Kathingo & another v Musee & another (Civil Case 54 of 2014) [2025] KEMC 110 (KLR) (19 May 2025) (Ruling)

Neutral citation: [2025] KEMC 110 (KLR)

REPUBLIC OF KENYA

IN THE MAKINDU LAW COURTS

CIVIL CASE 54 OF 2014

YA SHIKANDA, SPM

MAY 19, 2025

BETWEEN

MBOYA KATHINGO ..... 1ST PLAINTIFF

MUTETO MBALI ..... 2ND PLAINTIFF

AND

MUMO MUSEE ..... 1ST DEFENDANT

THE ATTORNEY GENERAL ..... 2ND DEFENDANT

RULING

THE CLAIM

1. Mboya Kathingo and Muteto Mbali (hereinafter referred to as the 1st and 2nd plaintiffs respectively) moved this court on 24/2/2014 vide a plaint dated 19/2/2014 seeking general damages for false and unlawful arrest and imprisonment as well as for malicious prosecution against Mumo Musee and The Attorney General (hereinafter referred to as the 1st and 2nd defendants respectively). The plaintiffs averred that on 22/12/2010, the 1st defendant made a false and malicious report to the police at Kibwezi police station to the effect that the plaintiffs had assaulted him. That pursuant to the report, the police at Kibwezi police station without conducting any investigations on the matter, unlawfully arrested and detained the plaintiffs in the police cells at Kibwezi. The plaintiffs further averred that they were subsequently charged and prosecuted in court at the Makindu Principal Magistrate's court with the offence of Assault in Criminal case No. 648 of 2011 on 13/6/2011. That the plaintiffs were later acquitted by the court on 10/5/2013.

2. The plaintiffs contended that their arrest, detention and prosecution was unlawful and malicious. They pleaded the following particulars of malice against the 1st defendant:

a. Making a false report to Kibwezi police station with the intention of causing the arrest and detention of the plaintiffs;

b. Making a false report that was not supported by any material evidence;

c. Causing the arrest and charging of the plaintiffs.

3. The plaintiffs further pleaded the following particulars of malice against the 2nd defendant:

1. Arresting and charging the plaintiffs without any reasonable grounds or evidence;

2. Failing to investigate the false allegations;

3. Prosecuting the plaintiffs without any sufficient evidence to sustain a charge of assault;

4. Subjecting the plaintiffs to a lengthy malicious prosecution without any evidence and causing the plaintiffs to incur a lot of expenses.

4. The plaintiffs therefore pray for judgment against the defendants jointly and severally for:

a. General damages for false and unlawful arrest and imprisonment and for malicious prosecution;

b. Special damages for Ksh. 125,000/=;

c. Costs and interests of this suit.

Non-appearance by the 1st Defendant

5. The 1st defendant failed to enter appearance nor file a defence. The plaintiffs requested for interlocutory judgment against him. The record indicates that interlocutory judgment was entered as against the 1st defendant on 12/6/2019.

The 2nd Defendant's Defence

6. The 2nd defendant entered appearance on 17/3/2024 and filed a statement of defence on the same day. The 2nd defendant denied that the 1st defendant made a false report at Kibwezi Police station to the effect that the plaintiff had assaulted him. In the alternative, the 2nd defendant averred that if the plaintiff was ever arrested, which was denied, then the same was after a complaint had been lodged with the police whereby investigations revealed a reasonable cause that an offence cognizable by law had been committed. The 2nd defendant further averred that any arrest, charge or prosecution would be in the execution of statutory duties bestowed upon the police and any acquittal thereafter does not entitle the plaintiff to a cause of action on malicious prosecution. The 2nd defendant denied the particulars of malice and those of special damages pleaded by the plaintiff and prayed that the plaintiff's suit be dismissed with costs.

The Evidence

The Plaintiffs' Case

7. At the hearing of the suit, only the plaintiffs testified in support of their case. The defendants did not attend court to testify nor call any witnesses in their defence. The plaintiffs adopted their statements filed in court as part of their testimony. The 1st plaintiff testified that on 22/12/2010 he was at his home when he heard noises from outside. He went to check and found the 2nd plaintiff and the 1st

defendant quarrelling. That the 1st defendant was chasing away the 2nd plaintiff's cattle whereas the latter was preventing him from doing so. The 1st plaintiff testified that the 1st defendant had a stick and machete and threatened to hit the 2nd plaintiff. The 1st plaintiff then intervened and separated them then snatched the stick and machete from the 1st defendant.

