



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NUMBER 73 OF 2017**

JOHN NG'ANG'A KINUU..... 1<sup>ST</sup> APPELLANT

SAMUEL GIATHI NJOROGE..... 2<sup>ND</sup> APPELLANT

JOHN KAHIA GIATHI.....3<sup>RD</sup> APPELLANT

VERSUS

PETER RUBIRO NDONGI..... 1<sup>ST</sup> RESPONDENT

JOSEPHINE KARIMI MUIGAL..... 2<sup>ND</sup> RESPONDENT

LEONARD NDONGI RUBIRO..... 3<sup>RD</sup> RESPONDENT

INSPECTOR GENERAL OF POLICE..... 4<sup>TH</sup> RESPONDENT

ATTORNEY GENERAL..... 5<sup>TH</sup> RESPONDENT

*(Being an appeal from the judgment of Honourable Mr. G. Onsarigo, Resident Magistrate in Kikuyu SPMCC No. 165 of 2013 delivered on 30<sup>th</sup> January, 2017)*

**J U D G M E N T**

John Ng'ang'a Kinuu, Samuel Giathi Njoroge and John Kahia Giathi, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants respectively filed an action before the Senior Principal Magistrate's Court at Kikuyu against Peter Rubiro Ndongi and 4 others, the Respondents herein, vide the plaint dated 16<sup>th</sup> July, 2013. In the aforesaid plaint the Appellants sought for the following orders:-

- a) Special, General and Exemplary Damages for Malicious prosecution.*
- b) Advocates fees in defending the charges against the Plaintiffs in Capital No. 18/98, Criminal Appeal Nos. 519, 520 and 521 of 2000, Criminal Case No. 7 of 2004 and Criminal Appeals Nos. 514, 515 and 516 of 2005.*
- c) Costs of the suit and interest thereon until payment in full.*
- d) Any other relief that this Honourable Court may deem fit and just to grant.*

The Defendants filed their defences to deny the Plaintiffs' claim. Hon. G Onsarigo, learned Resident Magistrate, heard the suit and proceeded to have the same dismissed.

Being aggrieved by the dismissal order, the Appellants preferred this appeal and put forward the following grounds: -

- 1. That the learned magistrate erred in law and fact to hold that the Appellants arrest, confinement and the subsequent prosecution was unlawful and malicious.*
- 2. That the learned trial magistrate erred in law and fact in failing to properly consider the issues before him and thereby reaching a decision based on the wrong principles of the law.*

- 3. That the learned magistrate erred in law and fact in failing to consider adequately or at all the exhibits produced by the Appellants.**
- 4. That the learned magistrate erred in law and fact in failing to find that the 4<sup>th</sup> and 5<sup>th</sup> Respondents had not instituted any proper investigations before prosecuting the Appellants.**
- 5. That the learned magistrate erred in law and fact in failing to find that the criminal proceedings were instituted without reasonable and probable cause.**
- 6. That the learned magistrate erred in law and fact in dismissing the Appellants claim against the weight of evidence.**
- 7. That the learned magistrate erred in law and fact in holding that particulars of malice are required in a claim for malicious prosecution when what is required is the evidence to suggest malice.**
- 8. That the learned magistrate erred in law by failing to make a finding as to quantum of damages payable to the Appellants had they succeeded on their case.**

When the appeal came up for hearing, parties and their counsels recorded a consent order to have this appeal disposed off by written submission. I have re-evaluated the case that was before the trial court. I have further considered the rival submissions and the authorities cited by the parties. It is the submission of the Appellants that the trial magistrate erred when he held that the Appellants had failed to prove that the prosecution was actuated by malice without reasonable and probable cause by failing to scrutinize evidence thoroughly. The Appellants, further stated that the trial magistrate failed to interrogate the evidence tendered and alleged that there was personal vendetta between the Appellants and the respondents.

The background of the appeal is that the Appellant filed a suit where they claimed that on or about 4<sup>th</sup> and 5<sup>th</sup> of June, 1998 and on 23<sup>rd</sup> May, 1998 the agents of the 4<sup>th</sup> and 5<sup>th</sup> Respondents, the police, arrested the Appellants whilst in their course of their employment. The Appellants further argued that upon their arrest they were charged with the offence of robbery with violence pursuant to the complaint lodged by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent vide Kikuyu S.R.M Criminal Case No. 18 of 1998. The Appellants were thereafter convicted and sentenced to suffer death. The duo appealed to challenge the decision. The appeal was successful leading to the release of the Respondents.

Upon their release from prison, the Appellants were prompted to file the action which was dismissed thus giving rise to this appeal.

On appeal, the Appellants argued that they presented before the trial court evidence to prove that they were unlawfully arrested and confined and later maliciously prosecuted. They argued that the trial magistrate completely ignored their piece of evidence thus unfairly dismissing their case.

The Respondents on the other hand are emphatic that the Appellants' case was properly dismissed. It is clear from the recorded evidence that the trial magistrate stated the Appellants had failed to prove their case on a balance of probabilities.

There is no doubt that the case before the trial court is a claim arising from malicious prosecutions. This court in the case of **John Ndeto Kyalo Vs KTDA and Another [2005] eKLR** restated the applicable principles as follows: -

***“In claim for malicious prosecution it is incumbent upon the plaintiff to prove, or course on a balance of probabilities, four essential aspects. Not one, not two, not even three but all f four essential aspects. These are that: -***

- 1. The defendants instituted the prosecution against the plaintiff;**
- 2. The prosecution ended in the plaintiff's favour;**
- 3. The prosecution was instituted without reasonable and probable cause; and**
- 4. The prosecution was actuated by malice.**

***If the plaintiff's case includes a claim for special damages he has not only to specifically plead but also strictly prove it.”***

It is apparent from the judgment of the trial court that the learned Resident Magistrate took into account the aforesaid principles vis-à-vis the evidence presented and came to the conclusion that the Appellants had failed to prove their case. I have on my part re-evaluated the evidence presented before the trial court. It is clear to me that the criminal charge preferred against the Appellants arose out of investigations carried out pursuant to a complaint filed by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. It is apparent that the complaint was not false, therefore, the investigations were instituted pursuant to a reasonable and probable cause. There is no dispute that on 17<sup>th</sup> May, 1998, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were attacked and robbed. The trio booked a report before Kikuyu Police Station. The report was real and not false. In the end, I find no merit in the appeal as against the order on liability.

The Appellants have argued that the trial magistrate erred when he failed to make a finding on quantum. The Respondents agreed with the submissions of the Appellants, but they have urged this court to find that the failure was not fatal in that it would not lead to the settling aside of the judgment. The trial court was under obligation to assess damages even after dismissing the suit. However, that failure is not sufficient to set aside the judgment.

In the end, this appeal is found to be without merit. It is dismissed with costs to the Respondents.

**Dated, signed and delivered at Nairobi this 13<sup>th</sup> day of July, 2018.**

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**J K SERGON**

**JUDGE**

In the presence of

..... for the Appellants

..... for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

..... for the 4<sup>th</sup> and 5<sup>th</sup> Respondents.