

THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E364 OF 2023

JAIRUS OTIENO EDWARD.....

.....PETITIONER

VERSUS

ATTORNEY GENERAL.....

RESPONDENT

J U D G M E N T

Introduction

1. The Petition dated 14th September 2023 is supported by the Petitioner’s verifying affidavit of similar date. The core of this Petition is the alleged unlawful arrest and malicious prosecution of the Petitioner by the Respondent without a just cause. Accordingly, the Petitioner seeks the following reliefs against the Respondent:

- i. A declaration that the fundamental freedoms of the Petitioner in the Bill of Rights under Articles 25, 27, 28, 29, 32, 33, 35, 36, 47, 48, 49, 50 and 51 of the Constitution have been violated, denied, infringed are under and threatened.***
- ii. An order that the Petitioner be compensated by way of damages for the unlawful, illegal and unconstitutional arrest, confinement, arraignment and charged in Court without any evidence.***

iii. Special Damages.

iv. Costs.

Petitioner's Case

2. The Petitioner depones that he was arrested and charged in **Criminal Case No.1470 of 2014** on 15th October 2014 where he was charged with stealing, forgery and handling of stolen property.
3. He depones that following his plea taking, he was supplied with the prosecution's witness statements. He stated during the of the criminal case, between 15th October 2014 to 11th March, 2019; he attended Court 19 times, yet the prosecution never tendered any evidence or summon any witness.
4. On 14th March 2019, the prosecution sought to withdraw the case but the Trial Court declined and acquitted him for lack of evidence. In making its decision to acquit the Petitioner, the Court ruled that the prosecution neither had a complainant nor witnesses and that the Petitioner had attended Court diligently.
5. The Petitioner contends that the Respondents is liable for the actions that caused him the and damage as a result of the unlawful arrest and prosecution.

6. He depones that because of this criminal case, his employment was terminated by his employer AON Kenya Insurance Brokers Limited on 19th December 2014.
7. The Petitioner deponed that the State failed to protect his rights and instead, it abused the process of the law enforcement to punish him. He says this has caused him indignity through the defective process without just cause. He contended that his right to a fair administrative action, access to justice and a fair hearing were violated by the Respondent hence this Petition.

Respondent's Case

8. The Respondent in opposition to the Petition filed its Grounds of Opposition dated 27th October 2023 on the premise that:
 - i. *This is a claim for unlawful arrest, false imprisonment, and malicious prosecution, all of which are torts under common law.*
 - ii. *The Petitioner ought to have filed a civil suit, in common law, by way of plaint, for compensation for the torts of false imprisonment, unlawful arrest and malicious prosecution.*
 - iii. *The petition offends the doctrine of constitutional avoidance as enunciated in the South African case of **S vs Mhlungu S v Mhlungu and Others (CCT25/94) [1995] ZACC 4** where the Court held that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue that course should be followed. This position was also reiterated by our Court of Appeal in **Communications Commission of Kenya & 5 Others vs Royal Media Service Limited & 5 Others (2014) eKLR.***

- iv. *A constitutional petition should not be resorted to where the law avails other avenues.*
- v. *It is well-settled law that the Petitioner ought to demonstrate how the Respondents' conduct constitutes a violation and/or contravention of their fundamental rights and freedoms. This was established in the case of **Anarita Karimi Njeru vs R (1976-1980) KLR 1272** where the Court stated that Petitioners must state and identify the rights with precision and how the same have been or will be infringed.*
- vi. *The mere fact that there are constitutional provisions that cover the same subject and that there is provision for litigation under the Constitution for redress, besides the usual civil process, does not obviate the need for formal proof.*
- vii. *No evidence has been adduced by the Petitioner to demonstrate that the actions of the Respondent were actuated by malice.*
- viii. *An acquittal on a criminal charge was not sufficient basis to ground a suit for malicious prosecution.*
- ix. *The Petition is an attempt by the Petitioner to subvert the wheels of justice by presenting the claim as a constitutional petition whereas the claim is civil in nature.*
- x. *The Petition has not been pleaded with precision since it does not adequately particularize the claim relating to any alleged violation of the Constitution.*
- xi. *The suit is barred by the doctrine of laches as there has been an unreasonable delay in pursuing the claim.*

- xii. *The Petitioner failed to file a suit for malicious prosecution within the time limit provided for under the Limitations of Actions Act and is using the Petition as a shortcut to get audience before this Court.*
- xiii. *Equity follows the law and does not aid the indolent. A person who has been wronged must act relatively swiftly to preserve their rights, otherwise, they are guilty of laches.*
- xiv. *The Instant Petition is based on allegations that have not been proved Contrary to Section 109 of the Evidence Act.*
- xv. *If the investigations culminate in the arrest and prosecution of the Petitioners, arrest and prosecution are legal processes provided for by law with specific constitutional safeguards, and do not amount to an infringement on the fundamental rights and freedoms of the Petitioners.*
- xvi. *The Petition is frivolous, vexatious, and an abuse of the court process and does not particularize and/or raise a cause of action against the Respondents.*
- xvii. *The instant Petition is unmerited as against the Respondents.*

Petitioner's Submissions

9. A.I. Onyango and Company Advocates for the Petitioner filed submissions dated 30th December 2024.
10. Counsel reiterating the Petitioner's averments submitted that the Respondent instigated a malicious prosecution against the Petitioner where there were no witnesses yet he was supplied with their witness statements. According to

Counsel, the Petitioner ought to be compensated for the Respondent's malicious prosecution.