8. The matter was reported to the Assistant County Commissioner's office. On 13/6/2011 the 1st plaintiff was arrested at Kibwezi town by the police. He was placed in police custody for five days and was later charged with the offence of assault of the 1st defendant on 22/12/2010. The plaintiff stated that the allegations were false and malicious as he never assaulted the 1st defendant nor saw the 2nd plaintiff assaulting the 1st defendant. That the plaintiffs were charged without any investigations being conducted. The 2nd plaintiff testified that on 22/12/2010 he was at his home when his child who was herding cattle went and informed him that their cattle were being driven away by a Watchman. The 2nd plaintiff went to the scene and found the 1st defendant driving away the cattle, alleging that they had trespassed onto the land belonging to the 1st defendant's employer.

9. The 2nd plaintiff and the 1st defendant started quarrelling whereupon the 1st defendant threatened to hit the 2nd plaintiff with a club and machete which he had. The 2nd plaintiff raised an alarm. That the 1st plaintiff went to the scene and snatched the machete and club from the 1st defendant. They took the items to the office of the Assistant County Commissioner and reported the incident. That on 15/6/2011, the 2nd plaintiff was arrested and charged alongside the 1st plaintiff with the offence of assaulting the 1st defendant. The 2nd plaintiff denied having assaulted the 1st defendant. He alleged that the 1st defendant and his employer have always harassed them owing to a land dispute between the 1st defendant's employer and the community. The plaintiffs prayed for compensation and produced several documents in evidence.

The Defence Case

10. As already indicated, the 1st defendant failed to enter appearance where after interlocutory judgment was entered against him. As for the 2nd defendant, no witnesses were called to testify.

Main Issues for Determination

11. In my considered view, the main issues to be determined are as follows:

    i. Whether the plaintiffs were unlawfully arrested;

    ii. Whether the plaintiffs were falsely imprisoned;

    iii. Whether the plaintiffs were maliciously prosecuted owing to the defendants' actions;

    iv. Whether the plaintiff is entitled to damages as against the defendants or any one of them; and

    v. Who is to bear the costs of the suit?

The Plaintiffs' Submissions

12. The plaintiffs filed written submissions in support of their case. They submitted that they had satisfied the elements for proof of a claim for malicious prosecution and contended that the prosecution was instituted without reasonable and probable cause and was actuated by malice. The plaintiffs submitted that they were charged six months after the alleged offence and no investigations were conducted. It was further submitted that there was no justifiable cause to arrest and detain the respondents in police custody. The plaintiffs contended that their evidence was not challenged and submitted that they had

proven their case on a balance of probabilities. They relied on the authority of Lawrence Onyango Oduori v The Attorney General & another [2022] eKLR and urged the court to allow the prayers sought.

Analysis and Determination

13. I have carefully considered the evidence on record and given due regard to the plaintiffs' submissions. From the pleadings and uncontroverted evidence by the plaintiffs, the following facts are evident:

    i. That on 22/12/2010 the 1st defendant made a report at Kibwezi Police station against the plaintiffs herein;

    i. That following the report, the plaintiffs were arrested by the police being agents of the 2nd defendant. They were detained, charged and prosecuted;

    ii. That the criminal proceedings were subsequently terminated following acquittal of the plaintiffs under section 215 of the *Criminal Procedure Code*.

Wongful or unlawful arrest.

14. According to the plaint and evidence by the plaintiffs, there is an indication that the plaintiffs were arrested following a complaint lodged by the 1st defendant. The plaintiffs pleaded that they were arrested without any reasonable grounds or evidence. Section 29(a) of the *Criminal Procedure Code* provides that a police officer may, without an order from a magistrate and without a warrant, arrest any person whom he suspects upon reasonable grounds of having committed a cognizable offence. Section 2 of the same code defines a "cognizable offence" as an offence for which a police officer may, in accordance with the First Schedule or under any law for the time being in force, arrest without warrant. The record indicates that the plaintiffs were initially charged with the offence of Assault causing actual bodily harm contrary to section 251 of the Penal code but the charge was later amended to include the offences of stealing and malicious damage to property.

