magistrate is against the Law and the weight of evidence.**
- 5. The Learned Trial Magistrate erred in Law and fact in awarding costs against the Appellants under the circumstances of this case.**

[3] The above grounds of appeal relate to two issues;

1. Whether the learned trial magistrate made a decision against the weight of evidence adduced; and
2. Whether the learned trial magistrate failed to properly apply the applicable law to the facts of the case.

#### **Cause of action**

[4] This is a case of unlawful arrest, false imprisonment and malicious prosecution. For a case of unlawful arrest and false imprisonment to succeed, a party must prove:

- 1. That the person was arrested and or confined without any lawful justification or**
- 2. That he was imprisoned without any order of the court.**

And in order to succeed on a case of malicious prosecution, the Appellants should prove the following matters:-

- 1. That the prosecution was instituted by the Respondents**
- 2. That the said prosecution was actuated by malice;**
- 3. That there was no probable cause to justify the prosecution of the Respondents in court;**
- 4. That the criminal proceeding terminated in favour of the Appellants;**
- 5. That the Respondent is liable to compensate the Appellants**

On malicious prosecution, see Contran, J in the case of **MURUNGA vs. ATTORNEY GENERAL (1979) KLR, 138**; and the decision of the Court of Appeal for Eastern Africa in the case of **MBOWA vs. EAST MENGO DISTRICT ADMINISTRATION [1972] EA 352**. I will apply this test in my re-evaluation of the facts of this case and determine whether the Respondent proved his case on a balance of probability.

#### **Of unlawful arrest and false imprisonment**

[5] The Appellants submitted that they were arrested simply because there was a boundary dispute and

then charged with crimes they knew not about. They further submitted that they that there was no order for their arrest and confinement. According to them, this was wrong and their case should succeed on this score. I have perused the record and the evidence of the Investigating Officer clearly show that they received reports on malicious damage to water pipes. And, they carried out investigations before the arrest of the Appellants. He stated that circumstantial evidence led the police to arrest the Appellants. I also note that, when the accused were charged in court on 18<sup>th</sup> October 2001, they were granted bond of Kshs. 30,000 each. Therefore, it is not true that the arrest was without any lawful justification or simply because there was a boundary dispute. The claim thereto fails.

### **Of malicious prosecution**

[6] I will now consider whether the Appellants have proved the following matters:-

1. *That the prosecution was instituted by the Respondents*
2. *That the said prosecution was actuated by malice;*
3. *That there was no probable cause to justify the prosecution of the Respondents in court;*
4. *That the criminal proceeding terminated in favour of the Appellants;*
5. *That the Respondent is liable to compensate the Appellants*

### **Was prosecution instituted by the Respondents?**

[7] As at October 2001, the power of prosecution was resident in the office of the Attorney General. Therefore, the prosecution herein was instituted by the Respondents. In any event, the AG is sued on behalf of other government agencies under section 40 of the Government Proceedings Act, there is normally little difficulties in proving this ground unless there has been an omission in joining the particular officer or officers who arrested and or investigated the case.

### **Did the proceeding terminate in favour of the Appellants?**

[8] My style has always been to determine this ground immediately after the first. I have two reasons; one, the ground has a purely technical reality on whether the proceeding ended in favour of the Appellants. Two, termination of a criminal proceeding in favour of the Appellants is not per se proof of malicious prosecution. The Appellants will need to prove that; the prosecution was actuated by malice; and there was no probable cause to justify the prosecution. Without a doubt, the criminal proceeding terminated in favour of the Appellant after full trial. But, as I have stated, was the prosecution actuated by malice; and without probable cause to justify the prosecution?

### **Malice**

[9] Was the prosecution actuated by malice, spite or ill-will or improper motives or other purpose other than of bringing the Appellants to justice? I am alive to the law that malice may be inferred from want of probable and reasonable cause but not vice versa. In this case I have found that there was probable and reasonable cause to prosecute. I similarly know that shoddy or inadequate investigations due to incompetence or negligence on the part of a police officer does not in itself translate into an automatic inference of malice on the prosecution. See the case of **THACKER vs. CROWN PROSECUTION SERVICE (1997) Times, 29, December**, and **ELGUZOULI-DAJ vs. METROPOLITAN POLICE COMR [1995] QB 335, [1995] 3 All ER 1074, CA**. From the record, only the 2<sup>nd</sup> Appellant gave oral testimony in court. He stated that the criminal prosecution was instituted out of malice. He saw malice on the fact that: (1) there was a boundary dispute between Igoki and Mikumbune locations; (2) he had disagreements with the Respondents; and (3) the community surrounding the school were against him working at the school. In cross-examination by Atheru, he stated that he could not pin-point anyone who was against him. He also stated that he comes from the same locality. Again, in re-examination, he stated

that he had no problem with the management of the school. He told the trial court that the police officers who arrested them were not known to him and that he had no grudge with the police officers. I have also considered the evidence DW1 and DW2 to the effect. They stated that, despite there being a long standing boundary between Igoki and Mikumbune locations, none gave any names of suspects to the police. This is contrary to the Appellants' submissions that the Respondents mentioned the Appellants maliciously because of deep rooted differences. The police are the one who investigated the matter, arrested and charged the Appellants. I have also considered that the prosecution in the criminal case called a total of 17 witnesses. In addition, the trial magistrate was careful in his analysis of evidence as he appreciated the law and the sentiments expressed by the criminal trial magistrate in the judgment as follows:-

