

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VIHIGA
CIVIL APPEAL NO E028 OF 2022

**GLADYS MARAGA ALIAS
MARAKA.....APPELLANT**

VERSUS

**GLADYS SHANYISA.....
RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTION.....INTERESTED
PARTY**

**(Being an appeal from the Judgment of Hon M. Ochieng (PM)
delivered at Hamisi in the Principal Magistrate's Court Civil Case
No 30 of 2019 on 8th November 2022)**

JUDGMENT

INTRODUCTION

1. In her decision of 8th November 2022, the Learned Trial Magistrate, Hon M. Ochieng, Principal Magistrate dismissed the Appellant's suit with costs.
2. Being aggrieved by the said decision, on 9th November 2022, the Appellant herein filed a Memorandum of Appeal of even date. He relied on eight (8) grounds of appeal.
3. Her Written Submissions were dated 7th March 2025 and filed on 8th March 2025. The Respondents did not file any Written Submissions. The Judgment herein is, therefore, based on the Appellant's Written Submissions only.

LEGAL ANALYSIS

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own

independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

5. This was aptly stated in the case of **Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123** where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
6. Having looked at the Grounds of Appeal and the Appellant's Written Submissions, it appeared to this court that the only issue that had been placed before this court for determination was whether or not the Appellant had proven her case on a balance of probabilities.
7. The Appellant submitted that through a Plaint dated 3rd May 2019, she brought a claim against the Respondents premised on the torts of malicious arrest, incarceration and prosecution. She asserted that the said suit had been triggered by her arrest which was effected by the police on the strength of a complaint lodged by the 1st Respondent herein.
8. She pointed out that the complaint made to the police by the 1st Respondent had been fabricated with lies (**sic**). She added that the 1st Respondent as the instigator of the said arrest was evident in her own oral testimony that she tendered before the Trial Court.
9. She contended that she was arrested and charged with the offence of stealing contrary to Section 268(1) and (2) as read with Section 275 of the Penal Code. She further asserted that she tendered evidence to show that

in the year 2017 when she was arrested, as the first biological daughter of the late Jairo Sakha Ambani, she had taken steps to institute succession cause proceedings in respect of her late father's estate so as to ensure equitable distribution of her father's land parcel number Tiriki/Cheptulu/805 (hereinafter referred to as the "subject land") among all the children of the deceased.

10. She further submitted that, while acting in collusion with one Michael Musuku Sakha, the 1st Respondent was inclined to employ nefarious schemes to grab the entire subject land and acquire absolute ownership thereof jointly with the said Michael Musuku Sakha to her exclusion and other *bona fide* beneficiaries of the estate of the deceased.
11. She pointed out that as part of the 1st Respondent's land grabbing schemes, the 1st Respondent sought to have her jailed by all means to prevent her from instituting the Succession Cause proceedings. She added that the 1st Respondent's criminal complaint lodged with the police was actuated by the ill motive alluded to hereinabove.
12. She asserted that when the 1st Respondent realised that her plans to put her behind bars had failed to materialise, as she had been discharged under Section 87A of the Criminal Procedure Code, the 1st Respondent resorted to filing succession cause in **Kakamega Succession Cause No 195 of 2017** where she obtained a Certificate of Confirmation of Grant sanctioning the transfer of the subject land to the said Michael Musuku Sakha and herself.
13. She pointed out that it took her intervention by way of filing Summons for Annulment of Grant in the said Succession Cause

proceedings to reverse ownership of the stolen land back to her deceased father's estate. She asserted that the 1st Respondent did not act in good faith when she reported to the police that she stole her property which was an indirect admission that she had lied to the police.

14. She blamed the Trial Court for analysing the evidence selectively and overlooking the 1st Respondent's admission on falsity of the criminal complaint she made against her. She added that with such an admission, the issue of whether there needed to be any criminal trial to confirm her guilt or innocence became moot. She placed reliance on the case of **Egbema vs West Nile Administration [1972] EA 60** where it was held that false imprisonment and malicious prosecution were separate causes of action and a plaintiff could succeed on one and fail on the other.
15. She urged the court to find that the four (4) ingredients of the torts of malicious arrest, incarceration and prosecution which included, the fact that the defendant instituted prosecution against a plaintiff, the prosecution ended in plaintiff's favour, the prosecution was instituted without reasonable and probable cause and the prosecution was actuated by malice as was held in the case of **Murunga vs Attorney General [1979]KLR 138**, existed in the circumstances of this case.
16. She urged the court to award her Kshs 2,000,000/= as general damages for each of the tort committed by the Respondent against her and a further Kshs 500,000/= as exemplary and aggravated damages noting the gravity of the offences that she had been wrongfully framed with and the fact that the Respondent remained unapologetic throughout the trial process.

