Mosigani v Khisa & another (Civil Appeal 001 of 2020)
[2025] KEHC 1677 (KLR) (27 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1677 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CIVIL APPEAL 001 OF 2020

RPV WENDOH, J

FEBRUARY 27, 2025

BETWEEN

EVANS OBWOCHA MOSIGANI ..... APPELLANT

AND

RONALD KHISA ..... 1ST RESPONDENT

THE ATTORNEY GENERAL ..... 2ND RESPONDENT

JUDGMENT

1. Evans Obwocha Mosigani, the appellant herein, is dissatisfied with the judgment of the Chief Magistrate in Kitale CMCC 475/2009 where the court found him to have maliciously prosecuted the 1st respondent Ronald Khisa (formerly the plaintiff) as a result of which the 1st Respondent was awarded damages of Kshs.150,000/= with costs and interest at court rates on 13/12/2019. The grounds of Appeal are as follows;-
    1. That the learned magistrate erred in law and fact in finding the appellant liable for malicious prosecution of the 1st Respondent in a criminal case No. 3808 of 2005 in Kitale yet it was not the appellant who prosecuted the 1st Respondent.
    2. That the court erred when it failed to exonerate the appellant herein from any liability once he found the 2nd Respondent herein not liable.
    3. That the court erred when it failed to understand who prosecutes in criminal cases and in so doing arrived at the wrong finding.
    4. That the findings of the trial court were against the weight of the available evidence.
2. The appellant therefore prays that the appeal be allowed and the Judgment of the lower court be set aside with costs.

3. The background to this case is that the 1st Respondent, Ronald Khisa (formerly plaintiff) sued the appellant (1st defendant) and the Honourable the Attorney General (2nd defendant) for damages and special damages for malicious prosecution. It was alleged that on 17/8/2005, the appellant made a false and malicious report that the appellant put pepper in his eyes, wrestled him down, flogged him, ransacked his pockets and took away Kshs. 8,100/= and a log book for motor vehicle registration number KAE 264Y. As a result of the said report, the 1st Respondent was arrested and charged in Criminal case no. 3808/2002 but was acquitted. The 1st Respondent then filed Criminal Case 475/2009, seeking damages for malicious prosecution. The appellant filed a defence denying the allegations and that he merely made a complaint to the police but never made a decision to charge the 1st Respondent. In the trial court, Counsel for the 2nd Respondent raised a preliminary objection to the effect that the Tort of malicious prosecution was time barred as respects the 2nd Respondent, the same having been filed after twelve (12) months. The trial court upheld the said objection. As a result, the 2nd Respondent was not found liable for malicious prosecution but the appellant was found liable. The appellant is aggrieved by the said decision which provoked this appeal.

4. This being a first appeal, this court has the duty to re-examine all the evidence tendered in the trial court, analyse it and arrive at its own independent conclusions as was espoused in Selle & Another – V- Associated Motors Boat Company Limited (1968) EA 123.

5. The 1st Respondent (plaintiff) (PW1) testified that he was a teacher at Nasokol Girls Secondary school and on 17/8/2005, he was arrested and arraigned before court on 20/8/2005 and charged for the offence of robbery in which the appellant was the complainant; that the Appellant alleged that the 1st Respondent robbed him of a logbook for Motor Vehicle KAE 264Y and cash Kshs. 8,100/=. He denied knowing anything about the allegations; that he was acquitted on 26/8/2008. He claimed that he had sold the subject vehicle to the appellant and that he was owed money by the appellant. He produced a copy of the proceedings in the criminal case (P.exh1). He issued notice on the Attorney General on 23/2/2008. He alleged that the 2nd Respondent did not carry out investigations and had failed to act diligently.

6. On his part, the appellant (DW1) stated that the 1st Respondent sold to him a vehicle KAE 264Y but the logbook was not in his name; that they attended the Deputy Commissioner's office to resolve the matter and the appellant was asked to pay Kshs. 8,100/= to have the logbook changed to his name; that later, the 1st Respondent went to him to hire a pickup to transport a dead body to Bungoma; that on the way to introduce him to the people who needed transport, the 1st Respondent held him, poured pepper in his eyes and he could not see. He reported to police and that is why the Respondent was charged in Criminal case 3803 of 2005; that on 31/10/2005, the 1st Respondent gave the logbook to the village elder and he agreed to withdraw the case and gave the 1st Respondent Kshs.30,000/= on humanitarian grounds. According to DW1 the attack was not witnessed by anybody.

7. DW2 Eli Msangya Muhonye stated that the appellant informed him of the attack by the 1st respondent.

8. DW3 Samuel Magoma a village elder at Chemi Chemi Okur village testified that on 30/10/2005, the appellant reported to him that he had a dispute with the 1st Respondent over sale of a motor vehicle and on 31/10/2005, he recorded an agreement between them as a witness and that the 1st respondent promised to go and withdraw the case he had filed against the appellant.

9. The appellant filed submissions and urged two issues

    1. Whether the trial magistrate right to find the appellant liable for malicious prosecution?

    2. Who prosecutes cases, the state, or the individual?

10. In answer to the first question, Counsel submitted that the appellant never prosecuted the 1st respondent and that since the court dismissed the case against the 2nd respondent, it should have done the same against the appellant. He relied on the decision of Jediel Nyaga –V- Silas Mucheke CA 59/19 where the court of appeal set aside an award of damages for malicious prosecution because the Attorney General had not been joined to the proceedings.

11. Counsel also relied on David Kirimi Julius –V- Frederick Mwenda CA.no.270/2003 where the facts were nearly the same as the earlier case. Counsel submitted that once the appellant made a report to the police, his involvement ceased and it is the police who took over and prosecuted the 1st Respondent and that the appellant never arrested the 1st Respondent himself.

12. In opposing the appeal, the 1st Respondent's Counsel submitted that both the appellant and 2nd Respondent were liable for the 1st Respondent's malicious prosecution and relied on the decision of James Kahindi Simba –V- DPP & two others (2020) eKLR where the court held that a police officer must have an independent opinion of the matter before he arrests because if the reports turns out to be false, the arrest becomes unlawful. Counsel submitted that the 1st Respondent met all the essential elements for the claim of malicious prosecution and made reference on Bullen and Leake and Jacob's precedents of pleading 14th Edition paragraph 2-5 on documents to prove malicious prosecution and the case of Stephen Gachau Githaiga & Another –V- Attorney General (2015) eKLR.

13. I have now considered the pleadings, evidence adduced in the trial court, as well as the rival submissions of both Counsel. It is settled law that to prove the tort of malicious prosecution, the plaintiff must establish the following four (4) elements.

    1. That the prosecution was instituted by the defendant or someone for whose acts the defendant is responsible.

    2 . That the prosecution terminated in the plaintiff's favour.

    3. That the prosecution was instituted without reasonable and probable cause

    4. That the prosecution was activated by malice."

14. In the case of Mbowa –V- East Mengo District Administration (1972) EA 352 and Muinga –V- Attorney General 1979 KLR 138, the then East Africa Court of Appeal held this "the plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must 'unite' in order to create or establish a cause of action. If the plaintiff does not prove them, he would fail in his action"

15. It is not in dispute that the 1st Respondent was charged for the offence of robbery in criminal case 3808/2005 (Kitale) of which he was later acquitted. The law is, however clear that being acquitted of criminal charges does not necessarily connote malice on the part of the prosecutor.

16. In Nzoia Sugar Company Limited, -V- Fungututi (1988) KLR 399, the Court of Appeal held that "an acquittal per se on a Criminal charge is no sufficient basis to found a suit for malicious prosecution. Spite, ill will must be proved against the prosecutor....."

17. In its defence the 2nd defendant at paragraph 2 thereof, the respondent raised a preliminary objection to the effect that the plaintiffs suit grossly offended section 13 of the *Government Proceedings Act*; The court considered the said objection in the Judgement and found that the plaintiff (1st respondent) filed his suit on 11/9/2009 two months after the statutory period of twelve (12) months had lapsed and that no leave was sought to file the suit out of time, under Section 5 of the *Public Authorities Limitation*

Act. The suit against 2nd respondent was found to be time barred, hence the 2nd Respondent could not be liable for the tort of malicious prosecution.