15. According to the first schedule to the *Criminal Procedure Code*, a police officer may arrest a suspect without a warrant for the offences of assault causing actual bodily harm, stealing and malicious damage to property. It therefore follows that the police did not require a warrant to arrest the plaintiffs herein. Section 24(h) of the *National Police Service Act* empowers the Police to apprehend offenders. Section 51(1) (k) of the *National Police Service Act* provides that a police officer shall apprehend all persons whom he is legally authorized to apprehend and for whose apprehension sufficient ground exists. Section 58 of the same Act stipulates:

> "Subject to Article 49 of *the Constitution*, a police officer may without a warrant, arrest a person—
>
> a. who is accused by another person of committing an aggravated assault in any case in which the police officer believes upon reasonable ground that such assault has been committed;
>
> b. who obstructs a police officer while in the execution of duty, or who has escaped or attempts to escape from lawful custody;
>
> c. whom the police officer suspects on reasonable grounds of having committed a cognizable offence;
>
> d. who commits a breach of the peace in the presence of the police officer;

e. in whose possession is found anything which may reasonably be suspected to be stolen property or who may reasonably be suspected of having committed an offence with reference to that thing;

f. whom the police officer suspects upon reasonable grounds of being a deserter from the armed forces or any other disciplined service;

g. whom the police officer suspects upon reasonable grounds of having committed or being about to commit a felony; or

h. whom the police officer has reasonable cause to believe a warrant of arrest has been issued." (Emphasis supplied)

16. According to section 59 of the same Act, an arrest by a police officer, whether with or without a warrant, shall be subject to the rules contained in the Fifth Schedule with respect to arrest and detention. Chapter 15 of the National Police Service Standing Orders reiterate the provisions of the governing Act as well as *the Constitution* on arrest of a suspect. According to Article 49(1)(a) of *the Constitution* of Kenya, an arrested person must be informed of the reason for their arrest. The common denominator in all the provisions of law is that there must be reasonable grounds before a person is arrested. The evidence of the plaintiffs indicates that they were informed of the reason for their arrest. However, the plaintiffs pleaded that there were no reasonable grounds to arrest them.

17. Apart from merely pleading in the plaint that they were arrested without reasonable grounds, the plaintiffs did not give evidence of the circumstances under which they were arrested. It is on record that they were arrested following a complaint by the 1st defendant. The plaintiffs produced and relied on the proceedings in the criminal case against them. I have perused the proceedings. The proceedings indicate that the investigating officer one Police Constable Samwel Wanjora testified that he received the report from the 1st defendant who looked injured and had a torn trouser. That the investigating officer issued the 1st defendant with a P3 form which was filled at the hospital. He also recorded statements from witnesses and visited the scene.

18. The law does not define what reasonable or sufficient grounds are to warrant arrest of a suspect. Both probable cause and reasonable suspicion ask whether a reasonable person in the officer's position would act on the information. Courts use all evidence available or what is called a "totality of the circumstances" analysis to determine if either probable cause or reasonable suspicion exists. The standards for probable cause and reasonable suspicion are much less than what is needed to convict a person of a crime. Probable cause authorizes a more severe intrusion, and therefore, law enforcement must meet a higher standard than reasonable suspicion. Probable cause is a fair probability or a reasonable ground that a crime was committed or is being committed. It means that a reasonable person would believe that a crime was in the process of being committed, had been committed, or was going to be committed.

19. Reasonable suspicion has been defined by the United States Supreme Court as "the sort of common-sense conclusion about human behavior upon which practical people are entitled to rely." Further, it has defined reasonable suspicion as requiring only something more than an "unarticulated hunch." It requires facts or circumstances that give rise to more than a bare, imaginary, or purely conjectural suspicion. Reasonable suspicion means that any reasonable person would suspect that a crime was in the process of being committed, had been committed or was going to be committed very soon. The terms probable cause and reasonable suspicion are often confused and misused. While both have to do with a police officer's overall impression of a situation, the two terms have different repercussions on a person's rights, the proper protocol and the outcome of the situation.

20. Reasonable suspicion is a step before probable cause. At the point of reasonable suspicion, it appears that a crime may have been committed. The situation escalates to probable cause when it becomes obvious that a crime has most likely been committed. In order to arrest a suspect the officer must have a good faith belief that a crime has been committed and the individual he is arresting committed the crime. As already indicated, the plaintiffs did not state why they believed that their arrest was wrongful or unlawful. From the proceedings relied upon by the plaintiff, it would appear that the police arrested them after receiving the report, recordings witness statements and gathering evidence.

