



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CIVIL APPEAL NO. 123 OF 2012**

*(An appeal from the Ruling of the Senior Principal Magistrate, Embu in CMCC No. 191 of 2013 dated 26/5/2014)*

ALEX MUTURI MURIITHI.....APPELLANT

VERSUS

PETER MBOGO..... 1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

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

This is an appeal against the judgment of Embu Senior Principal Magistrate delivered on 3/5/2012. The grounds of appeal are that the magistrate considered the evidence of the 2<sup>nd</sup> respondent who did not call any evidence. The magistrate misdirected herself when she concluded that the 1<sup>st</sup> respondent did not cause the prosecution of the appellant. The magistrate erred when she gave the appellant 28 days within which to appeal and erred in failing to quantify the damages that the appellant would have been awarded had he succeed in the appeal. The plaintiff erred in failing to make a determination against the 2<sup>nd</sup> defendant. The magistrate considered extraneous matters in arriving at her judgment.

Parties filed written submissions.

The appellant submitted that the magistrate in her judgment stated that she analyzed the evidence of the 2<sup>nd</sup> defendant yet the 2<sup>nd</sup> defendant never called any witness to testify. The magistrate was wrong in finding that the appellant did not make any complaint to the police yet he testified in two cases as a complainant. The magistrate erred in finding that the appellant did not establish malice on the part of the respondents. The magistrate erred in giving the appellant 28 days to appeal while the civil procedure provides for 30 days .Since the case was about damages the magistrate ought to have stated in her judgment the amount that she would have awarded had the appellant been successful. The magistrate erred in ignoring the 2<sup>nd</sup> respondent in her judgment yet the defendants had been sued jointly and severally. The evidence in the two criminal proceedings is clear that the respondents caused unlawful incarceration and prosecution of the appellant.

The respondents in the submissions stated that the magistrate was right in considering the defence of the 2<sup>nd</sup> respondent before making her judgment. The 2<sup>nd</sup> respondent did not appear but it filed a defence and the court was right in examining it. The magistrate was right in finding that the 1<sup>st</sup> respondent did not cause the prosecution of the appellant in criminal case number 1479 of 2003.It is the appellant who reported to the police that the 1<sup>st</sup> respondent had stolen his title from his house and this report led to the

arrest of the 1<sup>st</sup> respondent. After investigation, it was found that the appellant was found that the appellant should be charged with obtaining money by false pretences. The appellant admitted that he is the one who reported the matter to the police. At no point did the 1<sup>st</sup> respondent initiate criminal proceedings. The appellant did not plead or prove particulars of malice.

The duty of the 1<sup>st</sup> appellate court was discussed in the case of **MWANGI VS WAMBUGU, [1984] KLR 453:**

*“A Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”*

The court consolidated Suit 129/03 and 90/04.

PW1 testified that the 1<sup>st</sup> defendant was his neighbour. He was selling land ¼ acre from his parcel number Gaturi/ Nembure/7486 to the 1<sup>st</sup> defendant. The title was in pw1's name at the time of doing the sale agreement. PW1 did not transfer the land to the 1<sup>st</sup> defendant as the 1<sup>st</sup> defendant did not pay the entire purchase price. The 1<sup>st</sup> defendant sued him in suit number 67 of 02 for asking that pw1 be compelled to transfer the land to him. The suit was struck out on 23/6/02. The 1<sup>st</sup> defendant complained to the police causing pw1 to be charged in criminal case number 3009/02 for obtaining money by false pretence. The criminal case was later withdrawn under section 87(a)cpc. The 1<sup>st</sup> defendant sued him in another civil case number 185/02 which is still pending. In 2003, PW1 was charged in criminal case No. 1479/03 for obtaining money by false pretences and it was alleged that he took KShs.7,000/= under the pretence that he would sell land to the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant is the one who sued him. PW1 was arrested and placed in the cell for 4 days the first time. The case was later withdrawn. He later served a notice to sue to the Attorney General. He incurred expenses in both criminal cases. He produced receipts for expenses.

DW1 testified that PW1 sold land to him and the agreement was that DW1 would pay in installments. On 21/5/2002 he was drinking in a bar when police officers came and accused him of stealing the title deed. He surrendered the title to the police. He did not steal the title deed. After a few months the police came to his house and requested him to testify in court on grounds that he caused PW1 to be arrested. PW1 was arrested after the police did investigations and not because DW1 reported him.

The trial magistrate in her judgment stated that the issue for determination was whether the 1<sup>st</sup> defendant maliciously caused the arrest and prosecution of the plaintiff. The magistrate found that the 1<sup>st</sup> defendant did not cause the prosecution of the plaintiff.

The law and principles governing malicious prosecution were explained in the case of **MBOWA VS EAST MENGO DISTRICT ADMINISTRATION [1972] EA 352**. The East African Court of Appeal expressed itself as follows:-

*“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. Its essential ingredients are: (1) 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; (2) 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; (3) 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 (4), 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...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....."*

The above principles were restated in the case of **MURUNGA VS ATTORNEY GENERAL [1979] KLR, 138** as follows:-

- (a) That the Plaintiff must show that the prosecution was instituted by the Defendant, or by someone for whose acts he is responsible.*
- (b) That the the prosecution terminated in the plaintiff's favour.*
- (c) That the prosecution was instituted without reasonable and probable cause.*
- (d) That the prosecution was actuated by malice.*

The magistrate in her judgment stated that she had considered the plaintiff and defence cases and submissions. The 2<sup>nd</sup> defendant filed a defence dated 8/10/2003 in Civil Suit 129 of 2003. The 2<sup>nd</sup> defendant also filed a defence dated 18/5/2004 in civil case number 90 of 2004 .

According the principles explained in the above cases,it was mandatory for the appellant to prove that that the prosecution was instituted by the Defendant, or by someone for whose acts he is responsible.

From the appellants evidence during trial, the plaintiff did not demonstrate that the prosecution was instituted by the 1<sup>st</sup> respondent. He admitted that he is the one who reported the matter to the police after the report, the police conducted investigations and decided to charge the appellant.

Even assumings that the appellant succeeded in showing that the proceedings were instituted by the 1<sup>st</sup> respondent, the appellant had a duty to prove that the police in arresting him acted without a reasonable and probable cause. Further proof was required on whether the 1<sup>st</sup> respondent in reporting the matter to the police acted maliciously, with an improper and wrong motive. Finally, it is a requirement that proceedings must have ended in the appellant's favaur.

The foregoing analysis of the evidence demonstrates that the appellant did not prove the elements required to prove his case on the balance of probabilities. The magistrate found that the charges were instituted by the police after investigations and absolved the 1<sup>st</sup> respondent from blame.

It is true that the magistrate granted the appellant 28 days within which to file an appeal. This in my opinion did not prejudice the appellant in any way as he still filed his appeal within time. He has not demonstrated that he suffered any prejudice

It is true that the magistrate in her judgment failed to make a determination against the 2<sup>nd</sup> respondent. However from the evaluation of evidence, the appellant has not demonstrated that the prosecution was instituted by the 1<sup>st</sup> respondent and that the police acted without reasonable and probable cause and that the prosecution was actuated by malice.

The appellant has not identified the said extraneous matters for the consideration of this court.

It is my considered opinion that the appellant has failed to satisfy the court regarding his grounds of appeal. I find no merit in this appeal and it is hereby dismissed.

The appellant to meet the costs of this appeal. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 2ND DAY OF DECEMBER, 2015.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Mr. Mogusu for Mr. Kathungu for the appellant**