



REPUBLIC OF KENYA



**Kiratu v Inspector General & 3 others (Civil Suit E005 of 2023)
[2024] KEMC 183 (KLR) (18 September 2024) (Judgment)**

Neutral citation: [2024] KEMC 183 (KLR)

**REPUBLIC OF KENYA
IN THE LAMU LAW COURTS
CIVIL SUIT E005 OF 2023
FM MULAMA, RM
SEPTEMBER 18, 2024**

BETWEEN

SAMUEL MWANGI KIRATU PLAINTIFF

AND

INSPECTOR GENERAL 1ST DEFENDANT

DIRECTOR OF PUBLIC PROSECUTION 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

ANNE WAIRIMU MWANGI 4TH DEFENDANT

JUDGMENT

A. Introduction.

1. By a plaint dated 28th March 2023, the Plaintiff seeks the following orders against the defendants.
 - a. General damages for malicious arrest, confinement and prosecution.
 - b. Exemplary and punitive damages for malicious arrest, confinement and prosecution.
 - c. General damages for defamation.
 - d. General damages for loss of future expectations.
2. The summons to enter appearance and the plaint were served upon the defendants who entered appearance and participated in the hearing save for the 4th defendant who had an interlocutory judgment against her.



The evidence.

3. The plaintiff adopted his witness statement dated 28th March 2023 and produced in exhibit a copy of the judgement in Lamu CR NO. E107 OF 2021 as the only exhibit in the matter.
4. In brief the plaintiff who was the accused in Lamu CR NO. E107 OF 2021 stated that he used to assist the 4th defendants to herd her goats at some cost and as a result she also stayed at one of her houses that was a few meters from her house and used to pay rent to her every month.
5. That sometimes in April 2022 he decided to quit the herding of goats due to unpaid dues by the 4th defendants which had accumulated for months and she used to give him excuses when he asked for his dues from the 4th defendant and she also in addition to it insulted him.
6. The plaintiff then decided to pack and leave her premises but the 4th defendant frustrated his efforts to leave and when the plaintiff insisted of leaving the 4th defendant called the area chief and accused the plaintiff that he had committed an unnatural act an offence contrary to section 162(b) as well as preparation to commit a felony contrary to section 308(3) of the penal code.
7. He was arraigned in court and did not manage to post bail and he was held up until the suit was heard and determined and he was acquitted.

Defence case.

8. The 1st to 3rd defendants did not call any witness but produced in evidence 4 documents in exhibit to wit examination notes from Hindi Magogoni dispensary, suspected bestiality case examination report, exhibit memo form and certificate to photographic prints and closed their case.

Submissions by parties.

9. I have duly considered both sets of submissions and authorities cited and contained in the list of authorities filed by parties
B. Issue For Determination.
 - a. Whether the tort of malicious prosecution, unlawful arrest and false imprisonment has been proven to the required standard.
 - b. Whether the defendants are jointly and severally liable to the plaintiff in respect of the reliefs sought in the plaint.
 - c. What is the quantum payable to the plaintiff if any
 - d. Who bears the costs of the claim.

C. Analysis And Determination.

Whether The Tort Of Malicious Prosecution, Unlawful Arrest And False Imprisonment Has Been Proven To The Required Standard

10. The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. According to Odunga's Digest on Civil Case Law and Procedure page 5276, the essential ingredients to prove malicious prosecution are as follows:
 - a. The criminal proceedings must have been instituted by the defendant.



- b. The defendant must have acted without reasonable or probable cause.
 - c. The defendant must have acted maliciously.
 - d. The criminal proceedings must have been terminated in the plaintiff's favor.
11. The plaintiff must satisfy all of the above elements of malicious prosecution in order to succeed in obtaining an award of damages against the defendants. In the present case, it is undisputed that the plaintiff was arrested, detained, and charged vide Lamu MC CR NO.E107 OF 2022 by the police acting as agents of the 1st defendant following an investigation of the circumstances of the case.
 12. The essential ingredients are similarly set out in Bullen And Leake And Jacob's Precedents Of Pleadings, 14th Edition paragraph 2-5 which include;
 - i. The plaintiff to show that he was prosecuted by the defendant, i.e that proceedings on a criminal charge were instituted or continued by the defendant against him
 - ii. The proceedings were terminated in the claimant's favour
 - iii. The proceedings were instituted without unreasonable and probable cause
 - iv. The defendant instituted the proceedings maliciously; and
 - v. The claimant suffered loss and damage as a result.
 13. The ingredients of malicious prosecution aforementioned must be conjunctively proved. This is the holding in the case of Daniel Njuguna Muchiri V Barclays Bank Of Kenya Ltd & Another [2016] eKLR
 - a. The criminal proceedings must have been instituted by the defendants.
 14. It is the plaintiff's case that the 4th defendant made a report to the police (1st defendant) about an alleged bestiality act. The case was then investigated by the 1st defendant and prosecuted by the 2nd defendant in court.
 15. In the case of Stephen Gachau Githaiga & Another V Attorney General [2015] eKLR where Justice Mativo discussed the tort of malicious prosecution with specific attention to this 1st element and stated as follows;