21. In the circumstances, it cannot be said that there were no reasonable grounds for their arrest. The investigating officer may not have conducted proper investigations but in my view, the information that the police had was sufficient to cause the plaintiffs to be arrested. It does not matter that the information could have been false. Ordinarily, the decision to arrest a suspect is made independently by the police. The evidence on record indicates that all that the 1st defendant did was to lodge a complaint against the plaintiffs. There is no evidence to show that the 1st defendant was instrumental in the arrest of the plaintiffs in any way. There is no evidence to show that the police, in arresting the plaintiffs, acted on instructions and directions of the 1st defendant. Nevertheless, I have already made a finding that the arrest was not wrongful or unlawful.

False Imprisonment.

22. A person commits false imprisonment when they engage in the act of restraint on another person which confines that person in a restricted area. Under tort law, it is classified as an intentional tort. An intentional tort is a type of tort that can only result from an intentional act of the defendant. Depending on the exact tort alleged, either general or specific intent will need to be proven. False imprisonment consists of the complete deprivation of liberty without a lawful basis. Claims will usually be made against a public body that exercises detention powers, usually a local police service. Per Lord Bridge in R v Deputy Governor of Parkhurst Prison, Ex p Hague, the tort of false imprisonment has two ingredients: the fact of imprisonment and the absence of lawful authority to justify it.

23. Harper & James in their book, The Law of Torts, (3rd Edition) at page 226 authoritatively state that false imprisonment must include the following elements, namely:-

    1. There must be detention, i.e. unlawful restraint of a person's liberty or freedom of movement- See Pine v Olzewski 112 N.J.L. 429 [E.A. 1933];

    2. The detention needs not be forceful. Threats of force by conduct or words coupled with the apparent ability to carry out such threats are sufficient- Jorgensen vs Pennsylvania R.R., 38 N.J Super 317[App. Div. 1955];

    3. Detention must be total, i.e. it must be within boundaries. The restraint must be total rather than a mere obstruction of the right to go where the plaintiff pleases. Imprisonment is something more than a mere loss of freedom to go where one pleases; it includes the notion of restraint within some limits defined by a will or power exterior to our own;

    4. Detention must be for an appreciable time, however short. In Prosser on Torts, (3rded) at P 55, it is authoritatively stated that the tort is complete with even a brief restraint of the plaintiff's freedom;

    5. The detention must be unlawful and must have been against the plaintiff's will;

    6. Malice is not an ingredient in the tort of false arrest.

The plaintiffs pleaded in the plaint that pursuant to the false and malicious report made by the 1st defendant, police officers from Kibwezi Police station, without conducting any investigations on the matter unlawfully arrested and detained the plaintiffs in the police cells at Kibwezi. In his witness statements adopted as part of his testimony, the 1st plaintiff testified that he was arrested on 13/6/2011 and was in police custody for five (5) days but was charged in court on 13/6/2011. This implies that he was taken to court on the same day of arrest. If there was a typographical error in the witness statement, the same was not corrected during testimony. On the other hand, the 2nd plaintiff testified that he was arrested on 15/6/2011. He did not state when he was taken to court.

The Charge sheet produced in evidence by the plaintiffs indicates that they were arrested on 3/6/2011 but were released on cash bail of Ksh. 1,000/= each then taken to court on 13/6/2011. The proceedings of the criminal case indicate that the plaintiffs took plea on 13/6/2011. There was no allegation that the information contained in the charge sheet regarding their arrest was false. It therefore follows that the plaintiffs could not have been arrested on the dates indicated in their testimonies. It is not clear how long they were in police custody before being released on cash bail but it is obvious that they were detained for some time. In the authority of Daniel Waweru Njoroge & 17 Others v Attorney General [2015] KEHC 1154 (KLR), Mativo J (as he then was) observed that:

> "False arrest which is a civil wrong consists of an unlawful restraint of an individual's personal liberty or freedom of movement by another person purporting to act according to the law. The term false arrest is sometimes used interchangeably with the tort of false imprisonment, and a false arrest is one method of committing a false imprisonment. A false arrest must be perpetuated by one who asserts that he or she is acting pursuant to legal authority, whereas a false imprisonment is any unlawful confinement. Thus, where a police officer arrests a person without probable cause or reasonable basis, the officer is said to have committed a tort of false arrest and confinement. Thus, false imprisonment may be defined as an act of the defendant which causes the unlawful confinement of the plaintiff. False imprisonment is an intentional tort. The terms false imprisonment and false arrest are synonymous. In Price vs Phillips 90 N.J Super 480 (App. Div. 1966) it was held that "they are different names for the same tort." The gist of an action for false imprisonment is unlawful detention, without more- Jorgensen vs Pennsylvania R.R., 38 N.J Super 317(App. Div. 1955)." (Emphasis supplied)
>
> The foregoing reveals that false or wrongful arrest and false imprisonment are inextricably linked. If the arrest is wrongful or unlawful, the confinement that follows, however brief, is false. The evidence on record reveals that after the plaintiffs were arrested, they were charged and prosecuted to the end. They were even placed on their defence but later acquitted under section 215 of the *Criminal Procedure Code*. Section 36 of the *Criminal Procedure Code* provides:
>
> > "When a person has been taken into custody without a warrant for an offence other than murder, treason, robbery with violence

