



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCA NO. 128 OF 2017

SUSAN MUTHEU MUIA.....PLAINTIFF

VERSUS

JOSEPH MAKAU MUTUA..... DEFENDANT

JUDGMENT

1. The Appeal arises out of PMCC NO. 93 OF 2004 Kilungu where Respondent sought damages for malicious prosecution.
2. The cause of action was triggered by the Cr. case No. 81/02 where the Respondent was charged with offence of creating disturbances in a manner likely to cause a breach of peace contrary to section 95(1) (b) PC.
3. In the criminal case above, the Appellant was the complainant and the Respondent the accused.
4. After investigation and trial, the Respondent was acquitted under S. 215 CPC.
5. This prompted the lodgement of CC No. 93/04 claim damages for malicious prosecution against Appellant and the Attorney General.
6. After full trial, the Respondent succeeded and was awarded special and general damages prompting the filing of the instant appeal.
7. The Appeal raises 8 grounds namely:-

i. *The learned Principal erred in law and in fact by entering judgment in favor of the Respondent when there was no evidence to prove that the arrest and prosecution of the respondent in Makindu Cr. case No. 81 of 2002 was malicious and without probable or reasonable cause.*

ii. *The learned Magistrate erred in law and in fact by failing to appreciate the fact that the appellant had no responsibility to bond witnesses in the criminal case and the appellant did not deliberately fail to attend court at Makindu for the hearing of the criminal case on 22/03/2004 since he had not been bonded.*

iii. *The learned magistrate erred in law and in fact by failing to consider the appellant's evidence in defence that the respondent had actually created disturbance in a manner likely to cause a breach of peace and the acquittal in the criminal case was based on mere technicality.*

iv. *The learned magistrate erred in law and in fact by entering judgement against the appellant and in exonerating the 2nd defendant (i.e. Attorney General) from blame when it is very clear from the evidence on record that it is the Kenya Police who failed to bond witnesses including the complainant in the criminal case.*

v. *The learned magistrate erred in law and in fact by failing to properly analyze the evidence on record and find that the key ingredients of the tort of malicious prosecution had not been proved on the balance of probabilities.*

vi. *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.*

vii. *The award of Kshs. 50,000/= as general damages is excessive and not based on any judicial precedent and/or submission by Counsel.*

viii. *The judgement of the learned principal magistrate is a miscarriage of the justice and an affront to the constitutional right to the*

appellant to enjoy protection of law.

8. Parties agreed to canvass appeal via written submissions which they have filed and exchanged.

THE APPELLANT SUBMISSIONS

9. To succeed in a claim for malicious prosecution the plaintiff must prove/establish the following ingredients of the tort i.e.

a. *That the prosecution was instituted by the defendant or by someone for whose acts he is responsible.*

b. *That the prosecution was instituted without reasonable and probable cause.*

c. *That the prosecution was actuated by malice.*

d. *That the prosecution was terminated in the plaintiffs favour.*

10. All the four grounds above must be proved in order to succeed in a claim for damages for malicious prosecution.

11. With regards to ground (a) above, the complaint was made by the appellant. However this fact alone cannot make the appellant (complainant in the lower court) liable. They must prove the other 4 limbs of the necessary ingredients. It is one thing to make a complaint and quite a different thing to prefer charges and institute a criminal prosecution.

12. After a complainant has made a complaint it is for the prosecution to investigate the matter and make a decision whether to prosecute or not. Sometimes the complainant may take out a private prosecution.

13. In most cases the investigation and the decision to charge is undertaken by the Republic through the Kenya Police. At the time when the appellant made the complaint the Kenya Police were the ones who were responsible for investigating and taking out public prosecution on behalf of the Attorney General (now Director of Public Prosecution).

14. The appellant had neither control nor discretion over the matter. The investigation discretion and decision as to whether to charge or not to charge, the appellant was not the sole responsibility of the police for whose action the Attorney General is responsible.

15. In a public prosecution therefore the Attorney General (now Director of Public Prosecution) is a necessary party who must be joined in the proceedings. The Attorney General (Director of Public Prosecution) is the party who would be responsible for prosecutions instituted without reasonable or probable cause.

