



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gicheru v Kimwaki & another (Civil Appeal 346 of 2017)  
[2023] KECA 1107 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KECA 1107 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 346 OF 2017  
HM OKWENGU, HA OMONDI & JM MATIVO, JJA  
SEPTEMBER 22, 2023**

**BETWEEN**

**PAULINE WARUIRU GICHERU ..... APPELLANT**

**AND**

**ROBERT KIRAGU KIMWAKI ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Mbogholi Msagha, J) delivered on 22nd July 2015 in H.C. Civil Appeal No. 44 of 2005)*

**JUDGMENT**

1. This appeal has its origin in a suit filed in the Magistrates' Court at Githunguri through a plaint filed on 2<sup>nd</sup> October 2001. Robert Kiragu Kimwaki who is now the 1<sup>st</sup> respondent before us, sued Pauline Waruiru Gicheru who is the appellant before us, and the Attorney General (2<sup>nd</sup> respondent). The suit was for general and special damages for unlawful arrest, detention, and malicious prosecution. The 1<sup>st</sup> respondent succeeded in the magistrates' court and obtained judgment in his favour, including general damages of Kshs. 85,000.
2. The appellant who was dissatisfied with the judgment of the magistrates' court lodged an appeal in the High Court. Upon hearing the appeal, the High Court (Mbogholi Msagha, J – as he then was), upheld the judgment of the magistrates' court and dismissed the appeal. The appellant is now before us having filed a second appeal.
3. In her memorandum of appeal, the appellant has raised 6 grounds in support of the appeal. She faults the learned Judge of the High Court: in failing to interpret what prosecution means in law, and who does prosecutions in Kenya so as to bear responsibility for the tort of malicious prosecution; in failing to allow the appeal while it was clear that the pleadings before the subordinate court fell short of the



mandatory requirement of the Civil Procedure Act; in treating the misfeasance by the police and the prosecution officers as an act of the complainant; in attributing what was perceived as malice by the police to the appellant thereby expanding the ambit of the tort of malicious prosecution; in failing to find that the factual substratum of the case did not meet the test of any ingredients of malicious prosecution; and in holding the appellant liable jointly with the Attorney General, while the Attorney General had not opposed the suit in the subordinate court and liability could not be shared in the circumstances.

4. The appellant filed written submissions in which she submitted that the issue of the competence of the pleadings was raised before the 1<sup>st</sup> appellate judge, but the learned Judge did not mention that issue in his judgment and appeared to have ignored it, yet it was a crucial issue of law. That there were no particulars of any malice given against her even though malice formed the main prayer.
5. The appellant relied on Order 2 rule 2 of the Civil Procedure Rules that requires that a person who alleges a condition of mind such as malice, provide particulars of such malice. In support of this proposition, she cited *Gitau v East African Power Lighting Co. Ltd.* [1986] KLR 365.
6. The appellant also argued that the 1<sup>st</sup> appellate court erred in failing to interpret the meaning of prosecution and attributing prosecution to the wrong party, (that is, the appellant jointly with the Attorney General). She maintained that she only made a complaint to the police and did not even mention the 1<sup>st</sup> respondent's name; that although the 1<sup>st</sup> appellate judge correctly referred to Murunga v Attorney General [1979] KLR 138, (Murunga decision) the Judge erred in his interpretation of the meaning of "institution of the prosecution" as according to the principles in the Murunga decision, prosecution is instituted by the defendant or by someone for whose actions he is responsible. Therefore, the judge contradicted himself in the judgment after finding that the appellant reported an attempted robbery, and it was up to the police to take further steps; and the appellant could not force the police to prosecute the 1<sup>st</sup> respondent when there was no evidence to take him to court.
7. The appellant maintained that following those findings, she should not have been found liable for malicious prosecution as the discretion to take the 1<sup>st</sup> respondent to the criminal court was not in her hands. She referred to section 26 of the former Constitution of Kenya that gave the Attorney General power to prosecute, and submitted that the prosecution of the 1<sup>st</sup> respondent could only have been done lawfully by the Attorney General who was the constitutional officer mandated to do so.
8. Relying on *Mbowa v East Menjo District Administrator* [1972] EA 352, the appellant argued that the person liable in malicious prosecution is the one who sets the criminal law into motion, and that the person who arrested, detained, and prosecuted the 1<sup>st</sup> respondent was the Attorney General's agents and not the appellant; that the 1<sup>st</sup> appellate judge erred in equating making a complaint to the police with actual prosecution in court. She urged that the appeal be allowed and that she be awarded costs.
9. The 1<sup>st</sup> respondent also filed written submissions. He submitted that during the trial, he proved all the ingredients for the tort of malicious prosecution. These were: that it was the appellant who reported the matter to the police which led to him being arrested, charged, and prosecuted; and that the appellant was liable as the prosecution was initiated by her. The 1<sup>st</sup> respondent argued that the prosecution terminated in his favour and that the trial magistrate found that the prosecution was done without any probable cause.
10. The 1<sup>st</sup> respondent contended that the prosecution was actuated by malice as there was no evidence at all to prove a charge of attempted robbery with violence; that the appellant and the 2<sup>nd</sup> respondent colluded to arrest and charge him in order to silence him, as he had made a complaint against the appellant's husband. He maintained that the damages were rightly awarded as the appellant and 2<sup>nd</sup>



