Mukonya v Equity Bank Limited & another (Civil Appeal 573 of 2019)
[2025] KECA 1720 (KLR) (24 October 2025) (Judgment)

Neutral citation: [2025] KECA 1720 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 573 OF 2019

DK MUSINGA, M NGUGI & F TUIYOTT, JJA

OCTOBER 24, 2025

BETWEEN

DAID IRUNGU MUKONYA ..... APPELLANT

AND

EQUITY BANK LIMITED ..... 1ST RESPONDENT

THE HON ATTORNEY GENERAL ..... 2ND RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Mbogholi Msagha, J.) delivered on 6th November 2018 in High Court Civil Case No. 336 of 2009)

JUDGMENT

1. When Lucy Njeri Wamukonya (the deceased) nominated her brothers David Irungu (the appellant) and Stephen Maina as equal beneficiaries to her life policy with Aetna Life Insurance Company (Aetna) she would never have anticipated the controversy that the presentation of a cheque for payment of that benefit by the appellant would generate.

2. The official name of the appellant is "David Irungu Mukonya".

   In the form nominating him as a beneficiary, he is named as "David Irungu Wamukonya". To be noted is the slight difference to the third name in the two sets of names. Aetna drew a cheque dated 11th July, 2008 for USD 150,717.15 in the name of David Irungu Wamukonya and released it to the appellant.

3. Later, on 25th November, 2008, the appellant opened an account No. 0470193218836 in the name of David Irungu Mukonya with Equity Bank (the 1st respondent or the Bank) at its Moi Avenue branch. Events leading to the litigation that has been escalated to this Court were triggered by the presentation of the cheque by the appellant to the Bank with the two sides giving different versions.

4. According to the appellant, upon presentation of the cheque, one Nicholas Kyau (Nicholas), an agent or servant of the Bank, alleged that the appellant had stolen the cheque and he (Nicholas) lodged a complaint with police.

5. The version of the Bank is that its agent requested the appellant to explain the difference in the name of the payee of the cheque being "David Irungu Wamukonya" from the appellant's name, "David Irungu Mukonya". The appellant was rude and refused to comply with the request, as a result of which the Bank was forced to verify the said cheque using security mechanisms.

6. It is common ground that on or about 5th December, 2008, police officers attached to K.I.C.C. Police Station, through the Banking Fraud Investigation Unit, arrested the appellant and arraigned him before court on 8th December, 2008 on a charge of stealing contrary to section 275 of the Penal Code in Nairobi Chief Magistrate's Court Criminal Case No. 2039 of 2008

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7. The charges were later on 30th January, 2009, before hearing had commenced, withdrawn and the cheque eventually paid.

8. In proceedings before the High Court at Milimani taken out against the Bank and the Attorney General (2nd respondent), the appellant alleged that the arrest and charges were malicious, unsubstantiated and reckless. The arraignment, contended to be false, defamed the appellant, causing him mental anguish, and financial and credibility loss. He sought special damages against the two for costs incurred in defending the criminal proceedings, general, punitive and exemplary damages for unlawful arrest, false imprisonment, defamation, financial and credibility loss. He also sought costs.

9. On its part, the Bank asserted that its complaint was based on reasonable belief and or suspicion. Further, that other than making a complaint to the police to investigate, it did not play any role in the arrest or detention of the appellant.

10. The Attorney General defended the action of the Police, stating that after receiving what appeared to be a credible complaint, the Police prosecuted the appellant on reasonable suspicion of having committed an offence. In addition, the arrest and prosecution were lawfully carried out by the Police in discharge of their statutory duty to protect property, prevent and detect crime, apprehend offenders and enforce laws.

11. After hearing two witnesses for each side, the trial court held that there was a probable and reasonable cause for an inquiry to be initiated and there was more than mere suspicion because of lack of cooperation on the part of the appellant. The trial court (Mbogholi Msagha, J., as he then was), was not persuaded that the appellant had established his case against the two to warrant the orders sought.