“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...”
 16. It therefore goes without saying that the case was instituted by the defendants herein.

The defendant must have acted without reasonable or probable cause.

17. On whether there was reasonable and probable cause to prosecute the Plaintiff, Rudd, J in Kagane – vs- Attorney General (1969) EA 643, as quoted in the case of Stephen Gachau Githaiga & Another v Attorney General [2015] eKLR which set the test for reasonable and probable cause. Citing Hicks



vs. Faulkner, [1878] 8 QBD 167 at 171 *Herniman vs. Smith* [1938] AC 305 and *Glinski vs. McIver* [1962] AC 726, the learned judge stated 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...Excluding cases where the basis for the prosecution is alleged to be wholly fabricated by the prosecutor, in which the sole issue is whether the case for the prosecution was fabricated or not, the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of objective test. That is to say, 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 consisted of facts discovered by the prosecutor or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty. If and insofar as that material is based on information, the information must be reasonably credible, such that an ordinary reasonable prudent and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for the prosecution...If it is shown to the satisfaction of the judge that a reasonable prudent and cautious man would not have been satisfied that there was a proper case to put before the court, then absence of reasonable and probable cause has been established. If on the other hand the judge considers that prima facie there was enough to justify a belief in an ordinary reasonable prudent and cautious man that the accused was probably guilty then although this would amount to what I call primary reasonable and probable cause the judge may have to consider the further question as to whether the prosecutor himself did not believe in the probable guilt of the accused, and this is obviously a matter which is to be judged by a subjective test. This subjective test should only be applied where there is some evidence that the prosecutor himself did not honestly believe in the truth of the prosecution...Inasmuch as this subjective test only comes into operation when there were circumstances in the knowledge of the prosecutor capable of amounting to reasonable and probable cause, the subjective test does not arise where the reason alleged as showing absence of reasonable and probable cause is merely the flimsiness of the prosecution case or the inherent unreliability of the information on which the case was based, because this is a matter for the judge alone when applying the objective test of the reasonable prudent and cautious man. Consequently the subjective test should only be applied where there is some evidence directly tending to show that the prosecutor did not believe in the truth of his case. Such evidence could be afforded by words or letters or conduct on the part of the prosecutor which tended to show that he did not believe in his case, as for example a failure or reluctance to bring it to trial, a statement that he did not believe in it and, I think possibly, an unexplained failure to call an essential witness who provided a basic part of the information upon which the prosecution was based.”

18. It is clear from the judgement in the *Lamu Mccr No. E107 Of 2022 R Vs Samuel Mwangi Kiratu* that there was no eye witness who witnessed the plaintiff commit the alleged offence.
19. Given the holding in the foregoing case, the court observed, “If it is shown to the satisfaction of the judge that a reasonable prudent and cautious man would not have been satisfied that there was a proper case to put before the court, then absence of reasonable and probable cause has been established.” It is my view that once a complainant makes a report to the police station it is the duty of the police and



its investigative agencies to conduct proper investigations and present to court a water tight case given the standard of proof in criminal cases that has no room for doubts. It is not all cases that are reported to the police are to be presented to court.

20. Another protective layer the law has put in place is to have the charges reviewed by ODPP another independent body to review and advise on whether to proceed or drop the charges. The ODPP further in making the decision to charge or not they are guided by the Decision to Charge guidelines.
21. All these measures are put in place to ensure that before a complaint makes its way to court, there must a reasonable and probable cause and this places greater responsibility on the head of 1st and 2nd defendants before charges are pressed. One that the 1st defendant carries out proper and conclusive investigations and thereafter the 2nd defendant as an independent arm confirms that the file is ready and has high chances of returning a guilty verdict.
22. Anything less than that amounts to an exercise wherein the 1st and 2nd defendants acted without reasonable or probable cause when making the decision to press charges against the plaintiff.