11. Reliance was placed in **Morris Kyengo Makovu v Inspector General of Police & 3 others [2021] eKLR** where it was held that:

“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.”

12. Comparable reliance was placed in **Gitau v Attorney General [1919] KLR 13** and **Thomas Mboya Oluoch & another v Lucy Muthoni Stephen & another Nairobi HCC No. 1729 of 2001.**

13. Counsel submitted that the Petitioner's case satisfies the threshold of a malicious prosecution in that he proved that the prosecution was instituted by the defendant, the prosecution was instituted without reasonable and probable cause, the prosecution was actuated by malice and was terminated in his favour.

14. Consequently, Counsel argued that the Petitioner is entitled to the relief sought. Counsel submitted that the Petitioner

ought to be awarded general damages of Ksh.13,500,000/-. This is because he attended Court from 15th October 2014 to 14th March 2019 a period of 1594 days.

15. On quantum reliance was placed in **Anthony Murimi Waigwe y Attorney General & 4 others [2020] eKLR** where the Prosecution did not present witnesses in the case for 23 months (690 days) of the case and the Petitioner was awarded Kshs. 4,500,000 and Kshs. 500,000 in punitive costs.

Respondent's Submissions

16. Principal State Counsel, P.A. Chibole filed submissions dated 3rd March 2025 and highlighted the issues for discussion as: *whether the Court has jurisdiction to hear and determine this matter, whether the case is based on tort, whether the case is time barred and whether the Petitioner has proved his case to the required standards.*
17. Counsel submitted that the Petitioner ought to have approached the Court by way of a civil suit not a constitutional petition. According to Counsel, there are no constitutional issues raised in the Petition for the Court to determine or violation of fundamental rights and freedoms. As such, Counsel submitted that the Petition invokes the doctrine of constitutional avoidance. Reliance was placed in **Sports and Recreation Commission v Sagittarius Wrestling Club and Anor 2001 (2) ZLR 501 (S)** where it was held that:

“Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights.”

18. Further reliance was placed in **Muema Mativo v Director of Criminal Investigations & 2 others; HFC Limited (Interested Party) [2021] eKLR** and **Mumo Matemu v, Trusted Society of Human Rights Alliance and 5 Others Civil Appeal No. 290 of 2012 [2013] eKLR**.
19. Moreover, Counsel submitted that the facts relied in this Petition manifest a claim of malicious prosecution under the law of torts as they relate to a complaint of commencement of criminal proceedings without probable or just cause. In the light of this, Counsel argued that the Petitioner ought to have filed a civil suit for compensation for malicious prosecution as opposed to instituting a constitutional Petition.
20. Reliance was placed on **Mbowa vs. East Menگو District Administration [1972] EA 352** where 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.”

21. Counsel further submitted that the Petitioner’s case is time barred pursuant to operation of Section 3(1) of the Public Authorities Limitation Act where it provides that no

proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued. Counsel submitted that the Petitioner was acquitted in 2019 and filed this suit 4 years later hence matter time barred and reliefs sought, cannot issue.

22. Equally, Counsel submitted that the Petitioner had not proved his case to the required standard. Reliance was placed in **Stephen Gachau Githaiga & another v Attorney General [2015] eKLR** where it 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... The second element of the tort demands evidence that the prosecution terminated in the plaintiff’s favour... The second element of the tort demands evidence that the prosecution terminated in the plaintiff’s favour... The third element which must be proven by a plaintiff absence of reasonable and probable cause to commence or continue the prosecution... 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 fuelled by malice.”

23. Counsel submitted that the while the prosecution was initiated by the State and terminated in the Petitioner’s favour, there was reasonable and probable cause to

prosecute the Petitioner. Counsel noted that as per the charge sheet, the complainant was one, George Thiongo Wagakinya whose complaint was investigated by the police and recommendation for the charge made by the Director of Public Prosecution. Counsel stressed that this is in line with the Respondents legal mandate and in this case acted within the powers bestowed upon them by the law.

24. To buttress this point reliance was placed in **Paul Ng'ang'a Nyaga vs Attorney General & 3 Others [2013] eKLR** where it was held that:

“This court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they have acted in contravention of the Constitution.”