- respondent were liable for his unlawful arrest, detention, and malicious prosecution. He, therefore, urged the Court to dismiss the appeal.
11. The Attorney General also filed written submissions in which it identified two issues for determination. First is whether the learned Judge erred in law by holding the appellant who was listed as a complainant in the criminal case liable for unlawful arrest, detention, and malicious prosecution, for lodging a complaint to the police. Secondly, whether the Honourable Judge erred in law by failing to strike out the 1<sup>st</sup> respondent's suit for failure to plead particulars of malice in the plaint.
  12. The Attorney General argued that the judge did not err in holding the appellant and the Attorney General, jointly and severally liable to pay general damages for unlawful arrest, detention, and malicious prosecution, since the appellant had lodged a false and malicious complaint against the 1<sup>st</sup> respondent, and lied that there was an attempted robbery with violence against her by the 1<sup>st</sup> respondent. That since the appellant lodged a false report to the police against the 1<sup>st</sup> respondent whom she positively named, she is equally liable for the subsequent, unlawful arrest, detention, and malicious prosecution.
  13. The *Attorney General cited Gitau v Attorney General* [1990] KLR 13, in which it was held that if a person makes a complaint, or the police to whom the complaint is made genuinely believed the facts and acted upon them, being satisfied that a probable crime had been committed, then the arrest and subsequent prosecution would be justified, but if the court is satisfied that the report was made recklessly and indifferently, then those who are instrumental would be liable.
  14. The Attorney General submitted that the appellant cannot be heard to say that the 1<sup>st</sup> respondent did not plead the particulars of malice when she allowed the matter to proceed to trial, where the malice was substantiated through evidence. The Attorney General urged the Court to dismiss the appeal for want of merit.
  15. During the hearing of the appeal, Ms. Maina held brief for Mr. Mbigi for the appellant, while Mr. Chege was present for the 1<sup>st</sup> respondent and Mr. Ngugi for the Attorney General. The parties agreed that the matters be determined on the written submissions filed which we have already adverted to.
  16. What is before us is a second appeal. In *Maina v Mugiria* [1983] KLR 78, this Court held that on a second appeal, only matters of law may be taken, and if the High Court upholds a resident magistrate on a question of whether or not he exercised his discretion judicially, the issue as to whether he was right or wrong to do so is a question of law. In *Stanley N. Mureithi & Anor v Bernard Munene Ithiga* [2016] eKLR, the Court applying *Kenya Breweries Limited v Godfrey Odoyo* [2010] eKLR, stated that on a second appeal, the Court confines itself to matters of law only, unless it is shown that the court below considered matters it should not have considered or failed to consider matters it should have considered, or looking at the entire decision, it is perverse.
  17. In this appeal, the facts are substantially not in dispute. The appellant made a report to the police pursuant to which the 1<sup>st</sup> respondent was arrested by police and subsequently charged with the offence of attempted robbery with violence. The 1<sup>st</sup> respondent upon being tried was acquitted of the offence. The issue that arises for our determination is whether the appellant was actuated by malice in lodging her complaint, and whether she is liable for malicious prosecution. These are issues of law and therefore the appeal is properly before us



18. In *Mbowa v East Menngo Administration (supra)*, Lutta, JA in his leading judgment addressed the issue of malicious prosecution as follows:

“The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose for the prosecution should be personal and spiteful rather than for the public benefit.

...

It occurs as a result of the abuse of the minds of judicial authorities whose responsibility it is to administer criminal justice. It suggests the existence of malice and the distortion of the truth. Its essential ingredients are;

- i. The criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff. It suffices if he lays an information before a judicial authority, who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority.
- ii. The defendant must have acted without reasonable or probable cause. Thus there must exist facts which on reasonable grounds the defendant genuinely believes that the criminal proceedings are justified.
- iii. The defendant must have acted maliciously. In other words, the defendant must have acted in instituting criminal proceedings, with an improper and wrongful motive. That is, he must have had ‘an intent to use the legal process in question for some other than its legal, appointed and appropriate purpose’ *Pike v Waldrum* [1952] 1 Lloyds LLP 431 at P 452; and
- iv. The criminal proceedings must have been terminated in the plaintiff’s favour, that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge....The plaintiff in order to succeed has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must “unite” in order to create or establish a cause of action. If the plaintiff does not prove them, he would fail in his action...”

19. As it is not disputed that the appellant was the one who made the report that led to the 1<sup>st</sup> respondent being arraigned in court, and that the 1<sup>st</sup> respondent was acquitted of the charge of which he was arraigned, what we must consider is whether the appellant made her report without any probable cause and whether she was actuated by an improper and wrongful motive with an intent to use the legal process for some wrongful purpose.

20. In his judgment the learned Judge properly directed himself as follows:

“Acquittal of a suspect in a criminal case is not sufficient ground for filing a civil suit to claim damages for malicious prosecution or false imprisonment. Evidence of spite, ill will, lack of reasonable and probable cause must be established.”



21. The learned Judge then proceeded to consider the judgment of the trial magistrate in particular where the trial magistrate noted as follows:

“The 1<sup>st</sup> defendant knew very well that he never saw anybody at the scene and so armed with dangerous weapons she knew very well that nobody ever attempted to rob her yet she told the police that somebody attempted to rob her while armed with dangerous weapons. It is on record that prior to or before 1.8.2000 the 1<sup>st</sup> defendant’s husband had assaulted the plaintiff and another. The plaintiff had made the report to the police as against the 1<sup>st</sup> defendant’s husband who was duly arrested but released soon thereafter. Immediately he was released the plaintiff was arrested and charged with the said offence. It was revealed by the Investigating officer that the assault case reported by the plaintiff was stayed so that the attempted robbery case could be dealt with first. I did note that there was no causation or connection between the two complainants to justify any waiting as stated by the investigating officer. In noted that the parties were however the same which left me to find that the police were caused by the 1<sup>st</sup> defendant to stay the plaintiff’s complaint...” (See judgment in the trial court at page 79 of the Record of Appeal)”

22. A look at the evidence in the trial court reveals that the appellant did not personally see any robbers but claimed to have been informed by her house help of the presence of some three strangers who wanted to get into the compound. It is evident that the appellant was not attacked by any robbers and that her complaint to the police was based on information from her house help. The appellant conceded that she did not see anyone, and so her report forming the charge that the 1<sup>st</sup> respondent and others attempted to rob her with violence, had no reasonable or probable cause.

23. It is also apparent that the appellant’s husband and the 1<sup>st</sup> respondent had been embroiled in a dispute leading to the appellant’s husband being charged with assaulting the 1<sup>st</sup> respondent. This was shortly before the appellant lodged her complaint, and therefore the concurrent finding of the trial magistrate and the learned Judge of the 1<sup>st</sup> appellate court, that the appellant had an ulterior motive in making her complaint against the 1<sup>st</sup> respondent, was well anchored on the facts.

24. The evidence reveals that the officers who arrested the 1<sup>st</sup> respondent colluded with the appellant in having the 1<sup>st</sup> respondent charged with an offence for which there was no evidence, while staying the complaint that had earlier been laid by the 1<sup>st</sup> respondent against the appellant’s husband. At paragraph 8 of his plaint, the 1<sup>st</sup> respondent pleaded that at the time of hearing, he would tender evidence to prove that the “defendants’ conduct” was malicious and had no reasonable or probable cause. The evidence that was adduced was sufficient to meet what was pleaded as it was clear that the report and subsequent arrest and prosecution had an ulterior motive.

25. Both the appellant and the officers who arrested and charged the 1<sup>st</sup> respondent, were jointly and severally liable for malicious prosecution. It did not matter that the Attorney General did not defend the suit. The appellant was at liberty to bring 3<sup>rd</sup> party proceedings against the Attorney General, but failed to do so.

26. We find that the learned Judge of the 1<sup>st</sup> appellate court was right in dismissing the appellant’s appeal as the same had no merit. Likewise, we dismiss this appeal with costs to the 1<sup>st</sup> respondent. Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2023.**

**HANNAH OKWENGU**



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**JUDGE OF APPEAL**  
**H. A. OMONDI**

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**JUDGE OF APPEAL**  
**J. MATIVO**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