The defendant must have acted maliciously.

23. On Whether the prosecution of the plaintiff was actuated by malice existence of such malice is intertwined with the element of reasonable and probable cause and the prosecution of the plaintiff without reasonable and probable cause portrays malice and demonstrates that the instigator of the prosecution was motivated by malice. In the Stephen Githaiga case(supra) the court held that:

“The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words, the Police or any other prosecution arm of the Government is not a mere conduit for complainants. The Police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect.... However, where the Police deliberately decide not to take into account the version of the suspect and acts on a story that eventually turn out to be improbable and which no ordinary prudent and cautious man would have relied upon that failure may constitute lack of reasonable and probable cause for the purposes of malicious prosecution.”

24. Had the Police Officers carried out their investigations diligently and aggressively, they would have found that the Plaintiff had no reasonable connection to the offense since there was no eye witness to the offence. It is not in doubt now that the plaintiff used to assist the 4th Defendant to herd her goats and a herdsman more often than note he would be in the goats den and further than it is no uncommon for goats to make noises while grazing or in the den at times even unprovoked.
25. The case of Thomas Mboya Oluoch & Another v Lucy Muthoni Stephen & Another Nairobi HCCC No. 1729 of 2001 Ojwang, J (as he then was) was cited, approving the Stephen Githaiga case that:

“Unless and until the common law tort of malicious prosecution is abolished by Parliament, Policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense...I do not expect that any reasonable Police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State’s prosecutorial machinery, and to engage the



judicial process with this kind of litigation, is to annex the public legal services for malicious purposes”.

26. In my view in the absence of an eye witness and given the nature of offence the plaintiff was charged with the 1st defendant ought to have had conclusive proof that it was the plaintiff who was responsible for the act complained of given that unlike in human beings where such cases courts can convict based on the evidence of the victim (see section 124 of the [Evidence Act](#)) in this case the goat(s) could not and will never say who for lack of a better word defiled it.
27. Still in the Stephen Githaiga case the court stated that the absence of evidence upon which a reasonable Prosecutor would charge the Plaintiff renders the subsequent prosecution as actuated by malice. The court articulated this as follows:

“In the absence of any evidence as to the facts and circumstances upon which the second Respondents; relied, the court can only conclude that there was no probable and reasonable cause for charging the first Respondent and that constitutes malice for the purposes of the tort of malicious prosecution.”
28. Therefore in the absence of an eye witness who saw the plaintiff allegedly commit the said offence and the fact that in the criminal case the treating/examining doctor could not rule out other causes of the swelling to the private parts of the goat to include the goats menstruation, there were indeed doubts as to what caused the swelling and the prosecution and the police out to have cleared the doubt before pressing charges against the plaintiff in the absence of an eye witness. This was purely actuated by malice.
29. To the extent that the plaintiff was in custody for 5 months during the pendency of the trial in itself is not per se malicious as there is no evidence in court that he was denied bond at the instance of the 1st and 2nd defendants

The criminal proceedings must have been terminated in the plaintiff’s favor.

30. The judgment in the trial court clearly attest to the fact that the prosecution of the plaintiff was terminated in his favour when the trial magistrate declared that:

With regards to count 1 the court held as follows;

“it was the evidence of Pw 2 that the accused was also drunk. This could have made him lack the criminal responsibility to commit a crim though accused never said so. I therefore give accused benefit of doubt and acquit him under section 215 of the Criminal Procedure Code.”

With regards to count 2 the court held as follows;

“In the circumstance I find there is no sufficient evidence to convict accused of the offence of preparation to commit a felony contrary to section 308(3) of the Penal Code. I acquit accused under section 215 of the Criminal Procedure Code.”
31. It therefore goes without saying that the criminal proceedings in Lamu Mccr No. E107 Of 2022 Republic Vs Samuel Mwangi Kiratu was terminated in the plaintiff’s favour.



Whether The Defendants Are Jointly And Severally Liable To The Plaintiff In Respect Of The Reliefs Sought In The Plaint.

32. On Whether the Defendants are liable it was submitted by the plaintiff that all the defendants should be liable for his tribulations from the time of arrest and throughout trial; whereas the 1st Defendant's agents failed to carry out proper investigations into the link between the bestiality act and the Plaintiff; and that they prosecuted the Plaintiff based on no evidence at all occasioning the Plaintiff great loss and realigning his life to the negative by ruining his dreams and shattering his vision.