25. More reliance was placed on **Rose Esther Muthoni Wamuiya v Governor County Government of Nyandarua & County Government of Nyandarua; Ethics and Anti-Corruption Commission (Interested Party) [2020] KEHC 2485 (KLR)** and **Monari & another v Commissioner of Police & another; Abubakar & another (Interested Parties) [2012] KEHC 4595 (KLR)**.
26. In conclusion, Counsel submitted that the Petitioner is not entitled to the prayers sought in the Petition as allowing them would interfere with the institutional independence of the Office of the Director of Public Prosecutions and the Police.

27. Furthermore, Counsel submitted that the Petitioner had not proved the special damages sought as is required in law. To buttress this, Petitioner relied on **Hahn v Singh [1985] KLR 716** where the Court of Appeal held that:

“the learned judges held as follows, “Special damages must not only be specifically claimed (pleaded) but also strictly proved for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

Analysis and Determination

28. In view of the foregoing, it is my considered view that the issues that arise for determination in this matter are as follows:

- i. Whether the instant Petition offends the doctrine of constitutional avoidance.***
- ii. Whether the Respondent’s actions violated the Petitioners’ rights under Articles 25, 27, 28, 29, 32, 33, 35, 36, 47, 48, 49, 50 and 51 of the Constitution.***
- iii. Whether the Petitioner is entitled to the relief sought.***

Whether the instant Petition offends the doctrine of constitutional avoidance.

29. The doctrine constitutional avoidance requires Courts to refrain from applying the Constitution to resolve legal

disputes that are capable of being resolved either under the statute or other established legal principles or legal frameworks.

30. The principle of constitutional avoidance was expounded on by the Supreme Court in **Communications Commission of Kenya** (supra) as follows:

“[256] The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v. Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority judgment as follows [at paragraph 59]:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

[257] Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936)).”

31. Equally, in **Lugo v Director of Public Prosecutions [2022] KEHC 10574 (KLR)** the Court observed as follows:

“Courts will not normally consider a constitutional question unless the existence

of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of rights. Currie and de Waal opine that the principle of constitutional avoidance is of crucial importance in the application of the Bill of Rights. The author states: - When applying the Bill of Rights in a legal dispute, the principle of avoidance is of crucial importance. As we have seen, the Bill of Rights always applies in a legal dispute. It is usually capable of direct or indirect application and, in a limited number of cases, of indirect application only. The availability of direct application is qualified by the principle that the Bill of Rights should not be applied directly in a legal dispute unless it is necessary to do so.”

- 11. An important and critical issue arises from the above statements by Currie and de Waal. It is a fact that every legal dispute is capable of either direct or indirect application of the Bill of Rights. Every dispute is essentially a constitutional issue when one looks at it. This arises necessarily because of the principle of constitutional supremacy. One needs to be aware, however, of the singleness of the legal system. This is embodied in the fact that the supremacy of the Constitution does not detract from the usefulness of the rest of the body of law. In essence, all other laws give full expression to the ideals of the Constitution until found to be inconsistent with it.**

....

The exceptions to the application of the doctrine of constitutional avoidance are: -

- i. where the constitutional violation is so clear and of direct relevance to the matter,**
- ii. in the absence of an apparent alternative form of ordinary relief and**
- iii. where it is found that it would be a waste of effort to seek a non-constitutional resolution of the dispute.”**

32. In like manner, in **C O D & another vs Nairobi City Water & Sewerage Co. Ltd [2015] KEHC 7762 (KLR)** the Court noted as follows:

“11. Similarly, in Papinder Kaur Atwal -vs- Manjit Singh Amrit Nairobi Petition No. 236 of 2011 where after considering several authorities on the issue, Justice Lenaola remarked as follows:

“All the authorities above would point to the fact that the constitution is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes..... I must add the following; Our Bill of Rights is robust. It has been hailed as one of the best in any Constitution in the World. Our Courts must interpret it [with] all the liberalism they can marshal. However, not every pain can be addressed through the Bill of Rights and alleged violation thereof.” (Emphasis added)

12. The Supreme Court of India has also held that ordinary remedies available under common law and statutes must be pursued in the ordinary manner or as provided under statute. For instance, in Re Application by

Bahadur[1986] LRC (Const) the Court expressed itself as follows at page 307;

“The Courts have said time and again that where infringements of rights are alleged which can be founded in a claim under substantive law, the proper course is to bring the claim under such law and not under the Constitution. This case highlights the un-wisdom of ignoring that advice.... The Constitution sets out to declare in general terms the fundamental concepts of justice and right that should guide and inform the law and the actions of men. While an infringement of the Constitution might in certain cases give rise to the redress provided for at section 14, yet, as has been proclaimed by the highest Court in the land, it is not, “a general substitute for the normal procedures for invoking judicial control of administrative action.” (See *Harrikissoon v A-G [1979] 3 WLR 62*).

