Municipal Council of Nyeri v Kihoro & 5 others (Family Appeal 1 of 2019) [2025] KEHC 1312 (KLR) (28 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1312 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

FAMILY APPEAL 1 OF 2019

MA ODERO, J

FEBRUARY 28, 2025

BETWEEN

MUNICIPAL COUNCIL OF NYERI ..... APPELLANT

AND

WANYIRI KIHORO ..... 1ST RESPONDENT

JAMES GATAMA ..... 2ND RESPONDENT

CHARLES MAINA MWANGI ..... 3RD RESPONDENT

JOSEPH GITONGA KIMANI ..... 4TH RESPONDENT

GEORGE MAINA NJIRANI ..... 5TH RESPONDENT

JOHNSON MUCHEMI ..... 6TH RESPONDENT

JUDGMENT

1. Before this Court is the Memorandum of Appeal dated 7th January 2019 by which the Appellant Municipal Council of Nyeri (now the County Government of Nyeri) seeks the following orders:-

> "(a) That the judgment and orders of the Lower Court dated 23rd November 2018 in Nyeri CMCC Number 404 of 2008 be set aside and be substituted with an order dismissing the Respondents case against the Appellant.
>
> (b) That the Respondents do pay the costs here and below"

2. The Respondents Hon. Wanyiri Kihoro, James Gatama, Charles Maina Mwangi, Jospeh Gitonga Kimani, George Maina Njirani and Johnson Muchemi Muchemi all opposed the appeal.

3. The appeal was canvassed by way of written submissions. The Appellant filed the written submissions dated 31st October, 2023 whilst the Respondents relied on the written submissions dated 25th October 2024.

Background

4. The Respondents in this matter filed in the Chief Magistrates Court at Nyeri the Civil Case No. 404 of 2008. By way of the plaint dated 17th January 2005, the Respondents sought the following orders:

> "(a) General damages on an aggravated scale.
>
> (b) Exemplary damages and a declaration that the plaintiffs constitutional rights were violated.
>
> (c) Costs of the suit."

5. The Defendants being the Hon Attorney General (the 1st Defendant) and Nyeri Municipal Council, (the 2nd Defendant both opposed the suit. The 1st Defendant the Hon. Attorney-General filed a statement of Defence dated 14th February 2005. The plaintiff then filed a Reply to Defence dated 3rd March 2005. The second Defendant Nyeri Municipal Council filed a statement of Defence dated 26th January 2005.

6. The suit was heard by way of Vive Voce evidence. The plaintiffs were originally nine (9) in number. However the 3rd, 4th and 7th Plaintiffs passed away during the pendency of the suit. As such their claims against the Defendants were found by the lower court to have abated.

7. The 1st Respondent Hon. Wanjiru Kihoro relied upon his witness statements dated 3rd February 2017. The 1st Respondent told the trial court that the 2nd defendant made a false complaint to the Police against him and the other plaintiffs. That vide OB NO. 27 Respondents alleged that the plaintiffs had destroyed property belonging to the Nyeri Municipal Council. That as a result of the said complaint the Respondents were arrested and held in police cells at Nyeri Police station. Thereafter in September 2000 the plaintiffs were charged with six counts of Malicious Damage to Property contrary to Section 339(1) of the *Penal Code* in Nyeri Criminal Case No. 2899 of 2000.

8. The Respondents stated that the charges against them were sustained for a period of three (3) years and five (5) months with no witness ever appearing in court to testify against them. Finally the charges were withdrawn and the Respondents released unconditionally on 20th January 2004.

9. According to the Respondents the charges against them were maliciously instigated. The 1st Respondent stated that his prosecution arose from his work as the duly elected Member of Parliament representing Nyeri Town and his activities in fighting for the rights of poor men, women and children working in the Nyeri quarries.

10. The 1st Respondent alleged that then Nyeri Town Mayor one David Mararo Waigi (now deceased) who objected to his work and who was also eyeing the Nyeri Town parliamentary seat is the one who filed the false complaint against the Respondent with the police. That the late Mayor publicly stated that he would ensure that the 1st Respondent was convicted and imprisoned leading to a bye-election in Nyeri Town where he (Mararo) was sure to be elected as Member of Parliament.

11. The other Respondents alleged that they were arrested for no reason other than that they were associates and/or supporters of the 1st Respondent.

12. The Respondents state that they all expended finances in hiring advocates to defend them against what they termed spurious charges.

    The Respondents claims arose from their allegations of unlawful arrest false imprisonment and malicious prosecution.

13. The 1st Defendant, the Hon. Attorney General denied that arrest and prosecution of the Respondents was malicious. They state that the police were merely carrying their constitutional duties of investigating crimes, apprehending and prosecuting suspected criminals. They assert that the Respondents were arrested on probable and reasonable grounds of suspicion in the honest and lawful belief that they had committed an offence punishable by law.

14. On their part the 2nd Defendant conceded that the property in question did belong to them but denied having made a false complaint to the police. The 2nd Defendant further denied having imprisoned or charged the Respondents and asserted that the police acted independently without being directed and/or instigated by the 2nd Defendant.

15. The Defendants urged the trial court to dismiss the plaintiff's suit in its entirety.

16. Following the hearing of all parties the learned trial magistrate delivered her judgment on 23rd November 2018. In that judgment the court dismissed the Respondents claim for Kshs. 250,000. However the Court entered judgment in favour of the 1st, 2nd, 5th and 6th Plaintiffs against the 2nd Defendants jointly and severally and awarded them damages in the amount of Kshs. 1,000,000 each.

17. Being aggrieved by that judgment the 2nd Appellant filed the Memorandum of Appeal dated 7th January 2019 which appeal was premised upon the following grounds:-

    1. The Learned Chief Magistrate erred in law and fact in holding that the Appellant had prosecuted the Respondents. A miscarriage of justice was thereby occasioned.

    2. The Learned Chief Magistrate erred in law and fact in attributing police action to the Appellant who had no authority over them. A miscarriage of justice was thereby occasioned.

    3. The Learned Chief Magistrate erred in law and fact in framing issues which did not dissect the actions of the Appellant from the police in the arrest and prosecution of the Respondents thus arriving at the wrong findings and conclusions. A miscarriage of justice was thereby occasioned.

    4. The Learned Chief Magistrate erred in law and fact in not finding and holding that all the Appellant did was to report the damage of its barriers and the rest was up to the police who conducted their own independent investigations and formed the basis of the criminal proceeding. A miscarriage of justice was thereby occasioned.

    5. The Learned Chief Magistrate erred in law and fact in not finding and holding that the circumstances of this case pointed to the Respondents as the people who had damaged the Appellant's barriers and, in reporting them to the police to be investigated and, if necessary, prosecuted, the Appellant was not actuated by malice. A miscarriage of justice was thereby occasioned.

    6. The Learned Chief Magistrate erred in law and fact in not finding and holding that the circumstances of this case pointed to the Respondents as the people who had damaged the Appellant's barriers and, in reporting them to the police to be investigated and, if necessary, prosecuted, the Appellant was not actuated by malice. A miscarriage of justice was thereby occasioned.

7. In so far as the Appellant did not arrest or prosecute the Respondents, the Learned Chief Magistrate erred in law and fact in holding it liable in damages. A miscarriage of justice was thereby occasioned.

8. The Learned Chief Magistrate erred in law and fact in awarding damages of Kshs. 1,000,000/ = when the same was not merited or specifying it was in respect of which head. A miscarriage of justice was thereby occasioned.

Analysis and Determination

18. I have carefully considered the appeal before this court, the record of the proceedings before the trial court as well as the written submissions filed by both parties.