33. In the case of Catherine Wanjiku Kariuki vs. Attorney- General & Another [2011] eKLR, where the court held that:

“it is the duty of every Citizen to report to the Police any crime suspected, upon reasonable ground, to have been committed, or being committed, or about to be committed. Once that civic duty is done, it is the business of the Police to independently investigate the matter and arrive at their own conclusion... whether to charge anyone with such crime.”

34. In the case Douglas Odhiambo Apel & another v Telkom Kenya Limited Civil Appeal no 115 of 2006 where the court held, *inter alia* that:

“The Plaintiffs were arrested and charged by the police. And the prosecution was undertaken by the Attorney-General (now DPP) as public Prosecutor. Telkom Kenya was merely a complainant. The decision to charge and prosecute the plaintiffs was taken by the police and the Attorney-General. Telkom Kenya as a complainant would not have been involved in the process. Once Telkom Kenya had made a complaint to the police, it was left to police to investigate the complaint and decide whether or not to charge the plaintiffs. That is why in a claim for damages for unlawful arrest, false imprisonment and malicious prosecution; the proper defendant is always the Attorney General.”

35. It is my view malicious prosecution claims are not instituted as against a complainant who gave the information to the police to carry out their investigations and establish whether there is a *prima facie* case.

36. The 1st and 2nd Defendants by law are the only institutions with monopoly to institute criminal prosecutions. The Court of Appeal in Robert Okeri Ombeka v Central Bank of Kenya (*supra*) where the learned judges stated follows:

“Public policy favors the exposure of crime, and the cooperation of citizens possessing knowledge thereof is essential to effective implementation of that policy. 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. This view is in accord with the decision of the South African case of *Beckenstrater V Roffcher & Theunissen*, 1955 1 SA 129 (A) 135D-E, and carried forward in the case of *Relyant Trading (pty) Ltd V Shongwe*, 2007 1 All SA 375 (SCA) para 14 where Malan JA stated that:

“... the requirement of reasonable and probable cause "is a sensible one" since "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.”



37. The 4th defendant was justified and had the constitutional right to lodge a complaint to the police for investigations to be instituted to establish the person responsible for the act of unnatural offence contrary to section 162(b) of the Penal Code. There is no evidence to show that the 4th defendant determined for the 1st and 2nd defendants the specific offences with which the plaintiff was to be charged with.
38. Upon receipt of a complaint like in the instant case, it was upon the 1st defendant to investigate thoroughly before deciding who to charge with the relevant offences. This right or power was not mutually exclusive to the 1st defendant but the file was then to be forwarded to the 2nd defendant who made the ultimate decision to charge. There is no evidence on record that the 4th defendant insisted on a particular charge against the plaintiff as I have already stated. The fact that investigations by the police were shoddy does not mean that the 4th defendant had no reasonable or probable cause to complain against the plaintiff.
39. In Robert Okeri Ombeka V Central Bank of Kenya (supra) a Court of Appeal decision , wherein the Court of Appeal further observed that:
- “Public policy favours the exposure of crime, and the co-operation of citizens possessing knowledge thereof is essential to effective implementation of that policy. 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.”
40. Having said all of the above I do find no malice in the 4th defendant’s reporting to police that the plaintiff may have been engaged in unnatural offence contrary to section 162(b) of the Penal Code with her goats. She is not liable in the circumstances and as such liability shall therefore attach to the 1st, 2nd and 3rd defendants jointly and severally.

What Is The Quantum Payable To The Plaintiff If Any?

41. The plaintiff has asked for the grant of the prayers reproduced at paragraph 1 of this judgment.
42. In his submissions he has submitted on general damages for malicious arrest, confinement and prosecution and exemplary damages for being subjected to malicious prosecution.
43. The plaintiff has prayed for Kshs.1,000,000/= given that the plaintiff was in custody for 6 months and in doing so relied on the case of Daniel Waweru Njoroge and 17 others vs Attorney General[2015] eKLR. He has also placed reliance on the case of aqvi Syed Qmar vs Paramount Bank Limited & another [2015] eKLR where an award of Kshs.2,500,000/= was made for malicious prosecution.
44. The plaintiff in his claim for exemplary damages has prayed for Kshs. 500,000/= placing reliance on the case of Chrispine Otieno Caleb vs Attorney General [2014] eKLR
45. On what damages the plaintiff is entitled to, in Peter M. Kariuki v Attorney General [2014] eKLR, the Court of Appeal cited the Supreme Court of Uganda decision in Cuossens v Attorney General, (1999)1 EA 40, where the court held that;

“The object of an award of damages is to give an injured party compensation for the damage, loss or injury that he has suffered and that the general rule regarding the measure of damages is that the injured party should be awarded a sum of money as would put him in the same position as he would have been if he had not sustained the injury. Where the injury in question is non-pecuniary loss, assessment of damages does not entail arithmetical



calculation because money is not being awarded as a replacement for other money; rather it is being awarded as a substitute for that which is generally more important than money, and that is the best that a court can do in the circumstances.”

