



REPUBLIC OF KENYA



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**Kasilu v Mutuku & 2 others (Civil Appeal E033 of 2024)
[2026] KEHC 2344 (KLR) (18 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 2344 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E033 OF 2024
CJ KENDAGOR, J
FEBRUARY 18, 2026**

BETWEEN

JAMES MUNGUTI KASILU APPELLANT

AND

FAITH SYOMBUA MUTUKU 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

THE HON ATTORNEY GENERAL 3RD RESPONDENT

(An appeal from the Judgment delivered on 27th February, 2024 by Hon. F. Makoyo, Principal Magistrate, in Kilungu PMCC Civil Suit No. E190 of 2021)

JUDGMENT

1. This appeal arises from the Judgment delivered on 27th February, 2024 by Hon. F. Makoyo, Principal Magistrate, in Kilungu PMCC Civil Suit No. E190 of 2021, wherein the court dismissed the Appellant's claim for damages arising from alleged malicious prosecution. Being dissatisfied with the whole of the said decision, the Appellant lodged the present appeal vide the Memorandum of Appeal dated 25th March, 2024 on the following grounds: -
 - a. The Learned Trial Magistrate erred in law and fact by finding that the Appellant had not proved his case on a balance of probabilities.
 - b. The Learned Trial Magistrate erred in law and fact by disregarding or failing to analyze the entire evidence tendered by the Appellant and therefore arriving at an erroneous decision.
 - c. The Learned Trial Magistrate erred in law and in fact in failing to find that the 1st Respondent had made a malicious report at Kilome Police Station despite glaring evidence of malice and vendetta actuated towards the Appellant.



- d. The Learned Trial Magistrate erred in law and in fact in failing to find that the 2nd and 3rd Respondents had not instituted any proper investigations despite there being glaring gaps in the Investigating Officer's report.
 - e. The Learned Trial Magistrate erred in law and in fact in failing to find that the criminal proceedings against the Appellant were instituted without reasonable and probable cause.
 - f. The Learned Trial Magistrate erred in law and in fact in failing to find that the criminal proceedings against the Appellant were actuated by malice.
2. The background to this appeal is that the Appellant instituted proceedings before the subordinate court by way of a Plaint dated 28th July, 2021 against the Respondents seeking general damages for malicious prosecution, exemplary and aggravated damages for alleged injury to reputation and character together with costs and interest. The claim was founded on the allegation that the 1st Respondent lodged a complaint at Kilome Police Station which led to the Appellant's arrest and prosecution in Kilungu Sexual Offence Criminal Case No. 13 of 2020, in which he was subsequently acquitted under Section 210 of the Criminal Procedure Code.
 3. In response, the 1st Respondent filed a Statement of Defence dated 11th August, 2021, while the 2nd and 3rd Respondents filed their joint Statement of Defence dated 20th August, 2021 denying the allegations of malice and asserting that the prosecution was commenced following investigations and upon reasonable and probable cause.
 4. The matter proceeded to hearing before the trial court where the Appellant testified and called two witnesses, while the defence called the investigating officer as its witness. Upon considering the evidence on record, the trial Court delivered its Judgment on 27th February, 2024 dismissing the suit on the basis that the elements of lack of reasonable and probable cause and malice had not been proved on a balance of probabilities.

Submissions:

5. This appeal was canvassed by way of submissions. In submissions dated 11th July, 2025, the Appellant argued that the trial Court erred in finding that the prosecution was supported by reasonable and probable cause and in failing to infer malice from the surrounding circumstances. It was contended that the material contained in the police file did not disclose the offence of an indecent act as defined under Section 2 of the [Sexual Offences Act](#) and that the investigating officer failed to undertake independent investigations, instead relying on unverified witness accounts.
6. Counsel maintained that the history of disputes between the parties, the Appellant's prior testimony against the 1st Respondent in another criminal matter and the alleged threats made at Kilome Police Station demonstrated an improper motive. Reliance was placed on authorities including Secretary, Board of Management Lugulu Mixed and Boarding Primary School & another v Mutanda (Civil Appeal E090 of 2023) [2024] KEHC 5319 (KLR), Thomas Mutsotso Bisembe v Commissioner of Police & Another (2013) eKLR and Samson John Nderitu v Attorney General (2010) eKLR. On quantum, the Appellant urged an award of Kshs.3,000,000/= for general and aggravated damages, relying on Vastu Company Limited v Mwangi (Civil Appeal 547 of 2019) [2022] KEHC 3006 (KLR) and Sammy Kiprotich Tangu v Attorney General [2015] eKLR.
7. In response, the 2nd and 3rd Respondents filed submissions dated 26th August, 2025 contending that the Appellant failed to establish the essential elements of malicious prosecution. It was submitted that although the prosecution terminated in the Appellant's favour, acquittal alone was not proof of malice



or lack of reasonable cause and that the decision to charge was based on a complaint involving a minor and material gathered during investigations.