and attempted robbery with violence the officer in charge of the police station to which the person has been brought may in any case and shall, if it does not appear practicable to bring that person before an appropriate subordinate court within twenty-four hours after he has been so taken into custody, inquire into the case, and, unless the offence appears to the officer to be of a serious nature, release the person on his executing a bond, with or without sureties, for a reasonable amount to appear before a subordinate court at a time and place to be named in the bond, but where a person is retained in custody he shall be brought before a subordinate court as soon as practicable:

> Provided that an officer in charge of a police station may release a person arrested on suspicion on a charge of committing an offence, when, after due police inquiry, insufficient evidence is, in his opinion, disclosed on which to proceed with the charge."

> The above provision gives power to the police to either release suspects on bond or detain them where the police are of the opinion that the offence is serious and it is not practicable to take the suspect to court within 24 hours of arrest. I have already made a finding that there was reasonable suspicion and probable cause to arrest the plaintiffs. That being the case, it cannot be said that the plaintiffs' detention was unlawful. I am aware that the defendants did not call any witnesses in their defence. However, the court proceedings of the criminal case number 648 of 2011 at Makindu, which the plaintiffs rely on reveal that there was reasonable and probable cause to arrest the plaintiffs. Furthermore, in as much as the 1st defendant did not enter appearance not file a defence, the claim of false imprisonment cannot be sustained against him because the evidence does not show that he participated in the arrest and detention of the plaintiffs.

> As per the evidence, the 1st defendant merely made a report at the police station. There is no evidence to show that the plaintiffs were detained on instructions from the 1st defendant. The decision to arrest and detain the plaintiffs was made independently by the police. My view is buttressed by the authority of David Kirimi Julius

v Fredrick Mwenda [2009] KECA 259 (KLR) in which the court of Appeal held:

> "Mwenda having reported to the police about the assault, the police took over the matter, and what followed was entirely in the control of the police. He had absolutely nothing to do with the events that led to Kirimi's incarceration, and he cannot possibly be faulted for what happened. Accordingly, we find that there is no merit to this appeal, and the same is dismissed with costs to the respondent."

Malicious Prosecution

24. In the case of Mbowa v 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. 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 that the criminal proceedings terminated in his favour, for 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...The law in an 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. In this case the respondent could have brought his action for malicious prosecution until the prosecution ended in his favour. He could not have maintained his action whilst the prosecution was pending nor could he have maintained an action after he had been convicted. His right to bring the action only accrued when he secured his acquittal of the charge on appeal, and he then had the right to bring this action for damages...Time must begin to run as from the date when the plaintiff could first successfully maintain an action. The cause of action is not complete until such a time, and in this case this was only after he was acquitted on appeal".

Similarly, in the celebrated case of Murunga v The Attorney General [1979] KLR 138, which case has been cited with approval in many subsequent cases of this nature, Cotran J (as he then was) laid down the following elements as far as a case of malicious prosecution is concerned:

1. The plaintiff must show that the prosecution was instituted by the defendant or by someone for whose acts the defendant is responsible;

2. That the prosecution terminated in the plaintiff's favour;

3. That the prosecution was instituted without reasonable and probable cause;

4. That the prosecution was actuated by malice.

25. In the book Clerk and Lindsell on Torts, 18th Edition at page 823, the authors prescribe the essentials of the tort of malicious prosecution as follows:

> in an action of malicious prosecution the claimant must show first that he was prosecuted by the defendant, that is to say, that the law was set in motion against him on a criminal charge, secondly that the prosecution was determined in his favour, and thirdly that it was without reasonable or probable cause; fourthly that it was malicious. The onus of proving every one of this is on the claimant. Evidence of malice of whatever degree cannot be invoked to dispense with or diminish the need to establish separately each of the first three elements of the torts."