46. The same court of Appeal held that;

“Turning to the ground of appeal relating to damages, it bears repeating that assessment of quantum of damages is a matter for the discretion of the trial judge, which must be exercised judicially and with regard to the general conditions prevailing in the country and to prior relevant decisions.”

47. In the same case, the Court of Appeal quoted Madan JA in holding that:

“Madan, JA again, aptly observed that an award of general damages should not be miserly, it should not be extravagant, it should be realistic and satisfactory and therefore it must be a reasonable award. In the same judgment, he addressed an argument similar to the one before us, tying the quantum of damages to an appellant’s station in life:

“It is not always altogether logical that general damages should be assessed in relation to the station in life of a victim. There must be some general consideration of human feelings. The pain and anguish caused by an injury and resulting frustrations are felt in the same way by the poor, the not so rich and the rich. Again inflation is also no respecter of persons.””

48. With the above in mind, the plaintiff has pleaded for Kshs.1,000,000/= given that the plaintiff was in custody for 6 months and Kshs.500,000/= as exemplary damages.

49. From the plaint there is a claim for general damages for defamation. In the case of Byrum Kenneth Olenja versus Michael Opundo & Another (2011) eKLR Nairobi HCCA No. 230 of 2000 where the Court observed that the Appellants claim of defamation lacked a basis as it was not properly pleaded as required under Order 2 rule 7(1)), which stipulates that where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, he shall give particulars of the facts and matters on which he relies in support of such sense.

50. In the present suit the plaintiff has not even attempted to specifically plead his claim for defamation as is required under Order 2 rule 7(1) of the Civil Procedure Rules 2010 and as such he is not entitled to damages for libel and/or slander.

51. It was also observed in the case of Byrum(supra)that the claim for defamation was in actual fact a duplication as the damages suffered were the same as those for false imprisonment and malicious prosecution hence the Plaintiff is not entitled to damages for defamation and malicious prosecution as the same amounts to duplication. I find and hold in similar terms.

52. In the case of Cosmas M Nzau & 2 others v The Honourable Attorney General Nairobi high court civil suit No.714 of 2000 cited with approval in the case of Vastu Company Limited v Mwangi (Civil Appeal 547 of 2019)[2022] KEHC 3006 (KLR) (Civ) (17 June 2022) (Judgment)where the court awarded Kshs.800,000/= for each of the plaintiff for malicious prosecution.

D. Conclusion And Disposition.

53. In the end, I find that the plaintiff has not proved his case against the 4th defendant on a balance of probabilities and the plaintiff’s case as against the 4th defendant is dismissed. I however find that the



plaintiff's claim against the 1st, 2nd and defendants is proved on a balance of probabilities, that the 1st defendant set the law in motion, the 2nd defendant affirmed it and without reasonable or probable cause maliciously prosecuted the plaintiff as a result of which the plaintiff suffered loss and damage as a consequence thereof.

54. Accordingly, enter judgment for the plaintiff on liability against the 1st, 2nd and 3rd defendants jointly and severally and I award damages in favour of the plaintiff as against the 1st, 2nd and 3rd defendants as follows :-
- a. General damages for malicious prosecution of Kshs 1,000,000/=
 - b. Exemplary damages for malicious prosecution of Kshs 500,000/=
 - c. The claim for general damages for defamation was not proved and hence dismissed in toto.
 - d. Similarly, the claim for general damages for loss of future expectation is dismissed for want of proof.
 - e. The plaintiff is awarded costs and interests from the date of the judgement.
 - f. All other prayers not specifically granted are dismissed.

55. Orders accordingly.

DATED, SIGNED AND DELIVERED AT LAMU COURT THIS 18TH DAY OF September 2024.

HON. FLAVIAN.M. MULAMA

RESIDENT MAGISTRATE

LAMU LAW COURTS

LAMU

In the presence of;

Therbit Shee Ali-C/A

Mr. Soita for the Plaintiff.

Mr. Ojwang for the 1st, 2nd and 3rd defendants.

Ann Wairimu Mwangi.