***The burden is on the claimant to prove that there was malice. In the criminal court's own finding on page 4 of the judgment, the learned magistrate observed:***

***"This court visited the scene and there is no doubt that indeed the pipes and the intake chambers were destroyed. The destruction had been well calculated. It was evil and therefore malicious. All the accused appear to come from the same location, while all the affected parties came from the same and neighboring location the people of these two locations appear to have some deep-rooted inherent differences which this court was unable to unearth. It would be unsafe to assume that the accused persons were sympathetic to the cause of the destruction, but without concrete evidence adduced, I am of the view that it would be unsafe to convict them for malicious damage."***

Looking at the circumstances of this case, I do see any evidence that criminal prosecution of the Appellants herein was actuated by some other motive than the desire to bring to justice persons the police honestly believed to be guilty of damaging the water pipes. Therefore, the prosecution could not be said to have been actuated by malice, ill-will or spite in bringing the charges against the Appellants. There is absolutely no malice shown to have existed on the part of the Respondents. Thus, the trial magistrate did not err in holding that he found no malice in the institution of the criminal proceedings against the Appellants.

### **Reasonable and probable cause**

[10] This element is the linchpin of the tort of malicious prosecution. In a tort for malicious prosecution,

***"...reasonable and probable cause for a prosecution has been said to be an honest belief in the guilt of the accused person based on a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonable lead any ordinary prudent and cautious man, placed in the position of an accuser, to the conclusion that the person charged was probably guilty of the crime imputed..."*** *See Halsbury's Laws of England, 4<sup>th</sup> Edition - Reissue, Vol. 45 (2).*

When I juxtapose this test recognizes to constitutional imperatives, it perfectly balances; (1) the right to be presumed innocent until proven guilty; and (2) the need for the state to carry out its constitutional mandate to arrest and prosecute offenders. Therefore, the prosecutor's honest belief in the guilty of the subject should be founded upon a full conviction, that, upon consideration of reasonable grounds, of the existence of a state of circumstances as presented before him, he reasonably believed the person charged was probably guilty of the crime imputed. However, in my view, the reasonable belief need not be based on actual existence of a definite cause but upon reasonable belief held in good faith in the existence of facts as are perceived by and laid before the police officer. It is not therefore a requirement that the police officer or prosecution should test each and every possible relevant fact before taking action to prosecute. I will therefore be asking myself whether the impression produced by the facts before the police officer and prosecution would for a discreet and reasonable man justify a prosecution.

[11] From the record of the criminal trial presented in court, I see that the prosecution called a total of 16 witnesses in support of their case. The arresting and Investigation Officer, I.P. JOHN MUCHERU stated that he carried out investigation and received circumstantial evidence which led to his arresting the

Appellant. He even visited the scene and established that water pipes had been damaged. This fact was also observed by the criminal trial court which visited the scene. Faced with these facts, I do not think that the police officers acted without reasonable and probable cause. The criminal trial court found that *prima facie* case had been made by the prosecution upon which the Appellants were put to their defence. As the trial court correctly observed, so am I content to cite Rudd J in the case of **KAGANE & OTHERS vs. AG & ANOTHER [1968] EA643** that:

***“Consequently, the subjective test should be applied where there is some evidence directly tending to show that prosecutor did not believe in truth of his case. Such evidence could be afforded by words or letters or conduct on the part of the prosecutor which tending to show that he did not believe in it and I think possibly, an unexplained failure to call an essential witness who provided a basis part of the information upon which the prosecution was based”.***

The investigation officer carried out investigation before arresting and arraigning the Appellants in court. There was reasonable and probable cause to charge the Appellants. And as I stated, acquittal alone is not *per se* proof of lack of reasonable and probable cause to charge the person. Such evidence tending to show that the prosecutor did not honestly believe in his case should be provided. None was provided here.

[12] In conclusion, although the criminal prosecution terminated in favour of the Appellants, I see nothing to suggest that the prosecution was a contrived design of malice, or one without reasonable and probable cause. The police carried out investigations which led them to believe the guilt of the Appellants in the imputed crime. The prosecution also called witnesses to back their case. Therefore, the claim for unlawful arrest, false imprisonment and malicious prosecution fails totally. I dismiss this appeal. Given the nature of the claims herein, I order each party to bear own costs of the appeal as well as the lower court. It is so ordered.

**Dated, Signed and delivered in open court at Meru this 5<sup>th</sup> day of February, 2018.**

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**F. GIKONYO**

**JUDGE**

**In the presence of:**

Gitonga for Rimita for Applicant

Kiuga for 1<sup>st</sup> respondent

Kautha for 5-7<sup>th</sup> respondent – absent

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**F. GIKONYO**

**JUDGE**