12. This appeal challenges that judgment, it being contended that the learned judge erred in:

    i. concluding that there was reasonable cause in the arrest and subsequent prosecution of the appellant yet all the evidence showed that no due diligence was done by the 1st respondent prior to making the complaint against the appellant, nor were proper investigations conducted by the 2nd respondent to support the charge of theft.

    ii. concluding that the arrest and prosecution of the appellant was not malicious and in bad faith, yet the evidence on record expressly showed that the same was done without reasonable cause, due diligence nor proper investigations being conducted by the respondents.

iii. failing to consider that the agents of the 2nd respondent failed to discharge their evidential burden in NRB CMCC Criminal Case No. 2039 OF 2008 and that the proceedings were terminated in the appellant's favour.

iv. failing to consider the testimony of the appellant thus erroneously concluding that the appellant had been uncooperative in establishing the authenticity of the impugned cheque.

v. in failing to acknowledge that the reckless actions of the respondent caused the appellant loss, mental anguish embarrassment and tarnished his name which could have been reasonably avoided had the respondents done their duty in the circumstances.

13. The appellant asked us to allow the appeal, set aside the impugned judgment and to allow the prayers in his plaint dated 19th June 2009 filed at the High Court. Costs both here and at trial were also sought.

14. At plenary hearing, learned counsel, Mr Kuria, appeared for the appellant while learned State Counsel, Miss Gathoga represented the Attorney General. There was no representation for the Bank although submissions had been filed on its behalf. Counsel present asked us to proceed on the basis of the written submissions filed on behalf the appellant and the Bank with the Attorney General simply relying on what had transpired at the trial.

15. The written submissions by the appellant were somewhat jumbled up and repetitive. This is what we make of them.

16. The appellant argued that at the time of arrest he was not a flight risk and there was no reason for his arrest. The Police should therefore not have detained and charged him without evidence. It was contended that it was a far-fetched insinuation that he was rude and had he behaved in a disorderly manner, he ought to have been charged for that offence rather than the cooked-up charge of theft. Asserting that co-operation or lack of it does not warrant illegal detention and arraignment without proper investigations, the appellant cited 353 Mass. 287

(1967) 303-304 to illustrate that being rude does not give the police a right to deny a person civil liberties.

17. Regarding his detention in custody for three days without arraignment, the appellant contended this to be contrary to Article 40 of *akn ke act 2010 constitution the Constitution* and in violation of Article 9 of the International Covenant on Civil and Political Rights, which provides that "....No one shall be subjected to arbitrary arrest or detention...." and "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge....". Cited as well was Halsbury's Laws of England 4th Edition page 606, where illegal detention is defined as any total restraint of the liberty of the plaintiff in which the onus lies on the defendant to prove justification.

18. We were invited to examine the conduct of the respondents when the appellant presented the cheque to the Bank. It was the appellant's view that the Bank failed in its duty to confirm the veracity of the cheque with the drawer, despite him explaining the discrepancy in the name. It was argued that the agents of the 2nd respondent conducted no investigations whatsoever prior to the appellant's arrest and arraignment. They ought to have called and or visited the offices of the United Nations and Aetna to confirm the circumstances in which the cheque was issued. Despite the appellant providing necessary documentation to both respondents to elaborate the source of the monies and explain the discrepancy in the names, he was arrested. The actions of the police showed total negligence, arrogance and incompetence. The appellant submitted that no reasonable defence was made by either of the respondents at trial, and the learned judge misdirected himself by finding that there was probable or reasonable cause for the arrest and prosecution. The appellant posited that lack of reasonable

cause constituted absolute proof of malice. Concluding on this aspect, the appellant asserted that the elements of malicious prosecution were satisfied: prosecution was instituted by the defendant; terminated in the plaintiff's favour; instituted without reasonable and probable cause; and was actuated by malice. Cited were the decisions of George Masinde Murunga v Attorney-General [1979] KEHC 34 (KLR) and Kagane and Others -v- Attorney General and Another (1969) 1 EA 643.