13. It was further observed in the case of *Minister of Home Affairs vs Bickle & Others (1985) LRC Const(per (Georges C.J))*;

“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights.”

33. In the instant case, the Petitioner complains that he was unlawfully arrested and prosecuted in a criminal case that terminated in his favour. This clearly founds a cause of action in the law of torts. In **Bethwel Omondi Okal v**

Attorney General & another [2018] KEHC 7437 (KLR)

held thus:

“21. The law on false imprisonment and malicious prosecution is now well settled. For one to succeed, he/she must prove four elements. First that the criminal proceedings were instituted by the defendant who was instrumental in setting the law in motion against the plaintiff, second, that the defendant acted without reasonable or probable cause. Otherwise, there must exist facts which show that the defendant genuinely believed that the criminal proceedings were justified; third, that the defendant must have acted maliciously. That is the defendant in instituting the criminal proceedings acted with improper or wrongful motive. and fourth, the criminal proceedings must have terminated in the plaintiff’s favour having been acquitted of the charge laid against him. (See Egbema v West Nile District Administration [1972] EA 60)

22. From the above principles, it is therefore the law that a party who claims that he was unlawfully arrested falsely imprisoned and or maliciously prosecuted, bears the responsibility of proving that the arrest had no basis in law at all. It will not be enough for him to merely state that the arrest was unlawful...”

34. Further, in **Secretary, Board of Management Lugulu Mixed and Boarding Primary School & another v Mutanda [2024] KEHC 5319 (KLR)**, the Court observed as follows:

“The tort of malicious prosecution is an intentional tort that provides redress to a party, for losses incurred following unsuccessful and

malicious proceedings which are initiated without any lawful reasonable and/or probable cause by the Defendant. Although it is within any person's rights to approach the Courts and/or other quasi-judicial bodies to seek redress for wrongs committed against them, this right must be exercised within the confines and parameters of the law, for genuine and lawful reasons. If the right is exercised with other ulterior motives, this constitutes abuse of process, which is in itself a wrong and/or violation attracting a claim for damages for malicious prosecution. The elements of the tort of malicious prosecution have been discussed in various authorities including *Murunga vs The Attorney General (1976-1980) KLR 1251* where Cotran J listed them as follows: -

- i. That a prosecution was instituted by the defendant or by someone for whose acts he is responsible.**
 - ii. That the prosecution terminated in the Plaintiff's favour.**
 - iii. That the prosecution was instituted without reasonable and/or probable cause.**
 - iv. That the prosecution was actuated by malice.**
- 8. Instructively, all the elements apply conjunctively and must all be proven in order to successfully claim for damages for malicious prosecution."**

35. The Court went on further to note as follows:

"9. The last element on whether the prosecution was actuated by malice In *Nzoia Sugar Company Ltd v Fungututi [1988] KLR 399*, the Court of Appeal held;

"Acquittal per se on a criminal 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.”

- 10. In the case of *Hicks v Faulkner* [1878] 8 Q.B.D 167 at 171, Hawkins J held as follows with respect the meaning of reasonable and probable cause: -**

“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.”

- 11. The test for whether a case was instituted with a reasonable and probable cause was also laid out by the Court of Appeal in *Kagane & Other v The Attorney General & Another* [1969] EA 643, where Rudd J held as follows: -**

“...the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of an objective test. That is to say, to constitute reasonable and probable cause, 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 so far as

that material is based upon 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.”

46. In *Samson John Nderitu v The Attorney General [2010] eKLR, Nambuye J (as she then was) held as follows: -*

“It is trite and this court, has judicial notice of the fact that before an accused person is taken to court, and arraigned in court for criminal prosecution, the prosecuting authority namely the police or whatever unit, whose functions fall under the office of the Defendant, usually carry out investigations, record statements from potential witnesses, analyze the facts to determine if the facts disclose an offence before arraigning such a person in a court of law.”

36. This is, therefore, a case whose remedy is sufficiently and suitably founded under the law of tort hence is capable of being determined purely on non-constitutional grounds. The Court does not have to consider the Bill of Rights in order to resolve the matter as the existing legal principles under the common law and judicial precedents are all that is required to determine the matter.

37. I thus decline to invoke the constitutional jurisdiction of this Court under Article 165 (3) (b) of the Constitution to determine an ordinary tortious claim that can be fully be resolved without resorting to the Constitution.

38. It is the finding of this Court that this Petition offends the doctrine of Constitutional avoidance. The Petition is hereby struck out.

39. Costs are awarded at the discretion of the Court. I make no orders as to costs.

Dated, signed and delivered virtually at Nairobi this 5th day of March, 2026.

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L N MUGAMBI

JUDGE

ORIGINAL