16. For this proposition, appellants cite the following cases;-

a. **CHRISPINE OTIENO CALEB –VS- ATTORNEY GENERAL [2014] eKLR; JOHN NDETO KYALO –VS- KENYA TEA DEVELOPMENT AUTHORITY & ANOR 2005 eKLR HCCC. NO. 502 OF 1999.** At page 5 & 6 Maraga J, as he then was examined the position, defined what constitutes “reasonable and probable cause” then went on to state “.....*that it is the police who are liable to such person (accused person) for instituting a proceedings against him.*”

17. The judge went on state at page 6 that even if the accused had pleaded malice in making the complainant that would not help matters when it is clear that it was the police who investigated the matter and made the decision to charge the accused. The fault caused would always be attributed to the police (Attorney General).

18. Similarly in the case of **HCCC 2547 OF 1998 NBI DOUGLAS ODHIAMBO APEL & ANOR –VS- TELCOM KENYA & ATTORNEY GENERAL** Judge Kihara Kariuki faced with a similar issue rendered himself as such. “*The accused were arrested and charged by the Police and the prosecution was undertaken by the Attorney General as the public prosecutor. Telkom Kenya (complainant) was merely a complainant. The decision to charge and prosecute the plaintiffs was taken by the police and the attorney general Telkom Kenya as the complainant would not have been involved in that process..... that is why in a claim for unlawful arrest, false imprisonment and malicious prosecution, the proper defendant is always the Attorney General.*”

19. The learned Magistrate in RMCC NO. 93 OF 2004 came to the conclusion that he found no fault on the part of the police who investigated and prosecuted the respondent. Having arrived at this conclusion, it is clear that he absolved the police of any liability with respect to issues of “**reasonable and probable prosecution**” in the circumstances he could not in the same breath make a finding in favor of the respondent who had not established this vital ingredient of malicious prosecution.

20. It also clear that the respondent in his pleadings and evidence did not allege lack of reasonable and probable cause. He seemed to assume that his acquittal was enough to prove his claim in malicious prosecution.

21. **Lack of evidence of malice.** In a case of malicious prosecution the plaintiff must also prove that the prosecution was actuated by malice.

22. As stated above, the prosecution in RMCC NO. 93 OF 2004 was carried out by the police as agents of the Attorney General. The respondent (plaintiff) should have led evidence to prove malice on the part of the police. He did not.

23. The learned Magistrate fell into error in his judgment when he made a finding that because there was a long standing dispute between the Appellants (accused's) family and the Respondent's (complainant's) family then this was evidence of malice and therefore this had proved the ingredient of "the prosecution was actuated by malice" which is necessary in a claim for malicious prosecution.

24. Even if a complainant in a criminal case makes a malicious complaint that malice cannot automatically be transferred to the prosecutor unless it is proved that there was collusion between the complainant and the prosecutor in bringing up the prosecution.

25. In RMCC NO. 93 OF 2004, the learned magistrate made a clear finding that there was no collusion between the complainant and the police who were the prosecutors. He absolved the police of the issue of malice. In the circumstances he could not make a finding that the prosecution was actuated by malice.

26. It must always be remembered that the element of malice is material on the part of the prosecutor and not the complainant unless there is collusion between the two.

27. **MUSIC COPYRIGHT SOCIETY OF KENYA –VS- TOM ODHIAMBO OGOWL [2014] eKLR**. In the present case there was no malice on the part of the police/prosecutor. The learned magistrate having found as much could not hold that prosecution was actuated by malice.

28. This issue was made clear by Maraga J. as he was then in the case of;- **HCCC 502 OF 1999 – MOMBASA JOHN NDETO KYALO – VS- KENYA TEA DEVELOPMENT AUTHORITY & ANOTHER** – above quoted at page 6 paragraph 2.

29. The appellants thus submission is that the essential elements of:-

- a. *Reasonable and probable cause.*
- b. *Prosecution actuated by malice was not proved.*
- c. *Error in awarding General & Special damages*

have not been established.

30. To qualify for an award of special damages in a suit for malicious prosecution, the plaintiff must prove that his reputation has been injured.

31. He should prove that he suffered indignity humiliation and/or injury to his feelings. Evidence must be led to prove this.

32. There are no hard and fast rules to prove this. Some issues like the plaintiffs standing in society and extent of publication of the prosecution are relevant factors.

33. In the instant case no evidence whatsoever was led to prove that the respondent suffered any damages. This coupled with the fact that the tort was not proved clearly shows that the damages were awarded erroneously.