19. Turning to the question of damages, the appellant complained that his reputation was irreversibly damaged by the arrest, done in broad daylight in a banking hall, as well as by his arraignment in court. Citing Dr. Willy Kaberuka V Attorney General, Civil Suit No. 160 of 1993 [1994] II KALR 64, the appellant claimed damages for injury to his reputation, indignity and humiliation, and injuries to his feelings. The appellant sought compensation of Kshs.20,000,000.00.

20. In response, the Bank referred to the sequence of events that took place at its place of business. The appellant presented a cheque in the name of "David Irungu Wamukonya" which was not drawn in favor of the appellant, David Irungu Mukonya. In normal banking procedure, the appellant was asked to explain the difference in the two names. The appellant was rude and refused to comply, as a result of which the 1st respondent was forced to verify the said cheque using security mechanism. The complaint to the Police was based on reasonable belief and or suspicion of the appellant. The Bank asserted, further, that other than making a complaint to the Police for investigation, it did not play any role in the arrest or detention of the appellant as this was purely the mandate of the investigator. As to what amounts to reasonable and probable cause, the Bank cited the decision in Kagane and Others -v- Attorney General and Another (1969) 1 EA 643, relying on the old English decision of Hicks v. Faulkner (1878) 8 Q.B.D. 167 where in defining reasonable and probable cause, Hawkins J. (on behalf of the Court) stated:

> " Now I should define reasonable and probable cause to be, 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 any ordinarily 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."

21. On the issue of whether the appellant's arrest was malicious and in bad faith, the Bank submitted that malicious prosecution, as the name 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 requirement to prove malice is key in striking a balance between society's interest and compensating individuals wrongly prosecuted for an improper purpose.

22. While acknowledging the four elements of the tort of malicious prosecution, the Bank cited Chopra v. Eaton Co. (1999), 240 A.R. 201 (QB) to argue that the "underlying basis for actions founded on malicious prosecution is the allegation of facts which, if believed, would establish abuse of the judicial process while acting out of malice and without reasonable and probable cause". Also cited were George Masinde Murunga (supra) and Mbowa vs East Mengo District Administration [1972] E.A. 352 relied upon by the appellant. It was argued by the Bank that the appellant did not adduce any evidence that, in discharging its duties, the Bank was actuated by spite, ill-will or by improper motives. The Bank contended, further, that the appellant did not itemize particulars of malice and ill-will against it in his plaint and could not cling to the fact of his acquittal as proof that he was maliciously prosecuted, citing Nzoia Sugar Company Ltd v Fungututi [1988] KECA 93 (KLR) that "acquittal, per se, on a criminal case charge is not sufficient basis to ground a suit for malicious prosecution."

23. Regarding whether the appellant is entitled to special damages, the Bank supported the trial judge's finding that "special damages shall not only be specifically pleaded but strictly proved" and that "the Plaintiff has failed to do so".

24. This is a first appeal. Our duty therefore is to re-evaluate the evidence afresh and to draw our own conclusion, expressed in Selle & Another vs. Associated Motor Boat Company Ltd. & Others [1968] EA 123 as follows:

> " I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled.
>
> Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955) 22 EACA 210) ."

25. The pleadings filed by the appellant at trial reveal a complaint involving three torts. Unlawful arrest, false imprisonment and malicious prosecution. These are based on the same set of facts, the appellant contending that his conduct of presenting a cheque drawn in the name of "David Irungu Wamukonya" for payment in his account under the name "David Irungu Mukonya" did not warrant his arrest, detention and subsequent prosecution.