19. This is a first appeal. It is settled law that the duty of the first appellate court is to re-evaluate the evidence which was adduced in the subordinate court both on points of law and fact and come up with its own findings and conclusions [see Peters -vs- Sunday Post Limited [1958] E.A 424]

20. In Selle and Another -vs- Associated Motor Boat Company Ltd & Others [1968] I E.A 123 it was stated as follows:-

> " this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind [the fact] that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence."

21. Likewise in Gitobu Imanyara & 2 Others -vs- Attorney General [2016] eKLR, the Court of Appeal stated thus;-

> " An appeal to this court is by way of a 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 it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."

22. Therefore the appropriate standard of review in cases of appeal can be summarized in the following three principles:-

    1. On first appeal the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions.

    2. In reconsidering and re-evaluating the evidence the first appeal court must bear in mind and give due allowance for the fact that the trial court had the advantage of seeing and hearing the witnesses.

    3. It is not open to the first appellate court to review the findings of a trial court simply on the basis that it would have reached a different conclusion had it been hearing the matter for the first time.

23. It is common ground that the Respondent were arrested by police from Nyeri Police Station on diverse dates in November 2000 and were placed in custody. It is also common ground that the Respondents

were all arraigned in Court and were charged with five (5) counts of Causing Malicious Damage to Property contrary to Section 399(1) of the *Penal Code*.

24. The record indicates that the trial dragged on for a period of three (3) years during which period no witness ever appeared to testify on behalf of the prosecution. Eventually on 20th January 2004, the prosecution terminated the case and all the Respondents were acquitted under Section 202 of the *Criminal Procedure Code*.

25. According to the Respondents the Appellant made a false complaint to the Police. Acting upon that false complaint which according to the Respondents was a malicious complaint lacking any factual or legal basis, the police proceeded to arrest, detain and prosecute the Respondents. The Respondents allege that the actions of the police in arresting and prosecuting them were ill-motivated, lacked basis and amounted to false imprisonment and malicious prosecution. That the actions of the Appellants breached the constitutional rights of the Respondents. On this basis the Respondents sought general and special damages.

26. The first question to be answered is whether the arrest of the Respondents was unlawful and/or malicious i.e did it amount to a false arrest.

27. A false arrest is an arrest made without proper legal authority. Black's Law Dictionary 10th Edition defines a malicious arrest as

> " An arrest made without probable cause and for improper purpose-an abuse of process by which a person procures the arrest land often the imprisonment of another by means of judicial process without any reasonable cause."

28. A malicious arrest can form the basis of an action for false imprisonment and/or malicious prosecution.

29. The principles governing a claim founded on malicious prosecution were laid down by Cotran J in the case of Murunga -vs- Attorney General [1997] KLR 138 as follows.

    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 or probable cause.

    d. He must also show that the prosecution was actuated by malice."

30. Likewise in Mbowa -vs- East Mengo Administration [1972] E.A 352 the East African Court of Appeal stated as follows:-

> " 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 damages. 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."

31. Therefore a party who claims that he was unlawfully arrested and falsely imprisoned must prove that the arrest had no basis at all.

32. In the Ugandan Case of Mugwanya Patrick -vs- Attorney General, High Court Civil Suit No. 154 of 2009 [2012] UGHC 293 the Court stated that

> " The Civil tort of false imprisonment consists of unlawful detention of the Plaintiff for any length of time whereby he is deprived of his personal liberty. It must be total restraint..... where an arrest is made on a valid warrant it is not false imprisonment but where the warrant or imprisonment is proved to have been affected in bad faith then it is false imprisonment."

33. In John Ndeto Kyalo -vs- Kenya Tea Development Authority and the Hon Attorney General [2005] eKLR Hon. Justice Maraga (as he then was) observed that

> " Claims for false imprisonment (wrongful detention) and malicious prosecution are distinct causes of action and even though the evidence that may be adduced by a plaintiff may cover them both, the evidence must prove each of them distinctly on a balance of probabilities....."

34. It is trite law that he who alleges must prove

> " Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:
>
> > " Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

35. This was reiterated in Anne Wambui Ndiritu -vs- Joseph Kiprono Ropkoi & Another [2005] 1EA 334, where the Court of Appeal held that:

> " As a general proposition under Section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

36. The Respondents assert that the police had no legal and/or factual basis to arrest and detain them. At the outset it is important to point out that by their own admission and evidence the Respondents were arrested by police officers from Nyeri Police Station. They were not arrested by the Nyeri Municipal Council or its officers.

37. The Respondents claim that a false report was made by the Appellants to police which led to the arrest of the Respondents. No evidence has been tendered by the Respondents to prove on a balance of probabilities that the report made by the Appellant to police regarding the destruction of their property barriers was in fact a false report.

38. The Respondent produced and sought to rely on a letter dated 7th February 2000 written by the Permanent Secretary in the Ministry of Roads and Public Works addressed to all provincial and District Works Officers. The letter was referenced "Order to remove illegal toll stations and Bumps in classified roads."

39. The Appellant had made a complaint to police regarding the removal of their road barriers and stated that the value of the damaged barriers amounted to Kshs. 42,000. The 1st Respondent counters that the said barriers were removed by the council workers in compliance with the directions given in the

letter dated 7th February 2000. In effect the Respondents are alleging that the complaint made by the Appellant to police regarding destruction of Council Property was false. No evidence was tendered to show that said report was indeed false.

40. The fact that directions were given to have illegal toll stations removed does not negate the fact that council barriers may have been destroyed by other persons. The existence of this letter is not conclusive proof that the report made to police was in fact a false report.

41. The 1st Respondent claimed that the false report to police was made by the then mayor of Nyeri the late David Mararo. Once again I find no evidence to prove this allegation. There is no evidence to show who specifically made the report to the police. The OB extract was not produced to show who specifically made the report to the police. What is then the basis of the 1st Respondents assertion that it was the former mayor who made that report to the police.

42. All in all I am unable to find that the report made to the police by the Appellant regarding destruction of Council properties was in fact a false report. The report was recorded at Nyeri Police station Vide OB No.

27. Based on that report police moved to arrest the Respondents who were eventually charged with Criminal Offences. The fact that the trial did not proceed does not amount to proof that the complaint made to police was false.

43. The Respondents go on to claim that their prosecution by the Hon. Attorney - General was a malicious prosecution which had no basis and contravened their constitutional rights.

44. Blacks Law Dictionary 10th Edition defines

> " Malicious Prosecution as "The institution of a criminal or civil proceeding for an improper purpose and without probable cause."

45. As stated earlier there is no contesting the fact that following their arrest the Respondents were arraigned in court and faced criminal charges Vide Case No. 2899/2000.

46. The Respondents were eventually acquitted of all charges three (3) years later. The fact of acquittal does not amount to proof that the prosecution mounted against the Respondents was malicious. Not all prosecutions will result in a trial or a conviction for that matter.

47. In the case of Robert Okeri Ombeka -vs- Central Bank Of Kenya [2015] eKLR, the Court of Appeal held that

> " Comparative judicial experience in other jurisdictions also shows an emerging legal principle that an acquittal or discharge should not necessarily lead to a cause of action in malicious prosecution law suits. A malicious prosecution plaintiff cannot establish lack of probable cause based on having obtained in an earlier action an acquittal based on insufficiency of the evidence. Successfully defending a prosecution or a law suit does not establish that the suit was bought without probable cause." [Own emphasis]

48. Likewise in this case the fact that the Respondents were eventually acquitted does not amount to proof that their prosecution was malicious. A prosecution can fail for a variety of reasons e.g ineptitude of the prosecutors/police, failure of witnesses to attend court, failure to avail exhibits etc.

49. In order to satisfy the court that their prosecution was indeed malicious and unfounded the Respondents were required to tender proof that the prosecution was motivated by factors other than adherence to the 1st Appellants mandate to prevent and investigate crime.

50. In the case of Stephen Gachau Githaigia & Another -vs- Attorney General [2015] eKLR Hon Justice Mativo (as he then was) stated that

> " Malicious prosecution is an intentional tort designed to provide redress for losses flowing from an unjustified prosecution. Under the first element of the test for malicious prosecution the plaintiff must prove that the prosecution at issue was initiated by the Defendant. This element identifies the proper target of the suit, as it is only those who were actively instrumental in setting the law in motion that may be held accountable for any damage that results." [own emphasis]
>
> The second element of the tort of malicious damage demands evidence that the prosecution terminated in the plaintiffs favour. This requirement precludes a collateral attack on a conviction properly rendered by a criminal court, and this avoids conflict between civil and criminal justice. The favourable termination requirement may be satisfied no matter the route by which the proceedings conclude in the plaintiffs favour, whether it be an acquittal, a discharge or a preliminary hearing a withdrawal or a stay.
>
> The third element which must be proven by a plaintiff -
>
> absence of reasonable and probable cause to commence or continue the prosecution further delineates the scope of potential plaintiffs. As a matter of policy, if reasonable and probable cause existed at the time the prosecutor commenced or continued the criminal proceedings in question, the proceedings must be taken to have been properly instituted regardless of the fact that it ultimately terminated in favour of the accused.
>
> Finally the initiation of criminal proceedings in the absence of reasonable and probable grounds does not itself suffice to ground a plaintiffs case for malicious prosecution, regardless of whether the defendant is a private or public actor. Malicious prosecution as the label implies is an intentional tort that requires that the defendant's conduct in setting the criminal process in motion was fueled by malice. The malice requirement is the key to striking the balance that the tort was designed to maintain between society's interest in the effective administration of criminal justice and the need to compensate individuals who have been wrongly prosecuted for a primary purpose other than that of carrying the law into effect." [Own emphasis]

51. It is important to note that the prosecution of the Respondents was mounted by the police and not by the Nyeri Municipal Council who is the Appellant. The County Council did not conduct the prosecution against the Respondents. The Appellant was merely one of the witnesses in the case or the complaint is you will. It was not the Appellant who arrested the Respondents, arraigned them in court and charged them. All that the Appellants did was to make a report to police about destruction of their barriers. The decision of what action to take on that report lay exclusively with the police and the Hon. Attorney General. It was entirely up to the police to investigate the report and to decide whether or not to prosecute.

52. The 1st Respondent claims that his prosecution was instigated by the then Mayor of Nyeri Town the late David Mararo a political rival who was eyeing the seat held by the 1st Respondent.

53. In his written statement dated 3rd February 2017 at Paragraph *4* the 1st Respondent states as follows;-

> " The 2nd Defendant through the then Nyeri Town Mayor David Mararo Waigi took offence of my work and operations and filed a complaint with the police about alleged property belonging to them, which I had allegedly maliciously damaged. The mayor declared publicly that he would have me arrested; wherefore he would ensure conviction and imprisonment and that there would be 'sooner than later' a bye-election for the Nyeri Town Parliamentary seat and he would be elected MP with little or no opposition."

54. By this the 1st Respondent is stating that his arrest and prosecution were 'instigated' by the then Mayor of Nyeri Town. What proof was availed of these allegations – None that I was able to find. If the Mayor made statements 'publicly' as alleged by the 1st respondent then other people would have heard him say that he would have the 1st Respondent arrested, charged and convicted.

55. The 1st Respondent did not call as a witness any person who claimed to have heard the late Mayor make these statements. The Mayor was a public figure. Undoubtedly much of what he said and did would have been recorded in the media. The 1st Respondent did not avail in the trial court any media reports and/or footage capturing the mayor making these statements.

56. It was the 1st Respondents case that the Mayor instigated his prosecution on the basis of the ill-will the then Mayor had against him. Firstly no proof was offered to show that the police and/or the prosecutors were in any way influenced in their actions by the then Mayor.