8. Counsel argued that the allegations of threats and vendetta were unsupported and that the investigating officer acted within her statutory mandate upon receiving a credible complaint. Reliance was placed on *Mbowa v East Mengo District Administration* (1972) EA 352, *Paramount Bank Limited v Vaqvi Syed Qamara & Another* [2017] eKLR, *Sylvanus Okiya Ongoro v Director of Criminal Investigations & 4 Others* [2020] eKLR, *Aggrey Omoding v Fredrick Otieno Onyango & 2 others* [2020] eKLR and *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR in urging the court to uphold the judgment of the trial court and dismiss the appeal with costs.

Analysis & Determination:

9. Having considered the Memorandum of Appeal dated 25th March, 2024 the Judgment of the trial Court delivered on 27th February, 2024 the record of appeal and the submissions by counsel, the following issues arise for determination:

- a. Whether the Appellant proved the claim for malicious prosecution against the Respondents to the required standard.
- b. Whether this court should interfere with the findings and decision of the trial court.
- c. Who should bear the costs of the appeal.

10. This being a first appeal, the duty of this Court is as stated in *Selle & Another v Associated Motor Boat Co. Ltd* (1968) EA 123 where it was held that:-

“A first appellate court is mandated to 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.”

11. The appeal herein turns on the tort of malicious prosecution. The applicable principles were set out in *Mbowa v East Mengo District Administration* (1972) EA 352, which both parties relied upon, where the court stated that:-

“The action for damages for malicious prosecution is part of the common law of England... Its essential ingredients are:

- (1) the criminal proceedings must have been instituted by the defendant...
- (2) the defendant must have acted without reasonable or probable cause...
- (3) the defendant must have acted maliciously...
- (4) the criminal proceedings must have been terminated in the plaintiff's favour... The plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution... have been fulfilled... If the plaintiff does not prove them he would fail in his action.”

12. The Appellant further relied on *Thomas Mutsotso Bisembe v Commissioner of Police & Another* (2013) eKLR where the Court observed that:

“To prosecute a person is not prima facie tortious, but to do so dishonestly or unreasonably is... Malice... can either be express or can be gathered from the circumstances surrounding



the prosecution... the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution.”

13. On their part, the 2nd and 3rd Respondents placed reliance on *Sylvanus Okiya Ongoro v Director of Criminal Investigations & 4 Others* [2020] eKLR where the Court held that:-

“The fact that the petitioner was acquitted for lack of sufficient evidence in itself cannot sustain a claim for malicious prosecution especially where... no iota of malice can be inferred on the part of the prosecution and the complainant.”

14. Turning to the factual basis of this appeal, it is not disputed that criminal proceedings were instituted following a complaint lodged by the 1st Respondent at Kilome Police Station and that the Appellant was subsequently charged in Kilungu Sexual Offence Criminal Case No. 13 of 2020. It is equally not contested that the proceedings terminated in the Appellant’s favour upon his acquittal under Section 210 of the Criminal Procedure Code. The main issue before this Court, as was the case before the trial Court, revolves around the third and fourth limbs, namely absence of reasonable and probable cause and the existence of malice.

15. The Appellant’s position is that the material contained in the police file did not disclose the offence of an indecent act as defined under Section 2 of the *Sexual Offences Act*. Counsel argued that the minor’s own testimony in the criminal proceedings indicated that there was no touching of genital organs, breasts or buttocks and therefore no factual basis upon which an ordinary prudent and cautious person could conclude that the Appellant was probably guilty of the offence charged. It was further contended that the investigating officer merely reproduced witness accounts without undertaking independent investigations and failed to consider the surrounding circumstances, including the prior dispute between the Appellant and the 1st Respondent and the alleged threats made at Kilome Police Station.

16. On the other hand, the 2nd and 3rd Respondents maintained that the decision to prosecute was based on material gathered during investigations and the circumstances in which the minor was allegedly found crying with a torn dress while in the company of the Appellant. It was submitted that the adequacy of investigations or the strength of the evidence could not be assessed with hindsight and that the test remained whether the material available at the time could lead a reasonable and cautious person to believe that an offence had been committed.

17. On the meaning of reasonable and probable cause, the Court in *Kagame & Others v Attorney General* (1969) EA 643 held as follows:-

“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 would reasonably lead an ordinary prudent and cautious man... to the conclusion that the person charged was probably guilty.”

18. In *Samuel Gitonga Ringera v Henry Mutegi Maingi & 2 others* [2021] eKLR, PJO Otieno J stated as follows regarding the belief in the guilt of the Accused:

“The law makes it imperative that the belief in the guilt of the accused be founded upon a decision made after due inquiry into and consideration of the facts presented to the respondents. But the reasonable belief need not be based on actual existence of a definite cause, but upon reasonable belief held in good faith in the existence of facts as are perceived by the respondents. The converse is that where there is no basis to believe that the accused



is guilty of the accusation and the prosecution is all the same set in motion, there is clear evidence of malice.”