26. In the case of Stephen Gachau & Another v Attorney General [2015] eKLR, Mativo J (as he then was) held that:

> "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. 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." (Emphasis supplied)

27. It is evident that the prosecution of the plaintiffs was instituted by the police and office of the Director of Public Prosecutions. The plaintiffs produced in evidence the proceedings in Makindu Criminal Case No. 648 of 2011 in which they were jointly charged. The proceedings indicate that the plaintiffs took plea on 13/6/2011. The plaintiffs also produced the judgment in the aforementioned case which indicates that they were acquitted on 10/5/2013 under section 215 of the *Criminal Procedure Code*. It is therefore clear that the criminal proceedings terminated in favour of the plaintiffs.

28. I now move to the crucial issue of whether the prosecution was instituted without reasonable and probable cause. In their plaint, the plaintiffs stated that the 1st defendant made a false and malicious report at the police station, which caused their arrest and prosecution. The particulars of malice were pleaded in the plaint. In their testimonies in court, the plaintiffs merely stated that the report made by the 1st defendant was false and malicious as they did not assault the 1st defendant. The plaintiffs mentioned that there was a land dispute between the 1st defendant's employer and the community. In the case of Gitau v Attorney General [1990] KLR 13, the High court held that to succeed on a claim for malicious prosecution, the plaintiff must first establish that the defendant or his agent set the law in motion against him on a criminal charge. It was further held that the person who sets the law in motion must have done so without reasonable or probable cause.

29. The superior courts have invariably cited with approval the definition of reasonable and probable cause as laid down by Hawkins J in the English case of Hicks v Faulkner [1878] 8 QBD 167 where the learned Judge held thus:

> "Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed ".

30. In the Kenyan case of Kagame & Others v The Attorney General & Another [1969] EA 643, Rudd J, while citing Hick's case (supra) stated as follows:

> ".....to constitute reasonable and probable cause the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material constituted of facts discovered by the prosecutor or information which has come to him or both must be such as to be capable of satisfying and ordinary reasonable, prudent and cautious man to the extent of believing that the accused is probably guilty ".

31. The necessary deduction which the courts have for over a century made from the definition in Hick's case (supra), is that there has to be a finding as to the subjective state of mind of the prosecutor as well as an objective consideration of the adequacy of the evidence available to him or her. This is tantamount to a subjectively honest belief founded on objectively reasonable grounds that the

institution of proceedings was justified. A combination of both the subjective and objective tests means that the defendant must have subjectively had an honest belief in the guilt of the plaintiff and such belief must also have been objectively reasonable. The defendant will not be liable if he/she held a genuine belief in the plaintiff's guilt founded on reasonable grounds. In effect, where reasonable and probable cause for the arrest or prosecution exists, the conduct of the defendant instigating it is not wrongful. It is of importance to the community that persons who have reasonable and probable cause for a prosecution should not be deterred from setting the criminal law in motion against those whom they believe to have committed offences, even if in so doing they are actuated by indirect and improper motives.

32. The element of reasonable and probable cause is not established by the plaintiff who seeks only to prove that he was innocent. In Abrath v The North Eastern Railway Company [1882-1883] 11 QBD 440, Brett MR held that in order to show that there was an absence of reasonable and probable cause for instituting the prosecution, there was no doubt that the plaintiff was bound to give some evidence of the circumstances under which the prosecution was instituted. It is therefore not sufficient for the plaintiff to merely show that the proceedings were terminated in his favour and that there was no substantial ground for charging him. The learned Judge held as follows:

> "... if the plaintiff merely proved that (his innocence), and gave no evidence of the circumstances under which the prosecution was instituted, it seems that the plaintiff would fail; and a judge could not be asked, without some evidence of the circumstances under which the prosecution was instituted, to say that there was an absence of reasonable and probable cause."

33. The plaintiffs merely stated that the 1st defendant made a false and malicious report which caused them to be arrested and prosecuted. They did not give evidence of the circumstances surrounding their arrest and subsequent prosecution that would impute malice on the defendants. There is no evidence to show that the police and prosecution were made aware of or discovered certain information which would have absolved the plaintiffs but nevertheless continued with the prosecution. The plaintiffs did not point out what aspects of the investigations into the criminal complaint were left out by the agents of the 2nd defendant that could possibly have led the prosecutor to believe in the innocence of the plaintiffs as opposed to their guilt.