17. The tort of malicious prosecution was an arrest and prosecution of a claimant without reasonable and/or probable cause. In the case of **Mbowa vs East Meno District Administration [1972] EA 352**, the East Africa Court of Appeal stated that the essential ingredients of the tort of malicious prosecution were 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 favour.**

18. This court also had due regard to the case of **Attorney General vs Peter Kirimi Mbogo & Another [2021] eKLR**, where it was held that the above mentioned four (4) elements had to apply conjunctively and be proved to successfully claim for damages for malicious prosecution.

19. A reading of the criminal proceedings indicated that the Appellant herein was charged with several offences among them, the offence of stealing which she focused on in this case. She was discharged of the said offences under Section 87(a) of the Criminal Procedure Code Cap 75 (Laws of Kenya) which provides as follows:-

“In a trial before a subordinate court a public prosecutor may, with the consent of the court or on the instructions of the Director of Public Prosecutions, at any time before

judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal, if it is made before the accused person is called upon to make his defence, he shall be discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts.”

20. The Appellant herein brought the action at the Trial Court seeking damages for malicious prosecution. As it was not disputed that she was charged in a criminal case and discharged under Section 87(a) of the Criminal Procedure Code Cap 75 (Laws of Kenya), it was not necessary to analyse whether or not she had demonstrated two (2) ingredients namely, that a case was instituted against her and that the criminal proceedings were terminated in her favour as the facts of the case were clear in that respect. However, this court assessed, evaluated and analysed the evidence that she adduced to establish if she had demonstrated that the criminal proceedings were instituted without any probable or sufficient cause and that the same were actuated by malice.

21. Solomon Mulusa (hereinafter referred to as “PW 2”) corroborated the Appellant’s evidence. On the other hand, the 1st Respondent told the Trial Court that the Appellant destroyed the house of one Dinah and produced photographs as proof. She stated that she reported the matter to the police after the house was demolished but that the case was withdrawn on legal grounds.

22. On being cross-examined, she confirmed that the Appellant did not steal from her but that it was Michael Musuku Sakha (hereinafter referred to as “DW 2”) who told her to report her to the police. Her evidence was corroborated by that of DW 2 and William Liyosi Shitiavai (hereinafter referred to as “DW 3”).

23. Notably, there was a procedure of charging of a person once a complaint was lodged. Investigations were carried out by the National Police Service (NPS). The NPS was then required to forward the file the Office of the Director Prosecutions (ODPP) with a recommendation to charge, if at all. The mandate to prosecute a suspect or not lay with the ODPP which was not under the control or direction of any person or authority.

24. Article 158 (10) of the Constitution of Kenya, 2010 stipulates that:-

“The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.”

25. Once the 1st Respondent lodged a complaint with the 2nd Respondent, the matter moved from her hands. As preferring charges was the mandate of the ODPP, the Appellant failed to demonstrate how the ODPP instituted proceedings against her without reasonable or probable cause. She seemed to assume that

her discharge was enough to prove her claim in malicious prosecution.

26. Notably, malice could not automatically be transferred to the prosecutor unless it was proved that there was collusion between the complainant and the prosecutor prosecuting the matter as was held in the case of **Music Copyright Society of Kenya vs Tom Odhiambo Ogowl [2014] eKLR**. As stated above, the prosecution was carried out by the ODPP. She ought to have led evidence to prove malice on the part of the 1st and 2nd Respondents herein. In other words, the Appellant herein was required to prove that the prosecution was actuated by malice..

27. However, she did not demonstrate that there was any malice on the part of the police and/or the prosecutor. As she was discharged without the matter having been heard on merit, she did not demonstrate that there was no probable cause for the Prosecution to have instituted the criminal proceedings against her. If there was malice and/or probable cause, she did not demonstrate and/or prove the same.

28. Accordingly, having carefully considered the Appellant's Written Submissions, this court found and held that she had failed to prove her case for malicious prosecution to the required standard, which in civil cases was proof on a balance of probability. Consequently, her prayer for general damages under this head failed.

DISPOSITION

29. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal dated and lodged on 9th November 2022 was not merited and the same be and is hereby dismissed. As this matter emanated from criminal proceedings that were instituted by the State, there will be no orders as to costs.

30. It is so ordered.

DATED and **DELIVERED** at **VIHIGA** this **16th** day of **December** 2025

J. KAMAU
JUDGE