26. An unlawful arrest happens when a person is taken into custody without any legal justification. Such arrest becomes unlawful imprisonment or detention when the arrested person is detained in custody without any legal justification. Then there is a second instance of unlawful imprisonment or detention. A lawful arrest can mutate into an unlawful imprisonment, say where, although there is legal basis to arrest a person, he or she is detained for a period longer than that permitted by *akn ke act 2010 constitution the Constitution* or in a manner impermissible under statute or *akn ke act 2010 constitution the Constitution*.

27. We shall consider the allegation of unlawful imprisonment first because, as shall be evident shortly, whether or not there was legal justification for the arrest in this matter may have a linkage with whether or not the prosecution that followed amounted to malicious prosecution, and it may be more convenient to examine the two together or at least sequentially.

28. The arrest of the appellant was on 5th December, 2008 and it was not until 8th December, 2008 that he was arraigned in court for plea taking. The appellant submits before us that the length of detention was beyond the twenty-four-hour period permitted under Article 49 of *akn ke act 2010 constitution the Constitution*. The complaint of the appellant cannot be examined in the context of breach of the 2010 Constitution as the detention was before the advent of that Constitution. Yet to be fair to the appellant, he had at trial cited the correct law being section 72(3) of the repealed Constitution which read:

> "
>
> " (3) A person who is arrested or detained -

a. for the purpose of bringing him before a court in execution of the order of a court; or

b. upon reasonable suspicion of his having committed, or being about to commit, a criminal offence,

and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with."

29. This provision had two facets. It commanded that a person arrested or detained for the purpose of being brought to court by order of a court or for plea taking or for any another reason be brought to court as soon as was reasonably practicable. It, however, placed an outside period of twenty-four hours of the arrest or commencement of detention in all cases other than where the person was arrested or detained upon reasonable suspicion that she or he had committed or was about to commit an offence punishable by death, in which event the period was fourteen days. The second facet was that where these timelines had been breached, a burden was placed upon a person alleging that the provisions had been complied with to prove that the person arrested or detained had been brought to court as soon as was reasonably practicable.

30. The appellant was arrested on 5th December, 2008 which was a Friday, and produced in court for plea on 8th December, 2008, a Monday. The twenty-four-hour period after his arrest lapsed on Sunday and so the earliest he could be brought before court would be the following Monday which was on 8th December, 2008. As this was the day, he was arraigned in court for plea taking, it cannot be said that he was not brought to court as soon as was reasonably practicable. This complaint is without merit, and while it is true that the trial court did not consider it at all, we hold that nothing turns on it.

31. Collectively, the various authorities cited by the parties give a correct summation of the law on malicious prosecution that has long been adopted by our courts. The four elements of the tort are: the prosecution complained of was initiated by the defendant; it terminated in favour of the plaintiff; it was commenced or maintained in the absence of reasonable and probable cause; and it was actuated by malice or a primary purpose other than that of carrying the law into effect. What amounts to reasonable and probable cause is the existence of a state of circumstances that would reasonably lead a prudent and conscious accuser or prosecutor to the conclusion that the suspect is probably guilty of the crime he is accused of. The four elements are conjunctive so that even in the absence of reasonable and probable cause, still, the plaintiff must prove that the prosecution was actuated by malice. In this regard, while the absence of reasonable and probable cause may be indicative of the presence of malice, the plaintiff needs to do more to demonstrate that the prosecution was actuated by malice or motivated by some ulterior reason other than a genuine pursuit of justice for the victim or in public interest.

32. The appellant concedes, as he would, that he opened an account with the Bank in the name of "David Irungu Mukonya". It is not disputed that in the beneficiary form, his sister named him as "David Irungu Wamukonya". The last name, though similar to the last name of the appellant, is undoubtedly different. In addition, the name appearing on the appellant's national identity card was that in the account. From a different perspective, the name on the cheque was different from that on the appellant's identity card.

33. The defence of the Bank was that it was forced to lodge the complaint when the appellant became rude instead of explaining the inconsistency when called upon to do so. The appellant denied this allegation.

34. He says that he even went further. Before the trial court, his testimony was that:

> " I had an affidavit to explain to the bank. I do not have the affidavit in court. It is not part of document in court. I am not aware if the 1st defendant does not have it. That affidavit is not mentioned in my statement."

35. The appellant would be aware that at the core of the defence by the Bank was that he became cantankerous instead of explaining the differences in name. It is therefore surprising that the appellant would not produce the document that would debunk the defence theory that he had offered no explanation. The appellant does not fare any better because questions regarding the supposed affidavit were not put to the defence witnesses.

36. This must be put on a scale with the evidence presented by the Bank. In his evidence in chief (his written statement), Nicholas Kyau (DW1) stated:

> 'The matter was only handed over to the police for investigations and not necessarily for prosecution after the plaintiff became rude and failed to explain the difference between the names on the cheque and in his account."

37. We have looked at the questions fielded by this witness in his evidence at trial and not once was he challenged about his evidence in chief touching on conduct of the appellant at the banking hall. It is our finding that the evidence presented by the defence that the appellant was rude instead of offering an explanation was not controverted. In that event, the trial court cannot be faulted for holding that:

> " The 1st defendant witness denied that they called the plaintiff a thief, and the allegation that the plaintiff became rude on being asked to explain the anomaly had not been dislodged."

38. We must further uphold the finding of the trial court that under the circumstances, the Bank was justified and duty bound to lodge a complaint.

39. We turn now to examine how the matters unfolded after the complaint was lodged. The appellant was arrested, detained in police custody and arraigned in court on 8th December, 2008, when he took plea. He appeared for mention on 22nd December, 2008. The matter was then fixed for hearing on 30th January, 2009. On this date the prosecution sought to have the case withdrawn under section 87 of the Criminal Prosecution Code, a request that was granted.

40. When the complaint was lodged, Sgt. Tom Mboya Oranga (DW2) was tasked with investigating it. He produced two statements he had recorded. One was of DW1, who in a nutshell simply stated that once the appellant did not offer satisfactory explanation as to the discrepancy in the cheque, he left the matter to the Police for investigation.

41. In his self-recorded statement, he narrates the investigation he carried out before the appellant was charged. He concluded that:

> " I established that the names appearing on the suspect's ID card was David Irungu Mukonya, while the names appearing on the cheque was David Irungu Wamukonya.
>
> It was therefore suspected that the suspect might have obtained the cheque unlawfully."

42. Before the trial Court he testified;

> " The matter was withdrawn. I would not have charged him if I had known UN had written the cheque the way it was."

43. There is the letter of 30th December, 2008 from the UN in which the discrepancy in the names is explained. It was a response to a letter of 9th December, 2008 from Rumba Kinuthia & Co. advocates who represented the appellant in the criminal proceedings, written one day after their client had been charged. The response read, in part:

> "We also confirm that we received a copy of Mr. David Irungu Wamukonya's National Card No. 8922258 reading David Irungu MUKONYA and an Affidavit of Confirmation of Name dated 15th August 2008, copies herein attached."

44. It is this clarification that led to the withdrawal of the complaint. It would have been reckless and indefensible for the State to prefer charges against the appellant had this exculpatory evidence been availed to it before 8th December, 2008 when the appellant was arraigned in court. In these circumstances, just like the trial court, we come to the conclusion that there was just and probable cause for the appellant to be charged.

45. Regarding the arrest, we agree with the appellant that rudeness and uncooperativeness alone should not be a basis for arresting a person. Here, however, the appellant was not only belligerent, but took a stance that led the complainant and investigator to believe that a crime had been committed. The Police cannot be faulted for arresting him pending further investigation.

46. In the end, the appeal is without merit and is hereby dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 24 TH DAY OF OCTOBER 2025.

D. K. MUSINGA (PRESIDENT)

..... JUDGE OF APPEAL

MUMBI NGUGI

..... JUDGE OF APPEAL

F. TUIYOTT

..... JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR .