Wambua v Mbuthi & 2 others (Civil Appeal 231 of 2016)
[2022] KECA 84 (KLR) (4 February 2022) (Judgment)

Neutral citation: [2022] KECA 84 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 231 OF 2016

DK MUSINGA, AK MURGOR & J MOHAMMED, JJA

FEBRUARY 4, 2022

BETWEEN

CHRISTINE NTHAKYE WAMBUA ..... APPELLANT

AND

STEPHEN MBUTHI ..... 1ST RESPONDENT

MWANGANGI MBUTHI ..... 2ND RESPONDENT

ATTORNEY GENERAL ..... 3RD RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Garissa (Dulu, J.) delivered on 28th July, 2016 in Civil Appeal No. 16 of 2014)

JUDGMENT

1. The facts surrounding this appeal are that on 18th August 2011, the appellant, Christine Nthakye Wambua, discovered that her donkeys had gone missing and could not be traced. She immediately went out to search for them and eventually found them in the 1st and 2nd respondents' homestead. The 1st and 2nd respondents declined to release them as they claimed they were detaining the donkeys because they had invaded their father's land and damaged their crops.

2. This prompted the appellant to lodge a complaint with the Assistant Chief and the Administration Police. When the matter was not resolved, the appellant lodged a report at the Mwingi Police Station. The 1st and 2nd respondents were arrested and charged in Criminal Case Number 541 of 2011, at the Senior Resident Magistrates' Court at Mwingi, with the offence of stealing stock under section 278 of the Penal Code. Upon hearing evidence, the trial court acquitted the 1st and 2nd respondents under section 215 of the Criminal Procedure Code.

3. On 1st August 2013, the 1st and 2nd respondents filed a suit against the appellant and the 3rdrespondent, the Attorney General at the Senior Resident Magistrates' Court at Mwingi,Civil Case Number 66A of

2013, seeking damages for false imprisonment and malicious prosecution. The 1st respondent claimed that they did not steal the donkeys but had detained and held them as security until the damage caused to their crops was assessed. They claim to have been maliciously arrested and charged by the appellant and the 3rd respondent and therefore prayed for damages.

4. By a judgment delivered on the 9th September 2014, the suit by the 1st and 2nd respondents were dismissed by the same court that had tried the criminal case.

5. The 1st and 2nd respondents were dissatisfied with the decision of the trial court, and filed an appeal in the High Court.

6. Upon considering the grounds of appeal and the parties' submissions, the court rendered a judgment wherein it allowed the appeal and set aside the decision of the trial court. The court found the appellant and the 3rd respondent jointly and severally liable to the 1st and 2nd respondents for malicious prosecution and ordered that they jointly and severally pay the 1st and 2nd respondents general damages of Kshs. 100,000 as compensation for malicious prosecution as well as the costs of the appeal.

7. The appellant was dissatisfied with the judgment of the High Court and filed this appeal on the grounds that; the learned judge failed to consider all the elements of a tort of malicious prosecution and wrongly attributed liability to the appellant for failure by the Attorney General to defend the appeal, and in finding the appellant liable in a manner that was contrary to the established principles of law; in failing to appreciate that the appellant did not control the manner in which the police and the Director of Public Prosecutions framed the criminal charges against the respondents and the attendant prosecution.

8. When the appeal came up for hearing, learned counsel Mr. Mutua appeared for the appellant, while Nzili & Company Advocates were on record for the 1st respondent. There was no appearance for the 3rd respondent, but all the parties filed written submissions.

9. The appellant submitted that based on an analysis of the evidence, the High Court fell into error when it concluded that all the four requirements to establish malicious prosecution were proved when they were not, that for instance, there was no finding that the appellant's action of reporting the incident to the police was actuated by malice and yet the learned judge's conclusion that malice was established was not supported by any evidence or finding. Further, it was contended that the learned judge took into consideration irrelevant and extraneous material and erroneously concluded that the appellant did not withdraw the complaint against the 1st and 2nd respondents, yet the action of charging and prosecuting was the preserve of the police and the Office of Director of Prosecutions.