57. Secondly as has been pointed out earlier the prosecution of the Respondents was conducted by the Hon. Attorney General. The Respondents needed to show or demonstrate that the parties who conducted the prosecution were motivated by spite or ill-will. The Respondents needed to show that the actions of the police in arresting them as well as the decision by the 1st Defendant (the Hon. Attorney General) to prosecute the Respondents was attributable to the Appellants.

58. In the case of Nzoia Sugar Company -vs- Fungututu [1988] KLR 399 Apaloo JA (deceased) stated as follows:-

> " It is trite learning that acquittal perse, on a criminal case charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecutor. The mental element of ill-will or improper motive cannot be found in an artificial person like the appellant. But there must be evidence of spite in one of its servants that can be attributed to the company. The Respondent gave no evidence from which it can be reasonably inferred that the security Officer made this report to the police on account of hatred or spite that he had for him" [own emphasis]

59. The Respondents were not able to show that the particular officer prosecuting the case had spite or ill-will towards them. In any event the Appellant had no authority over the actions and decisions made by the 1st Defendant. The Hon. Attorney General was an Independent office not subject to direction from any quarter. The Appellant had no authority to direct the 1st Defendant on who to prosecute and who not to prosecute. There is nothing to show that the decision by the Hon. Attorney General to prosecute the Respondents was anything other than an independent decision as per their mandate.

60. The Respondents in their suit sued the Hon. Attorney General and the Nyeri Municipal Council. None of the Defendants were individuals they were artificial persons. The Respondent could not accuse these artificial persons of spite. They needed to show which particular officer in the Hon. Attorney Generals office or in the Nyeri Municipal Council harbored ill will or spite against them and

further the Respondents needed to avail proof of such spite-vague accusations of malice will not suffice. The Respondents have not named the particular officers who were influenced by the then Mayor and in what manner said officers were influenced.

61. In the judgment at Page 18 paragraph *26* the learned trial magistrate stated as follows;-

> " There was also mention that there was political rivalry that may have motivated the 2nd Defendant's representative to make the report. These allegations of spite were not challenged by the evidence."

62. In my view this finding was erroneous as the court was in effect shifting the burden or onus of proof. Instead of requiring that the plaintiffs prove their case on a balance of probabilities, the trial court was requiring that the Defendants to disapprove the allegations made by the plaintiffs.

63. Further in the same judgment at Page 18 paragraphs *27*, the trial magistrate stated that:-

> " Also when the police received the reports they did not conduct thorough investigations before effecting the arrest and charges in court. This is what led to the inevitable collapse of the cases in Court."

64. No evidence was tendered before the trial court to show much less prove that the cases collapsed due to failure to conduct proper investigations. No evidence was called to demonstrate what nature of investigations were conducted in the matter. How then could the trial court conclude that the investigations were wanting. As stated earlier cases can collapse for a variety of reasons. The collapse of a criminal case is not proof of inadequate investigations.

65. Finally at Page 18 Paragraph 28 of the judgment the trial court held as follows:-

> " The 2nd defendants have not demonstrated that there was any probable cause for them to report the plaintiffs to the police and the police have failed to demonstrate that the charges were valid. Under the circumstances the court is satisfied that the prosecution was malicious in nature."

66. Once again the trial court erred in shifting the burden of proof to the Defendants. The suit was filed by the plaintiffs thus the onus lay on the plaintiffs to prove each element of their claim on a balance of probabilities. It was not the duty of the Defendants to prove anything at all. The learned trial magistrate put the Defendants to task yet the suit had been filed by the plaintiffs.

67. All in all I find that the plaintiffs failed to prove their claim on a balance of probabilities. There was no proof of false arrest or malicious prosecution. In the circumstances the plaintiffs had no claim against the Defendants. As such I find merit in this appeal. The same is hereby allowed. The judgment of the lower court in Nyeri CMCC No. 404 of 2008 be and is hereby set aside in its entirety. The same is substituted with an order dismissing the Respondents case against the Appellants.

Each party to meet its own costs.

DATED IN NYERI THIS 28TH DAY OF FEBRUARY 2025.

.....

MAUREEN A. ODERO

JUDGE