18. I agree with the trial court's finding as regards the preliminary objection raised by the 2nd respondent. By dint of section 3 of the Public Authorities Limitations Act, a claim for malicious prosecution would be time barred as against the Attorney General unless instituted within one year of the last day of the period of the alleged prosecution. The 1st Respondent was acquitted on 26/8/2008 and therefore the proceedings for the tort of malicious prosecution should have been instituted within twelve months, by 25/8/2009. The 1st respondent filed the plaint on 11/9/2009 over two weeks later. The 1st Respondent did not seek the court's leave to file suit out of time. The trial court correctly found that the suit against the Attorney General was time barred.

19. The question then is whether the 1st respondent would have filed this suit against the 1st respondent alone or in other words who is the prosecutor in a case of malicious prosecution. In the cases of Jadiel Nyaga (Supra) and David Kirimi Julius (Supra) where the Attorney General had not been joined as a party, the suits were dismissed for being non suited.

20. In Court of Appeal 115/2006 Douglas Odha'imbo Apel & another –v- Telkom Kenya Ltd (2014) e KLR the Court of Appeal stated as follows;- "On the Law of malicious prosecution, we do not doubt that the judge directed himself properly in holding that the claim lay as against the Attorney General alone. He was also correct in holding that the withdrawal of the suit against the Commissioner of police and Attorney General meant that that claim was essentially non-suited."

21. On what is a prosecution and who is the Prosecutor in a malicious prosecution, Clark and Lindsell on Torts page 825 at 16 08, had this to say "in establishing the first essential element of the tort of malicious prosecution, two key issues must be addressed. What constitutes a prosecution and who is the prosecutor."

22. To prosecute is to set the law in motion, and the law is only set in motion by an appeal to some person clothed with judicial authority in regard to the matter in question, and to be liable for malicious prosecution, a person must be actively instrumental in so setting the law in motion".

23. On who is the prosecutor, Clark and Lindsell at paragraphs 16-18 states "their Lordship confirmed that a person who merely gives information to the police on the basis of which a decision to prosecute is made by the police or the Crown. The prosecution source will not be liable for malicious prosecution. The informant will not be the prosecutor" However, a complainant will be regarded as the prosecutor and liable for malicious prosecution if the following conditions are met;

    i. The defendant falsely and maliciously gave information about an alleged crime to a police officer stating a willingness to testify against the claimant and in such manner as makes it proper to infer that the defendant desired and intended that a prosecution be brought against the claimant.

    ii. The circumstances are such that the facts relating to the alleged crime are exclusively within the knowledge of the defendant so that it is virtually impossible for the police officer to exercise any independent discretion or judgement on the matter.

    iii. The conduct of the defendant must be shown to be such that he makes it virtually inevitable that prosecution will result from the complaint. His conduct is by such nature that if a prosecution is instituted by the police officer, the proper view is that the prosecution has been procured by the complainant. The judgement clearly establishes that the claimant must demonstrate that the defendant acted in such a manner as to be responsible directly for the

initiation of proceedings. The responsibility for initiating the prosecution must be his, not the result of a truly independent Judgment to prosecute on the part of the police, or some other party"

24. In the instant case, though the trial court in the criminal case made a finding that the offence as charged was not proved and it was likely instigated by the differences between the appellant and 1st respondent over sale of a motor vehicle, however, the police did not have an opportunity to explain what really transpired that led them to decide to prefer the charges against the 1st respondent. It follows that the absence of the Attorney General in this matter means that it cannot see the light of day, with the appellant alone as the defendant. As held in Douglas case (supra) it was necessary that the Attorney General be a party (Respondent) in the matter to explain why the police made a decision to prosecute. For the above reasons, I find no reason to consider the other essential elements in a malicious prosecution. The trial court erred in finding the appellant liable for malicious prosecution without the presence of the Attorney General in the matter. The appeal is merited and is allowed. The judgment of the trial court dated 13/12/2019 is hereby set aside with costs to the appellant.

DELIVERED, DATED AND SIGNED AT KAPENGURIA THIS 27TH DAY OF FEBRUARY, 2025

R. WENDOH.

JUDGE.

Judgment delivered virtually in the presence of

Appellant – No appearance

Respondent – No appearance

Juma/Hellen – Court Assistants.