10. The appellant concluded that had the learned judge considered all the evidence, the court would have arrived at the conclusion that the appellant had not acted with malice; and would have reached a different finding on the element of reasonable and probable cause.

11. Similarly, the 3rd respondent submitted that the learned judge was wrong in holding that the essential ingredients of malicious prosecution had been proved; that the 1st and 2nd respondents had not at any time alleged that the appellant's report was actuated by malice, spite or by indirect or improper motive; and that the police were motivated by good intentions in the performance of their statutory duties in that they reasonably suspected that the 1st and 2nd respondents stole the donkeys.

12. We have considered the record, the grounds of appeal and the parties' submissions. This is a second appeal and in the case of *Kenya Breweries Ltd. vs Godfrey Odoyo, Civil Appeal No. 127 of 2007* it was held thus;

> "In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."

13. Having said that, we consider that the central issue for determination is whether the High Court was right in holding that the tort of malicious prosecution was established.

14. To reach a finding on the tort of malicious prosecution, a court must conclusively establish that all the ingredients have been satisfied. The ingredients were set out in the case of *Mbowa vs East Mengo District Administration [1972] EA 352*, where the predecessor of this Court expressed that;

> "a. 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. It suggests the existence of malice and the distortion of the truth.
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> b. It's essential ingredients are:
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> c. The criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff and 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;
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> d. The defendant must have acted without reasonable or probable cause i.e. there must have been no facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified;
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> e. The defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose; and
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> f. 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.....
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> g. 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.
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> h. 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. The damage that is claimed is in respect of reputation but other damages might be claimed, for example, damage to property.....The damage to the plaintiff results at the stage in the criminal proceedings

> when the plaintiff is acquitted or, if there is an appeal, when his conviction is quashed or set aside. In other words, the damage results at a stage when the criminal proceedings came to an end in his favour, whether finally or not. The plaintiff could not possibly succeed without proving any or all of the first three essentials of malicious prosecution without the fourth which forms part of the cause of action, would not take him very far. He must prove that the court has found him not guilty of the offence charged.....
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> The law in action for malicious prosecution has been clearly defined and in so far as the ordinary criminal prosecution is concerned the action does not lie until the plaintiff has been acquitted of the charge.

15. In the case of *Egbema vs. West Nile Administration [1972] EA 60*, the same Court held:

> "False imprisonment and malicious prosecution are separate causes of action; a plaintiff may succeed on one and fail on the other. If he established one cause of action, then he is entitled to an award of damages on that issue...For the purposes proof that the criminal proceedings have been determined in the appellant's favour it is enough that the criminal proceedings have been terminated without being brought to a formal end. The fact that no fresh prosecution has been brought, although five years have elapsed since the appellant was discharged, must be considered equivalent to an acquittal, so as to entitle an appellant to bring a suit for malicious prosecution..."*

16. More recently, in *National Oil Corporation vs John Mwangi Kaguenyu 2 others [2019] eKLR*, the Court stated that,

> "...case law is replete on the issue of malicious prosecution. Of critical importance is that a litigant must establish malice. It is not sufficient to find one liable on the basis that he/she is the one who made the complaint. In the often-cited case of MURUNGA VS. ATTORNEY GENERAL [1979] KLR 138, the principles of the tort of malicious prosecution were spelt out. These are:-
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> > "i) The defendant instituted the prosecution against the plaintiff.
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> > ii) The prosecution ended in plaintiff's favour.
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> > iii) The prosecution was instituted without reasonable and probable cause.
> >
> > iv) The prosecution was actuated by malice."

17. In so far as the first and second elements are concerned, it is not in dispute that the appellant lodged a complaint concerning her two donkeys with the police. It is also not in dispute that the 1st and 2nd respondents were subsequently charged with the offence of stock theft. Thereafter, upon hearing their appeal, the High Court acquitted them of the charges preferred under section 215 of the *Criminal Procedure Code*. It is therefore uncontroverted that the first and second elements were established.

18. This would lead us into the third element which is whether there was reasonable and probable cause for instituting the prosecution. The test for reasonable and probable cause was set out by Rudd, J. in the case of *Kagane vs Attorney General(1969) EA 643*, citing the cases of *Hicks vs Faulkner [1878] 8 QBD 167, 171*, *Herniman vs Smith [1938] AC 305* and *Glinski vs McIver [1962] AC 726* where it was explained thus;

> "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 assuming them to be true, would reasonably lead an ordinary 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..... the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of objective test. That is to say, to constitute reasonable and probable cause the totality of 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 insofar as that material is based on 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...If it is shown to the satisfaction of the judge that a reasonable prudent and cautious man would not have been satisfied that there was a proper case to put before the court, then absence of reasonable and probable cause has been established. If on the other hand the judge considers that prima facie there was enough to justify a belief in an ordinary reasonable prudent and cautious man that the accused was probably guilty then although this would amount to what I call primary reasonable and probable cause the judge may have to consider the further question as to whether the prosecutor himself did not believe in the probable guilt of the accused, and this is obviously a matter which is to be judged by a subjective test. This subjective test should only be applied where there is some evidence that the prosecutor himself did not honestly believe in the truth of the prosecution...Inasmuch as this subjective test only comes into operation when there were circumstances in the knowledge of the prosecutor capable of amounting to reasonable and probable cause, the subjective test does not arise where the reason alleged as showing absence of reasonable and probable cause is merely the flimsiness of the prosecution case or the inherent unreliability of the information on which the case was based, because this is a matter for the judge alone when applying the objective test of the reasonable prudent and cautious man. Consequently, the subjective test should only be applied where there is some evidence directly tending to show that the prosecutor did not believe in the truth of his case. Such evidence could be afforded by words or letters or conduct on the part of the prosecutor which tended to show that he did not believe in his case, as for example a failure or reluctance to bring it to trial, a statement that he did not believe in it and, I think possibly, an unexplained failure to call an essential witness who provided a basic part of the information upon which the prosecution was based."

19. The evidence on record was that after the appellant found that her donkeys were missing, she filed a report where she also stated that she found that the 1st and 2nd respondents had detained her donkeys. Indeed, the 1st and 2nd respondents admitted to having detained her donkeys, which is what caused the appellant to report to the police. In our view, the 1st and 2nd respondents having been found harbouring the donkeys was sufficient to establish probable cause. As to what would transpire thereafter is a matter that would be left to the police and the prosecution to determine whether or not to mount a prosecution. Clearly, the course of action to be taken after she lodged a complaint was beyond her control.

20. In the case of *Jedel Nyaga vs Silas Mucheke, CA No. 59 Of 1987* this Court stated thus;

> "The appellant had made a complaint to the police and nothing more and what followed had nothing to do with him. The decision to arrest the respondent was made by the police who must have found some merit in the report".

Consequently, the Court found that; "the appellant who had made the report to the police was not responsible for the arrest of the respondent and the mere fact that he was a probable prosecution witness did not render him responsible for the arrest of the subsequent prosecution of the respondent by the police."

21. Similar findings were made in *Koech vs African Highlands & Produce Company Limited & Another [2006] 2 eKLR 148* thus;

> "The police carried out their own investigation and were satisfied that there were sufficient grounds upon which a charge of theft by servant could be preferred against the plaintiff. The first defendant carried out its own investigation regarding the disappearance of its property, just like any prudent person or company would in the circumstances but those investigations had nothing to do with the investigations by the second defendant through the police and the resultant decision to charge the plaintiff with the said offence."

22. So that, in as much as the appellant lodged a complaint with the police, she clearly had no control over its outcome. In other words, whether or not the police would prosecute the two respondents was a decision that rested entirely with the prosecution.

23. We would add that in the prosecution's case, there was also nothing in the evidence that disclosed that the police did not believe in the authenticity of the appellant's case. We therefore find that on the prosecution's part, reasonable and probable cause in prosecuting the case was properly established.

24. Next, we turn to determine whether the prosecution of the two respondents was accentuated by malice.

25. Whether or not there was malice, having regard to the circumstances was discussed, in the case of *Commissioner of Customs & Excise vs Hasmukh Shamji Halai & 3 others [2018] eKLR*, where this Court was explicit that;

> "The final element for proof was malice. For it would not matter that there was an acquittal of the two respondents; that the commissioner was the instigator of the prosecution; and that there was no probable or reasonable cause for it, if it is established that there was no malice. All the elements must dovetail in order to establish a cause of action. As this Court stated in *Nzoia Sugar Company Ltd vs Fungututi [1988] KLR 399*:
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> > "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.
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> > 32. In the *Githaiga case* (*supra*) the court explained as follows: -
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> > > "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."
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> > > Referring to the element of malice, the former East African Court of Appeal in the Mbowa case (supra) stated: -
> > >
> > > "the defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, with an intent to use the legal process in question

> for some purpose other than its legally appointed and appropriate purpose...".
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> 35. For our part, in view of the findings made earlier on other elements of the tort, we find the trial court's findings unsupportable. There is no evidence that the commissioner had improper and wrongful motive or that he intended to use the legal process for a purpose other than the legal one of ascertaining the truth about the importation of the goods found in possession of the two respondents."

26. In the instant case, there was no evidence of bad blood or the existence of a grudge between the appellant and the 1st and 2nd respondents, that would have led her to fabricate a complaint against them or that she instituted the complaint through an improper and wrongful motive or that she intended to use the legal process for a purpose other than the legal one of ascertaining the truth about the donkeys found in possession of the 1st and 2nd respondents. We are therefore satisfied that in the appellant's case no evidence of malice was present, and we so find.

27. And in so far as malice on the part of the police and prosecution was concerned, the case of *Egbema vs. West Nile Administration* (*supra*) is instructive. The court there was satisfied that;

> "There was no finding that the prosecution instituted by Uganda Police was malicious, or brought without reasonable or probable cause. The Uganda Police, unlike Administration Police, are not servants or agents of the respondent...The decision whether or not to prosecute was made by the Uganda Police, who are not servants of the respondents after investigation. There is no evidence of malice on the part of the respondent. The appellant was an obvious suspect as he was responsible for the security of the office from which the cash box disappeared. It cannot be said that there was no reasonable and probable cause for the respondent instigating a prosecution against the appellant. The actual decision to do so was taken by the Uganda Police. As the Judge has made no finding as to whether the instigation of the prosecution was due to malice on the part of the respondent, this Court cannot make its own finding. The circumstances of this case reasonably pointed to the appellant as a suspect and there was not sufficient evidence that in handing the appellant over to the Uganda Police for his case to be investigated and, if necessary, prosecuted, the respondent was actuated by malice".

28. Similarly, on the part of the police, a consideration of the facts that were before the High Court does not disclose that the decision to prosecute was actuated by malice, and we so find.

29. In effect, our analysis of the facts of the case in conjunction with the elements that require to be established in order for a finding of malicious prosecution to be reached shows that the prosecution was instituted on the basis of reasonable and probable cause and that it was not actuated by malice on the part of the appellant or the prosecution.

30. In effect, we reiterate the words of this Court in the case of Mbowa vs East Mengo District Administration (supra), thus;

> "[[T]he 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."

31. Without having demonstrated that all four ingredients united to form a cause of action, it is evident that the 1st and 2nd respondent failed to satisfy the ingredients necessary for a finding of malicious prosecution, as a consequence of which we find it necessary to interfere with the judgment of the High Court.

32. In sum, the appeal is merited and is allowed. The judgment of the High Court is hereby set aside with costs to the appellant and the 3rd respondent.

33. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022.

D.K. MUSINGA (P)

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JUDGE OF APPEAL

A.K MURGOR

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR