



REPUBLIC OF KENYA



KENYA LAW
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**Narendra v Nyongesa (Civil Appeal E008 of 2023)
[2025] KEHC 1331 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1331 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL E008 OF 2023
JR KARANJA, J
FEBRUARY 27, 2025**

BETWEEN

GUDHKA JAY NARENDRA APPELLANT

AND

JOHN JUMA NYONGESA RESPONDENT

JUDGMENT

1. This appeal arises from the judgment of the Resident Magistrate delivered on 13th February, 2022 in Kericho CMCC No. E005 of 2022, in which the Appellant, Gudhka Jay Narendra, was the first Defendant and the Respondent, John Juma Nyongesa was the Plaintiff.
2. It was pleaded by the Plaintiff/Respondent that on the 17th March, 2018, the first Defendant / Appellant maliciously and without reasonable or probable cause laid a false information against the plaintiff at Kericho police station vide OB No. 24/17/3/19 that the Plaintiff jointly with others attempted to rob the first Defendant of his days cash sale using a home made pistol to threaten him .That, as a result of the complaint, the plaintiff was arrested on 17th March, 2019 and confined in police cells until 22nd March, 2019 when he was arraigned in court for a charge of attempted robbery with violence contrary to section 297 (2) of the *Penal Code*.
3. The Plaintiff further pleaded that he was maliciously prosecuted for the offence, but was acquitted of all the charges in a judgement delivered by the court on 2nd December, 2020. He therefore contended that his arrest imprisonment and prosecution were all actuated by malice and/or absence of reasonable and probable cause. That, he was wrongfully imprisoned and deprived of his liberty defamed and greatly injured in his credit, character and reputation by being branded a robber. That, he also suffered considerable mental and body pain and anguish for a period of two (2) years when the case was in court.
4. The Plaintiff contended further that he suffered considerable trouble, inconvenience, anxiety and expenses and was greatly injured in his ability to seek alternative employment thereby suffering loss



and damage. He therefore prayed for judgment against...the defendants jointly and severally for special damages in the sum of Ksh 55,000/= and general damages for unlawful/or false arrest and malicious prosecution. He also prayed for damages in defamation together with costs of the suit and interest.

5. The first Defendant/Appellant denied the claim on the basis of his pleadings and contentions contained in his statement of defence dated 22nd February, 2022. He therefore prayed for the dismissal of the Plaintiffs case with costs. After trial, judgement was entered in favour of the plaintiff/respondent against the first defendant/appellant and another jointly and severally for the total sum of 2,550,000/= being both general and special damages. The plaintiff was also awarded costs of the suit and interest.
6. Being aggrieved with the trial court's decision and judgment, the first defendant/appellant preferred the present appeal on the basis of the seven (7) grounds set out in the memorandum of appeal dated 7th March, 2023. He therefore prays that the appeal be allowed and that the judgment of the trial court be quashed and/or set aside and be substituted for a judgment dismissing the case as against himself.
7. The hearing of the appeal was by written submissions filed herein by Nyamurongi & Co. Advocates on behalf of the Appellant and by Tengekyon & Koske Co. Advocates on behalf of the Respondent. This court gave due consideration to the appeal, the supporting grounds and the rival submissions for and against the appeal. Its role at this juncture was to reconsider the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.
8. In that regard, the evidence led by the Respondent (PW1) and the Appellant (DW1) was given due consideration in both its oral and written presentation. Apparently, the two were the only witnesses who testified in the persecution and defence of the case respectively and in the opinion of this court. there was no particular dispute that following a complaint made to the police by the Appellant, the respondent was arrested and charged with the criminal offence of robbery with violence for which he underwent a lengthy prosecution or trial and emerged victorious with an acquittal by the court of all the charges facing him. The judgment of the criminal court dated 2nd December, 2020 indicated that the respondent was acquitted under Section 215 of the Criminal Procedure Code. i.e after a full hearing of the case.
9. The present civil suit subject of this appeal was evidently ignited by the respondent's acquittal in the criminal case and there being no contest that he was arrested, charged and prosecuted at the instance of the Appellant the big question was whether the entire process was actuated by malice on the part of the Appellant.
10. In that regard, the Trial Court found in favour of the Respondent and in so doing relied heavily on the evidence and the outcome in the criminal case. The acquittal of the Respondent appears to have been the all important factor in attributing malice and absence of reasonable or probable cause upon the Appellant. The fact that there was an attempted robbery against the Appellant was not disputed, neither was the fact that the Appellant reported and made a complaint in that regard.
11. It was within the Appellants civic duty to report the offence to law enforcement agencies who were discharged with the responsibility to investigate the report or complaint and take necessary action against any suspect. It was not the responsibly of the Appellant to investigate the offence. Such action fell within the lawful mandate of the police as extended to the office of the director of public prosecutions.
12. The mere fact that a person had been acquitted of a criminal charge does not necessarily connote malice on the part of a complainant or a prosecutor. To prosecute a person is not prima-facie tortuous, but to do so dishonestly unreasonably is ,the burden of proving that the prosecutor did not act honestly



