



**Maina v Attorney General (Civil Appeal 9 of 2015)  
[2023] KECA 1586 (KLR) (27 October 2023) (Judgment)**

Neutral citation: [2023] KECA 1586 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL 9 OF 2015  
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA  
OCTOBER 27, 2023**

**BETWEEN**

**MICHAEL KAGOMA MAINA ..... APPELLANT**

**AND**

**THE HON ATTORNEY GENERAL ..... RESPONDENT**

*((An appeal against the judgment and decree of the High Court of Kenya at Embu dated 9th December, 2014 signed by the Hon. Justice H. I. Ong'udi, delivered by the Hon. Justice F. Muchemi in H.C.C.C. No. 136 of 2011))*

**JUDGMENT**

1. The appellant, Michael Kagoma Maina, filed suit against the Attorney General on behalf of the Commissioner of Police and the Kenya Police Service seeking to be awarded general damages for unlawful arrest, false imprisonment and/or detention, malicious prosecution and defamation. In his plaint, the appellant averred that on three occasions between the years 2001 and 2004, he was arrested and detained by the Provincial Criminal Investigation Officer, of the then Eastern Province on allegations that he had stolen from the public and had further lodged false claims being a person employed in the Public Service. The arrests and detentions eventually led to the appellant being charged with three counts of stealing by person employed in the public service contrary to Section 280 of the Penal Code and three counts of false claims by persons employed in the Public Service contrary to Section 100 of the Penal Code. The appellant was charged before the Embu Chief Magistrate's Court. At the time, the appellant was employed by the Kenya Police Service and had attained the rank of Superintendent of Police.
2. The appellant stated in his plaint that during the entire period that he was being investigated, he was subjected to arbitrary arrests, detentions and subsequently arraignment before court on the basis of false, manufactured and malicious evidence. The appellant pleaded that as a result of the charges that were laid against him, he was interdicted and could not therefore seek any other gainful employment



during the pendency of the trial since he was still a public servant under the terms and conditions of his employment. The appellant stated that due to the malicious charges laid against him, he was denied the opportunity of promotion as his career progression stagnated during the entire period of his investigation and the pendency of the trial before the Chief Magistrate's Court. The appellant averred that his family, especially the education of his children suffered as a result of his interdiction and arraignment before court on the false and malicious charges.

3. The appellant stated that he was later acquitted of all the charges after he had attended court for a period of eight (8) years from 22<sup>nd</sup> October, 2004 to 18<sup>th</sup> March, 2011 when he was eventually acquitted. The appellant set out the particulars of malice on the part of the respondent which included the allegation that his request to be retired from the police during the stated period was rejected without any justifiable reason. The appellant was of the view that this action reflected malice on the part of the respondent. The appellant further set out the particulars of pain, anguish and loss which included the allegation that his son and daughter had dropped out of college due to lack of fees as a result of his interdiction. He also alleged that he had been defamed in the eyes of the right-thinking members of the society and asked the court to compensate him accordingly. He also prayed to be awarded costs of the suit.
4. The respondent filed a defence. He denied the averments made by the appellant, particularly the allegation that the investigations, arrest, detention and prosecution was without justification, was unreasonable and was commenced without probable cause. The respondent denied the allegation by the appellant that the charges laid against him were motivated by malice or mischievous intentions. The respondent denied the particulars of malice, pain, loss and damage. The respondent pleaded that he would put the appellant to strict proof thereof in respect of the averments that he had made in his plaint. The respondent urged the court to find that there was no basis to make any award in favour of the appellant as prayed in his plaint. He urged the court to dismiss the appellant's suit with costs.
5. The High Court, upon hearing the case, found in favour of the appellant on the claim of malicious prosecution. This is what the court said in regard to the charges that the appellant had stolen from the Government:

“Besides the handwriting expert there is no external auditor who came to audit the transactions and accounts. None testified in the criminal case. There are witnesses who said they were being paid money by the cashier/accounts clerks who was not recording anywhere. Since when does an AIE holder make payments? The criminal case was very poorly investigated and in spite of the statements made by the plaintiff (appellant) explaining himself. I read a lot of malice in the manner the plaintiff was handled. There was really no basis for the charges framed against the plaintiff. The mere fact that the co-accused had said they used to bring money to the OCPD was not sufficient for anyone to jump up and charge the OCPD. Proper investigations had to be done to ascertain what the accounts clerks were saying. By virtue of their training or by experience in handling money, those clerks knew that upon receipt of any money, one must sign for it whether it is your boss or who...

My finding therefore is that had the officers investigating criminal case acted diligently, they would never have charged the plaintiff herein. Why had they to investigate a simple case like this for 3 years and take another 7 years to prosecute it? The blame in this delay was not on the court but the police whose witnesses were not readily available and their prosecutors were hardly ever ready to proceed”.



6. As regards the appellant's claim for damages for false imprisonment and detention, the High Court held that the appellant had failed to establish his case. The appellant's claim that he had been defamed was similarly disallowed.
7. The appellant's claim seeking compensation in respect to how the prosecution had resulted in his adverse career progression and premature retirement from employment was disallowed by the High Court. This is what the court said:

“The issue about his employment and the premature retirement date is a matter to be addressed at a different forum on employment relations now that we have a High court (sic) (the Judge meant the Employment and Labour Relations Court) set up for that under Article 162 (2) (a) of *the Constitution*”.
8. The High Court then assessed the damages payable to the appellant for malicious prosecution at Kshs.6,000,000/- together with costs.
9. The appellant was aggrieved by the decision of the High Court. He filed an appeal to this Court. In his memorandum of appeal, the appellant raised nine (9) grounds of appeal which may be summarized thus: He was aggrieved that the High Court had dismissed his claim for damages for unlawful arrest and unlawful imprisonment and detention yet there was evidence from the trial Magistrate's proceedings which established that he had been so unlawfully arrested and detained. He faulted the trial Judge for failing to appreciate that he had adduced sufficient evidence which established to the required standard of proof that he had indeed been defamed during the entire period that he was under investigation, his arrest, detention and his subsequent arraignment on unfounded charges before the Magistrate's Court; The appellant wondered how the trial Judge reached a verdict that he was maliciously prosecuted yet failed to find that he had been unlawfully arrested and detained. The appellant was aggrieved with the assessment of general damages that was made by the trial Judge. He urged this Court to enhance the award from Kshs.6,000,000/- that was awarded to Kshs. 20,000,000/- for malicious prosecution and make the appropriate award of general damages for unlawful arrest, unlawful detention, false imprisonment and defamation. In the premises therefore, the appellant urged the court to allow the appeal with costs.
10. When served, the respondent filed a cross appeal essentially urging the court to reduce the award of general damages awarded to the appellant for malicious prosecution. The respondent stated that the award made was excessive in the circumstances of the case.
11. The appeal was argued by way of written submissions. The appellant submitted that he lost his employment as a result of the malicious criminal charges that were laid against him. At the time of his arraignment before court, he had attained the rank of Superintendent of Police. The appellant submitted that even though the trial Judge had found that there was no evidence which could form a basis for criminal charges to be laid against him, nevertheless, she went ahead and made an award of damages that was not commensurate with the injury that he had suffered. The appellant was particularly irked that an award of damages was not made under the heads of unlawful arrest and unlawful detention. The appellant submitted that he had established, to the required standard of proof, that he was subjected to unlawful arrests and detentions by the police which was motivated by reasons other than the administration of justice.
12. The appellant wondered why the trial Judge dismissed his claim for unlawful arrest yet he had established by evidence that he was arrested and arraigned in court on trumped up charges. The appellant extensively quoted sections of the judgment of the trial court in support of his contention that the trial Judge should have made an award under the above heads of unlawful arrests and unlawful



- detentions by the police prior to the appellant's arraignment in court in respect of the criminal charges that he was later acquitted.
13. The appellant urged this Court to find that he had established the claim for false imprisonment and detention and therefore an award of damages ought to have been made in his favour under this head. The appellant referred the Court to the various parts of the proceedings and judgment of the High Court, which in his view, established that he had been falsely imprisoned and detained prior to his arraignment for trial before the trial Magistrate's Court.
  14. The appellant submitted that the trial Judge fell in error when she failed to find that he had been defamed, and secondly, that he ought to be compensated by an award of damages for defamation. The appellant cited the cases of *Muia Kisee v Sinota Mbusi* [1995] LLR 6088 (KCK) and *Wycliff A. Swanya & Toyota East Africa Ltd. & Anor.* [2009] eKLR where the court defined what constitutes defamation and the circumstances under which it can be established that a plaintiff had been defamed and therefore entitled to be compensated by an award of damages. The appellant explained that at the time of his arrest and arraignment before court, he was a Senior Police Officer. He stated that he was arrested and detained by junior police officers who had no regard for his rank and seniority in the Police Service. He stated that he was humiliated and defamed during the entire process of his arrest, detention and arraignment before the Magistrate's Court on false charges. The appellant submitted that taking into consideration his social status, and the manner that he was treated by the police, the trial Judge should have found that he had established his case to the required standard of proof that he had been defamed. He relied on the case of *Ochieng & Other v Standard* [200] 1 KLR 222 and *Dr. Willy Keberuka v Attorney General Kampala HCCC No. 160 of 1992* to support this argument.
  15. The appellant further submitted that the trial Judge did not evaluate the totality of the evidence adduced before the High Court and therefore made an award of damages for malicious prosecution that was inadequate and was not proportional to the injury that he had suffered. He pointed out that as a result of the malicious prosecution, he was interdicted from employment and was, as a result, unable to cater for the education of his children. His career progression was adversely affected as the malicious prosecution put paid to his chances of further promotion before his retirement. He was financially embarrassed as a result of his malicious prosecution. He had to endure the trial for seven (7) years before he was vindicated by the court. The appellant urged the Court to take into account these facts in arriving at a just assessment of damages to be paid to him for malicious prosecution.
  16. In response, the respondent urged the Court to find the appellant's appeal to be without merit. The respondent submitted that the appellant's arrest and detention was for the sole purpose of securing his arraignment before Court after he was charged with the offences that he was subsequently acquitted. The respondent explained that the appellant's arrest and detention prior to his presentation before Court to answer the charges that were laid against him was normal, reasonable and ordinary in the course of criminal proceedings. The trial Judge did not therefore err when she found that the appellant had not established a case to entitle him to an award of damages for unlawful arrest and detention.
  17. On the issue regarding whether the appellant was defamed, the respondent submitted that the appellant had not adduced any evidence to support his claim that he had been defamed. The respondent argued that the fact that the appellant was charged before a court of law cannot constitute defamation. He submitted that the appellant had failed to meet the legal threshold in *Wycliffe A. Swanya v Toyota East Africa Ltd. & Another* (supra) and therefore the trial Court correctly dismissed the claim for defamation.
  18. In respect of the finding of malicious prosecution, the respondent disagreed with the basis upon which the trial Judge assessed and awarded the damages. The respondent argued that the trial Court



should not have considered the appellant's rank and period of service at the time of his arraignment in Court in assessing the damages to be paid to the appellant for malicious prosecution. The respondent pointed out that the appellant had filed suit before the Nakuru Employment and Labour Relations Court (ELRC) in Cause No. 49 of 2013 and the issues regarding the circumstances and status of his employment were considered. The appellant was successful and was awarded Kshs. 3,884,210/=. The respondent therefore urged the Court not to consider the appellant's employment circumstances in assessing the damages to be paid to the appellant. The respondent urged the Court to reduce the damages assessed as payable to the appellant for malicious prosecution to Kshs. 2,000,000/= as per the respondent's notice of cross - appeal dated 24<sup>th</sup> August, 2015 and the decision of the Court in *Chrispine Otieno Caleb v Attorney General* [2014] eKLR. The respondent submitted that the sum of Kshs. 2,000,000/= would constitute appropriate compensation for malicious prosecution.