THE RESPONDENT SUBMISSIONS

34. The Respondent submits that, the law surrounding the tort of malicious prosecution is well settled as it was held by **Justice G V Odunga** in **CHRISPINE OTIENO CALEB –VS- ATTORNEY GENERAL [2014] eKLR** as he was guided by the findings of the judges of the East African Court of Appeal in **MBOWA –VS- EAST MENGO DISTRICT ADMINISTRATION [1972]EA 352**, who expressed themselves as follows:-

a. **"The action for damages for malicious prosecution is part of the common law of England...The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than for the public benefit. It originated in the medieval writ of conspiracy which was aimed against combinations to abuse legal procedure, that is, it was aimed at the prevention or restraint of improper legal proceedings..... It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion of the truth.**

b. **It's essential ingredients are:**

c. **The criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority;**

d. **The defendant must have acted without reasonable or probable cause i.e. there must have been no facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified;**

e. **The defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose; and**

f. The criminal proceedings must have been terminated in the plaintiff's favour, that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge.....

g. The plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage.

h. In other words, the four requirements must "unite" in order to create or establish a cause of action. If the plaintiff does not prove them he would fail in his action. The damage that is claimed is in respect of reputation but other damages might be claimed, for example, damage to property.....The damage to the plaintiff results at the stage in the criminal proceedings when the plaintiff is acquitted or, if there is an appeal, when his conviction is quashed or set aside. In other words, the damage results at a stage when the criminal proceedings came to an end in his favour, whether finally or not. The plaintiff could not possibly succeed without proving any or all of the first three essentials of malicious prosecution without the fourth which forms part of the cause of action, would not take him very far. He must prove that the court has found him not guilty of the offence charged.....

i. The law in action for malicious prosecution has been clearly defined and in so far as the ordinary criminal prosecution is concerned the action does not lie until the plaintiff has been acquitted of the charge.

35. Justice **John M. Mativo** in STEPHEN GACHAU GITHAIGA & ANOTHER –VS- ATTORNEY GENERAL [2015] eKLR that;

i. "Malicious prosecution is an intentional tort designed to provide redress for losses flowing from an unjustified prosecution. Under the first element of the test for malicious prosecution, the plaintiff must prove that the prosecution at issue was initiated by the defendant.

ii. This element identifies the proper target of the suit, as it is only those who were *actively instrumental* in setting the law in motion that may be held accountable for any damage that results.

iii. The second element of the tort demands evidence that the prosecution terminated in the plaintiff's favour. This requirement precludes a collateral attack on a conviction properly rendered by a criminal court, and thus avoids conflict between civil and criminal justice. The favourable termination requirement may be satisfied no matter the route by which the proceedings conclude in the plaintiff's favour, whether it be an acquittal, a discharge at a preliminary hearing, a withdrawal, or a stay.

iv. The third element which must be proven by a plaintiff – absence of reasonable and probable cause to commence or continue the prosecution – further delineates the scope of potential plaintiffs. As a matter of policy, if reasonable and probable cause existed at the time the prosecutor commenced or continued the criminal proceeding in question, the proceeding must be taken to have been properly instituted, regardless of the fact that it ultimately terminated in favour of the accused.

v. Finally, the initiation of criminal proceedings in the absence of reasonable and probable grounds does not itself suffice to ground a plaintiff's case for malicious prosecution, regardless of whether the defendant is a private or public actor. Malicious prosecution, as the label implies, is an intentional tort that requires proof that the defendant's conduct in setting the criminal process in motion was fueled by malice. The malice requirement is the key to striking the balance that the tort was designed to maintain: between society's interest in the effective administration of criminal justice and the need to compensate individuals who have been wrongly prosecuted for a primary purpose other than that of carrying the law into effect."

36. The learned Magistrate B Ochieng in his Judgement from which this appeal was born observed as follows and we quote;

a. "it can be discerned from the proceedings/judgement of the said case and the proceedings in the instant case that the 1st defendant and her witness, DW2 gave conflicting evidence as to the weapon the plaintiff/the respondent herein was armed with and what exactly transpired when he allegedly created disturbance in a manner likely to cause a breach of peace. This coupled with the plaintiffs assertion herein that his family and that of the 1st defendant/the appellant herein has a long standing land dispute which I have no reason to disbelieve, strongly suggests that the criminal case was fabricated by the 1st defendant the appellant herein against the plaintiff the respondent herein without reasonable or probable cause and was instituted with a malicious intention to settle scores."

37. Ground 6 of the memorandum of appeal is made in bad faith and solely aimed at misdirecting this honourable court.

38. The appellant alleges that the learned principal magistrate erred in law by awarding special damages when there was no documentary evidence to prove the respondents had incurred and/or suffered special damages where else the learned principle magistrate in his judgement stated that the plaintiff/the respondent herein produced a bundle of receipts amounting to Kshs. 38,300/= the amount claimed for special damages being expenses incurred in transport to court, meals taken and the advocates fees receipts which were marked as exhibit P2.