or reasonably being on the person prosecuted (see James Karuga Kiiru Vs Joseph Mwamburi & Others (2001[eKLR]).

13. A claim founded on malicious prosecution is governed by the following principles: -
1. He plaintiff must show that the prosecution was instituted by the defendant or by someone for whose acts he is responsible.
 2. The plaintiff must show that the prosecution terminated in his favour.
 3. The plaintiff must demonstrate that the prosecution was instituted without reasonable and probable cause.
 4. The plaintiff must also show that the prosecution was actuated by malice.

These principles were summarized by the learned authoris of Clerk and Lindsell on Torts, 18th at page 823 in the following terms:-

“in an action of malicious prosecution the claimant must show first that he was prosecuted by the Defendant, that is to say that the law was set in motion against him on a criminal charge, secondly that the prosecution was determined in his favour, and thirdly that it was without Reasonable or probable cause , fourthly that it was malicious. The onus of proving every one of this is on the claimant”.

14. It is the finding of this court that in this case whereas the Respondent established and proved by necessary undisputed evidence the first and second essentials or principles of malicious prosecution, he was unable to provide sufficient credible and cogent evidence to establish and prove the third and fourth essentials of malicious prosecution. He also did not lead sufficient evidence to prove that he was falsely arrested and confined.
15. It would therefore follow that the finding by the trial court that the third and fourth essentials of malicious prosecution were proved by the respondent was erroneous and against the applicable principles and also against the weight of the evidence. In the circumstance grounds 3,4,5 and 6 of the memorandum of appeal are hereby sustained thereby diminishing the relevancy of ground 7 which is on the quantum of damages. In any event, the award of damages made by the trial court was reasonable, neither inordinately high nor inordinately low.
16. Grounds 1 and 2 are essentially a challenge of the jurisdiction of the trial court to hear and determine the matter for want of time. The appellant’s contention was that the trial court was statute barred from dealing with the matter by dint of section 3(1) of the public authorities Limitations Act (Cap 39 LOK) which provides that; -

- (1). No proceedings founded on tort shall be brought against the government or a local authority after the end of twelve months from the date of which the cause of action occurred”

17. Although the issue of jurisdiction can be raised at any time or stage as was held in Jamal Salim Vs Yusuf Abdulahi Abdi & Another (2018) eKLR, it must however be raised at the earliest opportunity particularly during trial as part of the pleadings and/or by way of a preliminary objection. The Appellant ought to have raised the issue at the time of trial and doing so at this appellate stage smacks of ambush and/or an afterthought; Consequently, this court is disinclined to sustain grounds 1 and 2 of the appeal which are hereby overruled and dismissed.



18. Otherwise, on account of grounds 3 to 6 the appeal is merited and is hereby allowed as against the Respondent to the extent that the impugned judgment be set aside and substituted for a judgment dismissing the case against the Appellant who shall have the costs thereof as well as the costs of this appeal.

19. Ordered accordingly.

J.R. KARANJAH

JUDGE.

DATED AND DELIVERED THIS 27TH DAY OF FEBRUARY, 2025.