19. This is a first appeal. This Court is aware of its duty as the first appellate court in civil cases. In *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Company Advocates* [2013] eKLR, this Court held thus:

“This being a first appeal, we are reminded of our primary role as the first appellate court, namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”.

20. In *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR, this Court held thus:

“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 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”.

21. We have re-evaluated the facts of this appeal, in light of the grounds of appeal and the rival submissions made by the parties. From our analysis, these are the issues that came to the fore:

- I. Whether the appellant made a case that entitled him to an award of damage for unlawful arrest, detention and false imprisonment?
- II. Whether the appellant proved to the required standard that he was defamed and therefore entitled to be awarded damages?
- III. Whether the general damages awarded to the appellant should be enhanced or reduced?

The undisputed facts of this appeal are as follows:

22. The appellant was at the material time a Superintendent of Police. He was recruited as a Police Constable in the Kenya Police Service on 19<sup>th</sup> July, 1971. The appellant rose through the ranks and worked at the then various districts in the Country. At the time of the incident that led to his interdiction and arraignment in court, the appellant had served as a Police Officer for thirty (30) years. In 2001, the appellant was posted to Mwingi District as the acting Officer Commanding Police Division (OCPD). According to the evidence adduced, there were security challenges in the area at the time which required security interventions under the command of the appellant. During the period, the appellant had the Authority to Incur Expenditure (AIE). In Government parlance, he was an AIE holder. It was alleged that under his watch, the Government lost funds through misappropriation and lack of accountability. Investigations were commenced. However, it took a period of over three (3)



years before a decision was made to charge the appellant with the various offences related to the alleged loss of funds by the Government.

23. When the appellant was charged before court, he was interdicted from employment. The trial took seven (7) years before it was concluded in 2011. The trial Magistrate found that the prosecution had failed to establish all the charges that had been laid against the appellant. The appellant was acquitted of all the charges. At some point after the appellant had been charged, he requested to retire from the Police service. However, his request was rejected on the grounds that he had a pending criminal case in court.
24. Upon his acquittal, the appellant filed suit before the High Court seeking, inter alia, to be paid damages for malicious prosecution, unlawful arrest, and detention, false imprisonment and defamation. The trial Judge, upon considering the evidence adduced, found that the appellant had established that he had indeed been maliciously prosecuted. The learned Judge was scything in her judgment in regard to the manner in which the criminal case was investigated, charges laid against the appellant, and subsequently thereafter, his prosecution. This is what the trial Judge said:
  - “ 18. There is no evidence to contradict the plaintiff’s assertion that the events he talked about took place. There are witnesses in the criminal case who said they were being paid money by the Cashier/Accounts Clerk who was not recording anywhere. It was not the plaintiff who was paying out the money. The criminal case was very poorly investigated and in spite of the statements made by the plaintiff explaining himself he was still arrested and arraigned in court. Had there been any basis for charging the plaintiff the auditors and handwriting expert would have been called to testify. What is it that they were hiding from the Court? I read a lot of malice in the manner the plaintiff was handled”.
25. The learned Judge further stated:
  - “The investigations alone took three (3) years to complete. Thereafter the court process took seven (7) years. The delays in the court were caused by the prosecution not being able to avail their witnesses. I therefore find that the plaintiff has proved malice against the prosecution/ investigators who are State Officers”.
26. The trial Judge, however, held that the appellant had failed to prove that he was entitled to damages for unlawful arrest, false imprisonment/detention and defamation.
27. The appellant was aggrieved that he was not awarded damages for unlawful arrest, unlawful imprisonment and detention. He urged this Court to overturn the decision of the trial Judge and find that he had indeed established a case to be awarded damages for unlawful arrest, unlawful detention and false imprisonment. The respondent is, however, of a contrary view. He submitted that the appellant had failed to establish his case in respect of the above headings to have entitled the trial Court to find in his favour.
28. On re-evaluating the evidence adduced in that regard, we agree with the trial court that the appellant was not entitled to be awarded damages for unlawful arrest, unlawful detention and false imprisonment. The appellant was arrested and kept in custody in the normal course of criminal investigations and for the purposes of securing his arraignment before the trial court to take plea once a decision was made to charge him with the offences that he was later acquitted. We hold that it is not every instance of arrest and detention in custody that results in the accrual of the tort of unlawful arrest, unlawful detention or false imprisonment. We take judicial notice of the fact that in the course



