



**Murey v Moi University & another (Civil Appeal E081 of 2024)
[2025] KEHC 471 (KLR) (27 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 471 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E081 OF 2024
RN NYAKUNDI, J
JANUARY 27, 2025**

BETWEEN

RAPHAEL KIBOR MUREY APPELLANT

AND

MOI UNIVERSITY 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

(Being an appeal against the decree/judgment dated the 5th April, 2024 delivered by the Hon. Keyne Gweno Odhiambo – Senior Resident Magistrate in Eldoret Chief Magistrate Court Civil suit No. E062 of 2023 – Raphael Kibor Murey v Moi University & Another)

JUDGMENT

1. This is an appeal from the decision of the magistrates' court given in E062 of 2023. The appeal raised 6 grounds of appeal vide a memorandum of appeal dated 22nd April, 2024.
2. The appellant brought a suit against the Respondents at the lower through a plaint dated 8th February, 2023 in which he alleged that on or about 10th July, 2020, the 1st defendant caused to be made a false and malicious report at the Kesses police station against the Plaintiff over the alleged offences of cutting down trees contrary to section 334(c) of the Penal Code, stealing by servant contrary to section 281 of the Penal Code and an alternative charge of handling stolen goods contrary to section 322(2) of the Penal Code.
3. The Appellant averred that as a consequence of the false and malicious report, the Plaintiff was arrested on 10th July, 2020, incarcerated at Kesses Police station and arraigned before Eldoret Chief Magistrate Court vide criminal case no. E111 of 2020 Republic v. Raphael Kibor Murey on two counts and an alternative charge to wit;



- a. Count one; cutting down trees contrary to section 334(c) of the Penal Code whose particulars were;

“ Raphael Kibor Murey; on the 9th day of July 2020 at Moi University Forest in Kesses Sub-County within Uasin Gishu County willfully and unlawfully cut down wattle trees at the said forest, the property of Moi University.”
- b. County two; stealing by servant contrary to section 281 of the Penal code whose particulars were;

“ Raphael Kibor Murey; on the 8th/9th day of July 2020 at Moi University Forest in Kesses Sub-county within Uasin Gishu County, being a servant of Moi University, stole seventy logs of wattle trees valued at Kshs. 9,000/= the property of Moi University.”
- c. Alternative charge: handling stolen goods contrary to section 322(2) of the Penal Code whose particulars were:

“ Raphael Kibor Murey; On the 10th day of July, 2020 at Talai farm village in Kesses Sub-County within the Uasin Gishu County, otherwise than in the course of stealing, dishonestly retained seventy logs of wattle trees valued at Kshs. 9,000 knowing or having reason to believe them to be stolen goods.”
4. The Appellant at the trial court sought orders against the defendants jointly and severally for:
 - a. General, punitive and aggravated damages for false imprisonment and malicious prosecution.
 - b. Costs of the suit and interests.
5. The 1st Respondent/Respondent came on record and denied that the Plaintiff is entitled to general, punitive and aggravated damages for false imprisonment and/or malicious prosecution as alleged in the Plaint. That the subsequent withdrawal of the criminal case against the Plaintiff/Appellant does not mean there was no reasonable or probable cause of action. The 1st defendant in denying the claim averred that it is not in any way liable in tort as it was merely a complainant. That the decision to investigate, arrest, charge and prosecute the Plaintiff was solely the responsibility of the police and the public prosecutor.
6. The 2nd Defendant/Respondent equally came on record and denied the Plaintiff's/Appellant's averments and stated that the said arrest and arraignment is well anchored in law.
7. The trial court considered the matter and made a finding that the Plaintiff's arrest, detention and prosecution were not instituted without reasonable and probable cause. That there were reasonable grounds for his arrest and prosecution and as such the claim for malicious prosecution was not proved.
8. Aggrieved with the said decision, the appellant filed the instant appeal predicated upon the following grounds:
 - a. That the learned magistrate erred in law and fact in failing to find that the failure to present evidence to the criminal court was a clear demonstration of the fact that the prosecution was instituted without evidence hence malicious as the state did not file in court the witness statements and exhibits.



- b. That the Learned magistrate erred in law and fact in failing to find that the appellant had proved his case on a balance of probabilities and in the absence of the 2nd Respondent giving evidence as to who the witnesses in the criminal matter were and what evidence existed to sustain the charges on basis existed for the decision to disallow the appellant's case.
 - c. The learned magistrate erred in law and fact in failing to find that the 1st Respondent had no established proprietary interest in the trees as the charge sheet indicated that there was a forest hence the trees were the property of the Kenya Forest Service as opposed to it thus no basis existed for the charges.
 - d. That the Learned Magistrate erred in law and fact in failing to find the state as the prosecutor having not established the existence of reasonable and probable cause in mounting the prosecution, a finding of malicious prosecution ought to have been made.
 - e. That the learned magistrate erred in law and fact in finding that the 1st respondent was denied an opportunity to present its case in court while failing to consider that the appellant had no duty to compel attendance of the Respondents to prosecute him and in their absence in court, the finding terminating the prosecution without tendering evidence connoted lack of reasonable and probable cause in bringing the prosecution as no appeal was lodged against it or a new prosecution commenced.
 - f. That the Learned Magistrate erred in law and fact in failing to find that the appellant was entitled to his claim for false imprisonment as no basis existed to have him arrested and held him in custody based on the eventual outcome of the prosecution termination in his favor.
9. The appellant prayed that the appeal be allowed, judgment be entered against the Respondents with an award of damages as prayed before trial court. He prayed for costs of the suit and interest together with costs of the appeal.

Appellant's submissions

10. Learned Counsel Mr. Kigamwa for the Appellant opened his submissions by outlining the background of Civil Suit No. E062 of 2023, where his client faced charges of cutting down trees, stealing by servant, and handling stolen goods. Counsel submitted that these charges were filed without any evidentiary foundation and were subsequently withdrawn due to the prosecution's failure to present witnesses.
11. In advancing his case for malicious prosecution, Mr. Kigamwa argued that the prosecution initiated by the 1st Respondent lacked both reasonable and probable cause. To buttress this argument, counsel drew the court's attention to the minutes of the disciplinary committee meeting held on 16th June, 2023, which revealed that the 1st Respondent had merely filed a false report with the police, lacking any substantive evidence against the Appellant.
12. Learned counsel further submitted that the charges preferred against his client were actuated by malice, spite, and ill will. In support of this contention, counsel highlighted his client's statement dated 11th July, 2020, which indicated that the accusations stemmed from a revenge mission orchestrated by one Kiprop, a Security Personnel at the 1st Respondent's institution. It was argued that the investigating officer's failure to consider this crucial aspect demonstrated the malicious nature of the prosecution.
13. On the issue of procedural impropriety, counsel relied on the authority in *James Kahindi Simba v Director of Public Prosecution & 2 others* (2020) eKLR.



14. In support for his argument and lack of probable cause, Mr. Kigamwa cited the decision in *Thomas Mboya Oluch & Another v Lucy Muthoni Stephen & Another*.
15. In addressing the quantum of damages, learned counsel relied heavily on the case of *Dr. Willy Kaberuka v Attorney General Kampala*, HCCS No. 160 of 1993, where the court recognized that injury to reputation and humiliation need not be proved by hard and fast rules but can be inferred as natural and foreseeable consequences of malicious prosecution.
16. To strengthen his argument on exemplary damages, counsel cited several precedents including *Chrispine Otieno v Attorney General (2014)*, where substantial awards were made in similar circumstances. Counsel drew parallels between these cases and the present matter, emphasizing his client's loss of reputation, career progression opportunities, and sense of dignity.
17. In conclusion, Mr. Kigamwa submitted that the cumulative effect of the malicious prosecution warranted an award of Kshs. 2,000,000/= as general damages and Kshs. 500,000/= as exemplary damages. Counsel maintained that such an award would be commensurate with the Appellant's suffering, considering the damage to his reputation at his place of employment, loss of trust, and loss of sense of identity.

Respondent's submissions

18. Learned Counsel for the 1st Respondent opened his submissions by outlining that this appeal arises from the judgment of Honorable Keyne Gweno Odhiambo Senior Resident Magistrate delivered on 05/04/2024. Mr. Odoyo proceeded to set out the brief facts, noting that the Respondent had filed suit via a Complaint dated 08/02/2023 seeking general, punitive and aggravated damages for false imprisonment and malicious prosecution, along with costs and interests.
19. Counsel drew the court's attention to the evidence of Mr. Obadiah K. Rotich, who testified that the Appellant was employed by the 1st Respondent as a messenger/cleaner before being promoted to office assistant. Mr. Odoyo submitted that following investigations conducted by the 1st Respondent's security officers on 10/07/2020, logs and rafts of wattle trees suspected to have been stolen from the 1st Respondent's farm were found at the Appellant's residence.
20. It was counsel's submission that during interrogation, the Appellant conceded that the wattle trees were obtained from the 1st Respondent's farm. Learned counsel emphasized that the arrest and report to Kesses Police Station was not malicious as it was based on reasonable belief of the truthfulness of the facts in possession of the 1st Respondent at the time of investigations.
21. Significantly, Mr. Odoyo argued that the 1st Respondent did not play any role in the decision to hold the Appellant in custody, charge and/or institute criminal proceedings against him. Counsel maintained that the decision to charge after investigations was that of the 2nd Respondent as a state agency, and the 1st Respondent cannot be held responsible for the 2nd Respondent's constitutional mandate.
22. On the legal framework, counsel relied heavily on Section 87(a) of the Criminal Procedure Code regarding withdrawal from prosecution in trials before subordinate courts. He argued that a withdrawal under this section does not absolve the Accused Person of the offence, as the prosecution/police retain the right to re-arrest after release by the court.
23. Mr. Odoyo placed considerable reliance on the case of *Kagane and others Vs Attorney General and Another [1969] EA*, citing the four essential ingredients required for malicious prosecution. While



conceding that the 1st and 2nd ingredients were met, counsel argued that the 3rd and 4th ingredients regarding lack of reasonable cause and malice were not established.

24. In buttressing his arguments, counsel cited several authorities including James Karuga Kiiru Vs Joseph Mwamburi and 3 others, Nairobi C.A No. 171 of 2000, and Robert Okeri Ombeka Vs Central Bank of Kenya [2015] eKLR, emphasizing that an acquittal or discharge does not automatically establish malicious prosecution.
25. In conclusion, Mr. Odoyo submitted that the appeal lacks merit and ought to be dismissed with costs, maintaining that the subordinate court's decision dismissing the Appellant's case with costs was proper, sound in law and ought not to be disturbed.

Analysis and Determination

26. After carefully reviewing the appeal, the lower court proceedings, and the parties' submissions, the court has identified the primary legal question: whether the appellant has substantiated the tort of malicious prosecution against the respondents according to the required legal standards.
27. The fundamental ingredients for a successful malicious prosecution claim have been definitively articulated by Cotran, J in the landmark case of *Murunga v Attorney General* (1979) KLR, 138. To prevail in such a claim, a claimant must demonstrate the following elements to the court's satisfaction, based on a balance of probabilities:
 - a. The plaintiff must show that the prosecution was instituted by the defendant, or by someone for whose acts he is responsible;
 - b. The plaintiff must show that the prosecution terminated in his favour;
 - c. The plaintiff must demonstrate that the prosecution was instituted without reasonable and probable cause;
 - d. He must also show that the prosecution was actuated by malice.”
28. It is not disputed that CMC Criminal Case No. 111 of 2020 was initiated through a report made by the 1st Respondent. It is also not disputed that in the said case, the appellant was discharged under section 87(a) of the Criminal Procedure Code. The trial court while dismissing the claim gave an account on the events leading to the withdrawal of proceedings. The court noted that the 1st defendant/respondent only failed to attend court once, and it was on the said date that the matter was withdrawn. That in other instances, the case did not proceed due to the court not sitting or the indisposition of the court prosecutor. Nonetheless, on that account it is evident that the 1st and 2nd ingredients were duly proved. The prerequisites for a malicious prosecution claim are not merely suggestive, but cumulative. Critically, the absence of even a single essential ingredient is sufficient grounds for the court to dismiss the claim. Each element must be comprehensively established to sustain a successful malicious prosecution action.
29. As to whether the prosecution of the appellant was instituted without reasonable and probable cause, what amounts to reasonable and probable cause was well explained by Rudd J in *Kagame & others v AG & another* [1969] EA 643 where it was 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 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...”

30. Regarding the third ingredient of malicious prosecution, lack of reasonable and probable cause; this court finds significant guidance in the precedent set by Rudd J in *Kagame & others v AG & another* (supra). Reasonable and probable cause requires an honest belief in the accused's guilt, founded on reasonable grounds that would lead an ordinary prudent person to conclude the charged individual was probably guilty.
31. In this case, the evidence reveals that on 10/07/2020, the 1st Respondent's security officers conducted investigations which uncovered logs and rafts of wattle trees suspected to be stolen from their farm, located at the Appellant's residence. Crucially, during interrogation, the Appellant himself conceded that the wattle trees were obtained from the 1st Respondent's farm.
32. Mr. Obadiah K. Rotich's testimony confirmed that the Appellant was employed by the 1st Respondent as a messenger/cleaner before being promoted to office assistant. This context is important in evaluating the circumstances surrounding the allegations. The court notes that the 1st Respondent maintains it did not play a direct role in the decision to hold the Appellant in custody, charge, or institute criminal proceedings. The decision to charge after investigations was that of the 2nd Respondent as a state agency.
33. Significantly, as rightly noted by the 1st Respondent, the withdrawal of criminal proceedings under Section 87(a) of the Criminal Procedure Code does not automatically absolve the Accused Person of the offense. The prosecution/police retain the right to re-arrest after release by the court.
34. The Appellant has failed to demonstrate that the actions of the Respondents in setting legal processes in motion were motivated by spite rather than a genuine attempt to administer criminal justice.
35. After a comprehensive analysis of the evidence and submissions, the court concludes that: The first two ingredients of malicious prosecution were met; There was reasonable and probable cause for the prosecution but No malice was proven. In the end the Appellant has failed to substantiate his claim of malicious prosecution.
36. Consequently, this appeal is found to be without merit and is hereby dismissed with costs to the Respondents.

DATED AND SIGNED AT ELDORET THIS 27TH DAY OF JANUARY, 2025

In the Presence of

Mr. Mugambi for the Applicant

Nafula for the Odira for the Respondent

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R. NYAKUNDI

JUDGE