34. The defendants did not call any witnesses in defence. However, that cannot be construed as an admission of liability. The duty is cast on the plaintiffs to prove their case on a balance of probabilities notwithstanding that the defendants did not call any witnesses. This duty is cast upon the plaintiffs by section 107 (1) of the *Evidence Act* which provides as follows:

> "Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

35. Section 109 of the *Evidence Act* also provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. In the case of Kirugi & Another v Kabiya & 3 Others [1987] KLR 347, the Court of Appeal held thus:

> "The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof."

36. In the authority of Nzoia Sugar Company Ltd v Fungututi [1988] KECA 93 (KLR), the Court of Appeal observed:

> "It is trite learning that acquittal, per se, on a criminal case charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill will must be proved against the prosecutor. The mental element of ill-will or improper motive cannot be found in an artificial person like the appellant. But there must be evidence of spite in one of its servants that can be attributed to the Company. The respondent gave no evidence from which it can be reasonably inferred that the Security Officer made this report to the police on account of hatred or spite that he had for him."

37. Similarly, in Robert Okeri Ombeka v Central Bank of Kenya [2015] KECA 464 (KLR), the Court of Appeal held:

> "Comparative judicial experience in other jurisdictions also shows an emerging legal principle that an acquittal or discharge in a criminal prosecution should not necessarily lead to a cause of action in malicious prosecution law suits. A malicious prosecution plaintiff cannot establish lack of probable cause based on having obtained in an earlier action an acquittal based on insufficiency of the evidence. Successfully defending a prosecution or a law suit does not establish that the suit was brought without probable cause. It is the state of mind of the one commencing the arrest or imprisonment, and not the actual facts of the case or the guilt or innocence of the accused which is at issue. Probable cause is determined at the time of subscribing a criminal complaint and it is immaterial that the accused thereafter may be found not guilty."

38. The court further held that public policy favors the exposure of crime, and the cooperation of citizens possessing knowledge thereof is essential to effective implementation of that policy. That persons acting in good faith who have probable cause to believe that crimes have been committed should not be deterred from reporting them by the fear of unfounded suits by those accused. In the authority of Hassan Magiya Kiage v Attorney General & another [2017] KECA 203 (KLR), the Court of Appeal quoted with approval the decision of the Supreme Court of Canada in Nelles v Ontario [1989] 2 SCR 170, where it was held:

> "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."

39. In the case of James Karuga Kiiru v Joseph Mwamburi & 2 others [2001] KECA 354 (KLR), the Court of Appeal held that as far as arrest is concerned, the burden is on the defendant(s) to prove that they had reasonable cause for suspecting that the claimant had committed an offence. That to prosecute a person is not prima facie tortious, but to do so dishonestly or unreasonably is. The court further observed that malicious prosecution differs from wrongful arrest and detention, in that the onus of proving that the prosecutor did not act honestly or reasonably, lies on the person prosecuted. The proceedings in the criminal case relied upon by the plaintiffs indicate that the trial court found that

they had a case to answer and placed them on their defence. The implication was that the prosecution had established a prima facie case against the plaintiffs.

40. For purposes of criminal proceedings, a prima facie case is defined in the Mozley and Whiteley's Law Dictionary 11th Edition as:

> "A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A prima facie case then is one which is established by sufficient evidence and can be overthrown only by rebutting evidence adduced by the other side." Emphasis added

41. The locus classicus on what constitutes a prima facie case is to be found in the celebrated case of Ramanlal Trambaklal Bhatt v. R [1957] E.A 332 at 334 and 335, where the court stated as follows:

> "Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one "which on full consideration might possibly be thought sufficient to sustain a conviction." This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is "some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence". A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence..... It may not be easy to define what is meant by a "prima facie case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence." (Underlining mine)

42. In the authority of Ronald Nyaga Kiura v Republic [2018] eKLR, the court observed that a prima facie case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebuttal is offered by an accused person. From the definition of what constitutes a prima facie case in criminal proceedings, it is my view that where the plaintiff is acquitted after a full trial in the sense that he is called upon to offer his defence before the acquittal, it would be difficult to find that his prosecution was instituted without reasonable and probable cause and that it was actuated by malice. A careful reading of the judgment in the criminal case reveals that the plaintiffs were acquitted because of inconsistencies in the prosecution case and lack of sufficient evidence to prove the offence beyond reasonable doubt.

43. Other than pleading particulars of malice and stating that the report made by the 1st defendant was false and malicious, the plaintiffs did not adduce evidence to show that the prosecution was actuated by malice. In the authority of Gilbert Otieno Okite & another v Kenya Sugar Research Foundation [2020] KECA 900 (KLR), the Court of Appeal held that:

> "Turning to the issue of malicious prosecution the learned Judge held that in the absence of the Attorney General and Raphael Mukhuyu Shiundu, the initial complainant, the prayers sought by the appellants could not be granted. The claim for malicious prosecution cannot be brought against private individuals or entities, who only lay complaints of a criminal nature to investigative authorities. The decision to prosecute lies with the authorities charged with the mandate to set the law of prosecution in motion, namely the office of the Director of Public Prosecutions. The respondent could not be held responsible for

malicious prosecution since it never had legal authority and did not in fact prosecute the appellant." (Emphasis mine)

44. It therefore follows that a claim of malicious prosecution cannot lie against the 1st defendant. He had no control or authority over the prosecution of the plaintiffs herein.

45. In my considered view, it is improbable to find that a prosecutor acted maliciously where there is reasonable and probable cause to prosecute or to find that the defendant who was motivated by malice had reasonable and probable cause to prosecute. The finding that there was reasonable and probable cause to prosecute invariably neutralises the existence of malice in the circumstances as the latter is contingent on the former. The two requirements appear inseparable in most instances of malicious prosecution. In both elements, there must be evidence of the circumstances leading to the prosecution. It is from these circumstances that an inference of malice or ill-will can be drawn. As already pointed out, the plaintiffs did not give evidence of such circumstances. The plaintiffs tend to rely on the mere fact that hey were acquitted of the charges.

46. A plaintiff cannot just come to court and say, "Look, I was charged with a criminal offence but was acquitted. I deserve to be compensated ". My observation is that in cases of this nature where the Attorney General has been joined as a defendant, the plaintiff must adduce evidence of ill-will against a particular officer or officers charged with duties leading to the prosecution. No evidence of spite or ill-will was given by the plaintiffs against any officer working under the auspices of the 2nd defendant. In my considered view, a mere lapse in the conduct of investigations in respect of a criminal complaint, per se, does not warrant an inference of malice on the part of the police or the prosecutor. In any event, the plaintiff did not point out any specific lapses in the investigations. In my considered view, the police or the prosecution are not required to satisfy themselves that the evidence gathered is sufficient to prove a charge beyond reasonable doubt before instituting criminal proceedings.

47. Issues of the standard of proof are within the purview of the courts and not the investigating and prosecuting agencies. Where the prosecution fails to prove a charge beyond reasonable doubt, it cannot be said that the prosecution was malicious. The plaintiff must show that the prosecutor acted out of ill-will. Having considered the law and evidence on record, I am afraid that the plaintiffs have failed to establish circumstances upon which the court can form the desired opinion. The result is that the plaintiffs have failed to prove that their arrest, detention and prosecution was without reasonable and probable cause and was malicious.

48. I am aware that interlocutory judgment was entered against the 1st defendant on 12/6/2019 for failing to enter appearance and file a defence. In the case of Mohamed Guyo Boru v Richard Mwilaria Aritho [2022] KEHC 2229 (KLR), the court was of the opinion that a case can still be dismissed even where there is interlocutory judgment. Similarly, in EMC (A minor suing through MNC) v James Irungu Nyanja [2020] KEHC 493 (KLR), the court observed:

> "Therefore, I need not to belabour to emphasize that the Appellant failed to discharge her burden in demonstrating how the Respondent was linked to the causation of the accident, notwithstanding that the suit was uncontested and an interlocutory judgment entered against the Respondent. No doubt that an interlocutory judgement was entered against the Respondent. But on introspecting the general meaning of the word "Interlocutory" it merely means 'on the interim'. What this implies is that the Court had prima facie entered an interim judgment against the Respondent for his failure to enter appearance and file a defence. But then, at the formal proof hearing it was incumbent upon the Appellant to demonstrate how the accident occurred, who caused the accident and to what extent liability

for the accident could be apportioned to the Respondent. To this extent the Appellant totally failed."

49. Notwithstanding the interlocutory judgment, and given the nature of the claim, the plaintiffs still bore the burden of proving that the defendants were liable.

Disposition

50. The upshot of the above considerations is that the plaintiffs have failed to prove their case against the defendants on a balance of probabilities. On the basis thereof, I make a finding that the plaintiffs are not entitled to the reliefs sought or to any remedy at all as against the defendants. The unfortunate or fortunate result as the case may be, is that the plaintiffs' suit against the defendants is hereby dismissed. As the defendants did not actively participate in the proceedings, there shall be no order as to costs of the suit.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 19TH DAY OF MAY, 2025.

Y. A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.