of investigations or in order to secure the arraignment of a suspect before court so that they can answer to the criminal charges facing them, it may be necessary to secure their arrest and detention in custody prior to their arraignment in court. We further observe that the appellant was investigated and charged prior to the promulgation of the 2010 Constitution. Articles 49 and 50 of the 2010 Constitution enshrines the basic rights of arrested and accused persons. It includes a requirement that suspects must be arraigned in court within twenty four (24) hours of their arrest. It was not clear from the evidence adduced by the appellant how long he was detained after his various arrests, or how many times he was arrested before he was arraigned in court. We cannot therefore fault the trial Judge for holding that the appellant had failed to establish that he had been unlawfully arrested, unlawfully detained and subjected to false imprisonment.

29. We further hold that the finding made by the trial Judge that the appellant was maliciously prosecuted include events prior to his arraignment in court and prosecution. We hold that the appellant's arrest and detention by the police in custody cannot be delinked from his arraignment and subsequent prosecution. The events leading to the appellant's investigation, arrest, detention in custody prior to his arraignment in court, his prosecution, constitute one complete chain which cannot be split into distinct and separate causes of action that requires the court to award distinct and separate awards of damages. We hasten to add that this holding only applies in circumstances where the aggrieved party has been subjected to the entire process from arrest to prosecution. Where an aggrieved party has been arrested, detained in custody and not charged, the tort of unlawful arrest and unlawful detention or false imprisonment is liable for an award of damages if proved. We therefore find no merit with the appellant's assertion that the trial Judge erred in failing to find that he was entitled to an award of damages under the various heads that he pleaded in his suit.
30. The appellant was aggrieved that the learned trial Judge failed to find that he had established, to the required standard of proof, that he had been defamed when, as a senior police officer, he was investigated, arrested by junior police officers before being detained in custody, and arraigned in court and prosecuted. It was the appellant's case that he had been humiliated and the reputation that he had built as a respectable member of the society was lowered by the unlawful process by state officers who were motivated by malice. In particular, the appellant urged the Court to find that his arrest and subsequent prosecution had denied him the opportunity of promotion before he attained his retirement age. It was instructive that whereas the appellant pleaded that he had been defamed, he did not call a single witness to corroborate his testimony to the effect that he had so been defamed. On his part, the respondent urged this Court to find, just like the trial Court, that the appellant failed to establish, to the required standard proof on a balance of probabilities, that he had indeed been defamed and was deserving of an award of damages.
31. Our re-evaluation of the submission made in regard to the above issue leads us to the conclusion that the learned trial Judge did not err when she found that the appellant had not established to the required standard of proof that he had been defamed. Both the appellant and the respondent appreciated that the appellant was required to meet the legal threshold set in the case of *Wycliffe A Swanya v Toyota East Africa Ltd. & Another* (supra) to establish that he had been defamed.

We agree with the holding by the trial Court that being subjected to a criminal trial process, per se, without any other evidence, cannot find a cause of action for defamation. It was apparent from our perusal of the proceedings and the proceedings and the appellant's submissions that he was humiliated and pained by the entire process that led to his prosecution and interdiction from employment as a senior police officer with the Kenya Police Service. He lost social status among his peers as a result of his prosecution. The appellant was however unable to adduce evidence before the trial court to prove,



to the required standard of proof on a balance of probabilities, that he had been defamed. This Court therefore holds that this ground of appeal lacks merit and is disallowed.

32. On the last ground of appeal, the appellant faults the trial Judge for assessing damages, upon his establishing that he had been maliciously prosecuted, that was not commensurate to the suffering that he underwent. The trial Judge did not take into account the pain and humiliation that he suffered. In the appellant's opinion, the assessment was on the lower side. He suggests that he should have been awarded the sum of Kshs. 20,000,000/=.
33. On his part, the respondent did not challenge the fact that indeed the appellant had established a case that he was maliciously prosecuted. The submissions filed reflects this position taken by the respondent. The respondent, however, challenges the assessment of damages by the trial court of Kshs.6,000,000/= in favour of the appellant. The respondent was of the opposite view to the appellant. The respondent argued that the award made in favour of the appellant was excessive taking into consideration similar awards made in the recent past for malicious prosecution. The respondent was of the opinion that the trial Judge took into consideration irrelevant factors in arriving at the said assessment. The respondent was of the view that the sum of Kshs. 2,000,000/= would be adequate compensation in the circumstances.
34. The principles to be considered by this Court in determining whether or not to overturn the assessment of damages by the trial Judge are well settled. This Court in *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR held thus:

“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages, it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principles of law, or that the amount awarded was so extremely high or so very low as to make it in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Root v Rairre* [1941] ALLER 297. It was echoed with approval by this Court in *Butt v Khan* [1981] KLR 349 when it held as per Law JA that:

‘An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on the wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low’.

35. As stated earlier in this judgment, both the appellant and the respondent are in agreement that the appellant established, to the required standard of proof on a balance of probabilities, that he was indeed maliciously prosecuted. The issue for determination by this Court is whether the trial court erred in assessing the damages that were ordered to be paid to the appellant as compensation.
36. This is one of those rare appeals where both the appellant and the respondent, for the reasons that have been stated above, were displeased by the assessment of the said damages. Whereas the appellant urges this Court to review the award of damage upward on account that it was too low as to amount to an erroneous estimate of the damages to be paid to him as compensation, the respondent on the other hand is of the view that the amount awarded was too high and excessive as to amount to an application of the wrong principle.



37. On our part, upon re-consideration of the evidence on record and the reasons proffered by the trial Judge, we are unable to disagree with her. The trial Judge was exercising judicial discretion. We are satisfied that, from the material placed before the trial court, including the authorities cited by the both parties, that the assessment of the sum of Kshs. 6,000,000/= as general damages for the proven tort of malicious prosecution of the appellant was spot on. The trial Judge took into consideration the appellant's rank at the Police Service at the time of his arrest, unlawful detention and subsequent prosecution. The Court also took into account the respondent's conduct during the entire period under consideration. The trial Judge also took into consideration the hardship that the appellant experienced during the period he was under investigation and subsequently when he was prosecuted.
38. It became apparent to us that the appellant desired to persuade both the trial court and this Court that the circumstances of his employment should have formed the basis of the assessment of the said damages. Indeed, the appellant urged us to take into consideration that during the period that he was under investigation and later when he was prosecuted, he was denied the opportunity of career progression with the Kenya Police Service. The appellant was of the view that if he had not been maliciously prosecuted, he would have risen in rank by the time of his retirement from the Police Service.
39. We find no fault with the observation made by the trial Judge that the issue touching on the appellant's employment with the Kenya Police Service was an issue which should have been canvassed in the Employment and Labour Relations Court (ELRC) and not in a malicious prosecution suit. The respondent did not place any material before this court that can convince us to interfere with the judicial exercise of discretion by the trial Judge when she assessed the said damages in favour of the appellant.
40. It is clear from the foregoing that the appeal is for dismissal.  
It is hereby dismissed. The cross-appeal on damages by the respondent is similarly dismissed. Since both parties were unsuccessful in their respective appeals, the order that commends itself to us is that each party shall bear their own costs.
41. It is so ordered.

**DATED AND DELIVERED AT NYERI THIS 27<sup>TH</sup> DAY OF OCTOBER, 2023.**

**JAMILA MOHAMMED..... JUDGE OF APPEAL**

**L. KIMARU.....JUDGE OF APPEAL**

**A. O. MUCHELULE..... JUDGE OF APPEAL**

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

Deputy Registrar