19. What emerges from the above exposition is that the consideration is not so much whether the prosecution ultimately succeeds but whether, at the time of instituting the charge, there existed material capable of creating an honest belief in the guilt of the accused. The trial Court found that the existence of witness statements pointing towards the commission of an offence was sufficient to demonstrate reasonable and probable cause. The question then is whether that conclusion was supported by the evidence on record.
20. The Appellant’s principal contention is that the trial Court failed to interrogate whether the material before the investigators disclosed the essential ingredients of the offence charged. It was argued that the existence of witness statements, without an examination of their contents, could not amount to reasonable and probable cause where the facts disclosed therein did not meet the statutory definition of an indecent act.
21. His argument, therefore, is that the minor’s testimony, as reflected in the criminal proceedings, indicated that there was no touching of genital organs, breasts or buttocks and therefore no factual foundation for the offence of an indecent act as defined under Section 2 of the *Sexual Offences Act*.
22. From the record, the investigating officer testified that she received a complaint from the 1st Respondent involving a minor and that upon investigations, she gathered witness statements and prepared a covering report which led to the decision to charge. The Appellant himself acknowledged that he was found in the company of the minor at the material time. The trial Court placed considerable weight on these circumstances and further noted that the Appellant admitted he did not know the officers who investigated and charged him, thereby weakening the allegation of a personal vendetta on the part of the investigators.
23. Upon re-evaluating the evidence as required of a first appellate Court, this Court is not persuaded that the trial magistrate erred in concluding that reasonable and probable cause existed. The existence of a complaint, supporting witness accounts and the circumstances described by the investigating officer provided a factual basis upon which an honest belief in the Appellant’s guilt could be formed at the time the decision to prosecute was made. The issue of reasonable and probable cause is therefore resolved against the Appellant.
24. Having so found, I now turn to consider whether the Appellant established that the prosecution was actuated by malice. In *Nzoia Sugar Company Limited v Fungututi* (1988) KLR 399, the Court held that:-

“An acquittal per se on a criminal charge is not sufficient basis for grounding a suit for malicious prosecution, as 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 ... but there must be evidence of spite in one of its servants that can be attributed to the company.”

25. Similarly, in *Susan Mutheu Muia v Joseph Makau Mutua* (2018) eKLR, Civil Appeal No. 128 of 2017, the Court stated that:-

“Even if a complainant in a criminal case makes a malicious complaint, that malice cannot automatically be transferred to the prosecutor unless it is proved that there was collusion between the complainant and the prosecutor in bringing up the prosecution... He absolved



the police of the issue of malice. In the circumstances he could not make a finding that the prosecution was actuated by malice.”

26. The Appellant urged this court to infer malice from the alleged prior disputes between himself and the 1st Respondent, the claim that he had testified against her in another criminal matter and the alleged threats made at Kilome Police Station. However, the trial court considered the evidence of PW2 and PW3 and found that it did not establish an improper motive. Notably, PW3 conceded that he did not witness any threat by the 1st Respondent, and the Appellant himself acknowledged that he did not know the investigating or arresting officers prior to the incident.
27. The investigating officer testified that she acted upon a complaint involving a minor, recorded statements and recommended charges based on the material gathered. There was no evidence that she acted in concert with the 1st Respondent or that the decision to prosecute was influenced by any personal vendetta. Even if the Appellant believed that the 1st Respondent’s complaint was malicious, that alone would not establish malice on the part of the investigators or the prosecuting authorities absent proof of collusion.
28. In the circumstances, the Appellant did not place before the trial Court evidence demonstrating spite, ill will or improper motive attributable to the Respondents. The allegations of threats were not corroborated by independent evidence and were expressly weakened by the testimony of PW3. As *Mativo J in Phen Gachau Githaiga & Another v Attorney General [2015] eKLR* held:

“the initiation of criminal proceedings in the absence of reasonable and probable grounds does not itself suffice to ground a plaintiff’s case for malicious prosecution, regardless of whether the defendant is a private or public actor. Malicious prosecution, as the label implies, is an intentional tort that requires proof that the defendant’s conduct in setting the criminal process in motion was fueled by malice. The malice requirement is the key to striking the balance that the tort was designed to maintain: between society’s interest in the effective administration of criminal justice and the need to compensate individuals who have been wrongly prosecuted for a primary purpose other than that of carrying the law into effect.”
29. Upon re-evaluating the evidence in its entirety, this court finds no basis upon which to fault the trial Court’s conclusion that the Appellant failed to establish the element of malice. The fourth limb of malicious prosecution was therefore not proved.

Disposition:

30. In the result, the appeal lacks merit and is hereby dismissed. Given the nature of the dispute and the fact that the trial Court ordered each party to bear its own costs, I see no reason to depart from that approach. Each party shall therefore bear its own costs of the appeal.
31. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 18TH DAY OF FEBRUARY, 2026

.....
HON C KENDAGOR
JUDGE

In the presence of:



Court Assistant: Beryl

No appearance for parties.