39. In the present case, the plaintiff/the respondent herein adduced evidence station that he was tortured by the police and fell ill while remanded in custody for three (3) days. Justice **John M. Mativo** in STEPHEN GACHAU GITHAIGA & ANOTHER –VS- ATTORNEY GENERAL [2015] EKLR being guided by the findings in the Uganda case of *Dr. Willy Kaberuka –vs- Attorney General Kampala* in which it was held that;

i. "The plaintiff suffered injury to his reputation. He must have suffered the indignity and humiliation. He is

also entitled to recover damages for injuries to his feelings especially the possibility of serving a sentence.....There are no hard and fast rules to prove that the plaintiff's feelings have been injured or that he has been humiliated as this is inferred as the natural and foreseeable consequence of the defendant's conduct. The plaintiff's status in Society is also a relevant consideration and for all these reasons the plaintiff is entitled to damages.....A plaintiff who has succeeded in his claim is entitled to be awarded such sum of money as will so far as possible made good to him what he has suffered and will possibly suffer as a result of the wrong done to him for which the defendant is responsible."

40. And found no reason to interfere with the award of Kshs. 300,000 made by the lower court stating that;

a. "The general principal is that the assessment of damages is within the discretion of the trial court and the appellate court will only interfere where trial court, in assessing damages, either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is not based on any evidence."

41. The respondent herein clearly manifested the loss and damage suffered as a result of the actions of the appellant and adduced evidence to that effect hence his entitlement to General Damages.

42. Again and as earlier stated the issue of awarding general damages is a discretionary matter. The appellant has to clearly manifest how excessive the award of the trial court was.

43. No merit in submitting on grounds 2 & 4 of the memorandum of appeal for the issues raised in the said grounds were not considered by the trial court and as such fall outside the scope of the judgement being appealed against herein. It's therefore submitted that this appeal be dismissed with costs.

44. The duty of the first trial court The duty of a first appellate Court as was held in the cases of **Mwana Sokoni –vs- Kenya Bus Service Ltd (1985) KLR 931 and Selle –vs- Associated Motor Boat company ltd (1968) EA 123** as to analyze and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses.

45. The defendants denied the claim in their respective statements of defence. However, the 2nd defendant failed to make appearance on the hearing date despite having been served and consequently in their case the matter proceeded ex-parte.

46. PW1, the plaintiff herein, averred that sometime in January 2002 the 1st defendant lodged a complaint against him with the police leading to his arrest and arraignment before the Resident Magistrate, Makindu vide RMCC No. 81 of 2002 for the offence of Creating Disturbance in a manner likely to cause a breach of the peace c/s 95(1) PC.

47. He had been held in custody for three days before being arraigned in court. After full trial he was acquitted of the charge under S. 215 CPC for lack of sufficient evidence.

48. PW1 produced certified copies of the proceedings and judgement before the court as Exb. P1. During trial he incurred expenses traveling to court, taking meals, and paying his advocate fees totaling Kshs. 38,300/-.

49. He produced a bundle of receipt totaling Kshs. 38,300/-. He produced a bundle of receipts totaling the said amount as Exb. P2.

50. PW1 contends that the defendant maliciously and without reasonable or probable cause charged and prosecuted his as a result of which he was greatly injured in his credit, character and reputation and suffered severe mental anguish and pain and incurred expense in defending himself and he has thereby suffered loss and damage for which he holds both defendants liable.

51. DW1, the 1st defendant while admitting having lodged a complaint at Makindu police post against the plaintiff leading to his arrest and prosecution asserted that it was not actuated by malice as he had indeed threatened her with harm.

52. She called one witness DW2 Onesmus Muthoka who stated that he had witnessed the plaintiff threaten DW1 and was a witness in the criminal matter against the plaintiff.

ISSUES ON EVIDENCE ANALYSIS AND DETERMINATION

53. Having looked at the proceedings and judgment of the trial Court, the grounds of appeal, the rival submissions and authorities cited therein, I find that the only issue for determination is whether the ingredients of the elements of malicious prosecution were proved as required by the law.

54. To succeed in a claim for malicious prosecution the plaintiff must prove/establish the following ingredients of the tort i.e.

a) That the prosecution was instituted by the defendant or by someone for whose acts he is responsible.

b) That the prosecution was instituted without reasonable and probable cause.

c) That the prosecution was actuated by malice.

d) That the prosecution was terminated in the plaintiffs favour.

55. With regards to ground (a) above, the complaint was made by the appellant. However this fact alone cannot make the appellant (complainant in the lower court) liable. They must prove the other 4 limbs of the necessary ingredients. It is one thing to make a complaint and quite a different thing to prefer charges and institute a criminal prosecution.

56. After a complainant has made a complaint it is for the prosecution to investigate the matter and make a decision whether to prosecute or not. Sometimes the complainant may take out a private prosecution.

57. In most cases the investigation and the decision to charge is undertaken by the Republic through the Kenya Police. At the time when the appellant made the complaint the Kenya Police were the ones who were responsible for investigating and taking out public prosecution on behalf of the Attorney General (now Director of Public Prosecution).

58. The appellant had neither control nor discretion over the matter. The investigation discretion and decision as to whether to charge or not to charge, the appellant was not the responsible of the police for whose action the Attorney General was responsible.

59. In a public prosecution therefore the Attorney General (now Director of Public Prosecution) is a necessary party who must be joined in the proceedings.

60. The Attorney General (Director of Public Prosecution) is the party who would be responsible for prosecutions instituted without reasonable or probable cause. See **CHRISPINE OTIENO CALEB Suppra; JOHN NDETO KYALO Suppra**. The court defined what constitutes **“reasonable and probable cause”** then went on to state **“.....that it is the police who are liable to such person (accused person) for instituting a proceedings against him.”**

61. The judge went on state at page 6 that even if the accused had pleaded malice in making the complainant that would not help matters when it is clear that it was the police who investigated the matter and made the decision to charge the accused. The fault caused would always be attributed to the police (Attorney General).

62. Similarly in the case of **HCCC 2547 OF 1998 NBI DOUGLAS ODHIAMBO APEL & ANOR suppra** , the court faced with a similar issue rendered itself as such;

“The accused were arrested and charged by the Police and the prosecution was undertaken by the Attorney General as the public prosecutor. Telkom Kenya (complainant) was merely a complainant. The decision to charge and prosecute the plaintiffs was taken by the police and the attorney general Telkom Kenya as the complainant would not have been involved in that process..... that is why in a claim for unlawful arrest, false imprisonment and malicious prosecution, the proper defendant is always the Attorney General.”

63. The trial Magistrate came to the conclusion that he found no fault on the part of the police who investigated and prosecuted the respondent. Thus he absolved the police of any liability with respect to issues of **“reasonable and probable prosecution”** in the circumstances he could not in the same breath make a finding in favor of the respondent who had not established this vital ingredient of malicious prosecution.

64. It also clear that the respondent in his pleadings and evidence did not allege lack of reasonable and probable cause. He seemed to assume that his acquittal was enough to prove his claim in malicious prosecution.

65. In a case of malicious prosecution the plaintiff must also prove that the prosecution was actuated by malice.

66. As stated above, the prosecution was carried out by the police as agents of the Attorney General. The respondent (plaintiff) should have led evidence to prove malice on the part of the police. He did not.

67. The learned Magistrate fell into error in his judgment when he made a finding that because there was a long standing dispute between the Appellants (accused’s) family and the Respondent’s (complainant’s) family then this was evidence of malice and therefore this had proved the ingredient of **“the prosecution was actuated by malice”** which is necessary in a claim for malicious prosecution.

68. Even if a complainant in a criminal case makes a malicious complaint that malice cannot automatically be transferred to the prosecutor unless it is proved that there was collusion between the complainant and the prosecutor in bringing up the prosecution.

69. The trial magistrate made a clear finding that there was no collusion between the complainant and the police who were the prosecutors. He absolved the police of the issue of malice. In the circumstances he could not make a finding that the prosecution was actuated by malice.

70. It must always be remembered that the element of malice is material on the part of the prosecutor and not the complainant unless there is collusion between the two. See **MUSIC COPYRIGHT SOCIETY OF KENYA –VS- TOM ODHIAMBO OGOWL [2014] eKLR**.

71. In the present case there was no malice on the part of the police/prosecutor. The learned magistrate having found as much he could not hold that prosecution was actuated by malice.

72. This issue was made clear in the case of; - **HCCC 502 OF 1999 – MOMBASA JOHN NDETO KYALO Suppra**.

73. Thus the court finds that the appeal has merit and makes the following orders;

i. The appeal is allowed.

ii. Costs to the appellant.

SIGNED, DATED AND DELIVERED THIS 2ND DAY OF MAY, 2018 IN OPEN COURT.

C. KARIUKI

JUDGE

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