



REPUBLIC OF KENYA



KENYA LAW
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**Oremo & another v Namisi & 3 others (Civil Appeal 93 of 2022)
[2025] KEHC 5475 (KLR) (29 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5475 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 93 OF 2022
SC CHIRCHIR, J
APRIL 29, 2025**

BETWEEN

ALBERT MUMANI OREMO 1ST APPELLANT

GETRUDE KHASUNGU 2ND APPELLANT

AND

HANNINGTON LITUNYA NAMISI 1ST RESPONDENT

THE HON ATTORNEY GENERAL 2ND RESPONDENT

**PRINCIPAL SECRETARY INTERIOR AND COORDINATION 3RD
RESPONDENT**

SERGEANT LUCY WAITHERA 4TH RESPONDENT

*(Being an Appeal from the Judgment of Hon. Hazel wandere(SPM) delivered on 1st
November 2022 in Kakamega chief Magistrate's court Civil case No. 368 of 2019)*

JUDGMENT

1. The 1st Respondent filed suit at the chief Magistrate's Court at Kakamega seeking for damages for unlawful arrest, confinement, malicious prosecution and of defamation of his character. The defendants in the suit were the Appellants herein, and the 2nd to the 5th Respondents.
2. The suit arose out of the prosecution of the 1st respondent in Kakamega Chief Magistrate Court Sexual Offence Case No. 94 of 2014, wherein the 1st Respondent was acquitted under Section 210 of the [Criminal Procedure Code](#).



The plaintiff/ 1st Respondent's case.

3. It was the plaintiff's Case that the Charge of defilement and the alternative of the charge of having an indecent act with a child was actuated by malice. On particulars of malice, he stated that he was framed, as no offence was committed; that he was subjected to inhuman treatment at the time of his arrest and confinement ,he was mentally tortured by being subjected to a DNA test; he was defamed by the charges and finally that the charge was based on a pre-existing family feud between himself and the 1st Appellant herein.
4. He further pleads that his image was tarnished, that he incurred costs on court attendances and his rights to liberty were infringed.
5. The Attorney- general filed a defence on behalf of the 2nd, 3rd, 4th and 5th respondents. It was these respondents' case that the arrest was lawful. That there was reasonable belief that the 1st respondent had committed an offence. It is denied that the arrest and prosecution was actuated by malice.
6. The respondents also denied the infringement of rights and the assertion that the 1st respondent's image had been tarnished.
7. The appellants denied making the report to the police but state, in the alternative, that the report was made on the reasonable belief that an offence had been committed. It is further stated that their role was limited to making a report which report was not motivated by malice. The damage suffered by the 1st were denied.
8. At the conclusion ,the trial court returned a verdict in favour of the 1st respondent and awarded him general damages of Kshs. 3,000,000. Aggrieved by the outcome, the Appellants filed the present Appeal.

Memorandum of Appeal

9. The Appellants have set out the following grounds
 1. That the learned Magistrate erred in law and in fact by failing to properly analyze the evidence on record and find that the key ingredients of the tort of malicious prosecution had not been proved on the balance of probabilities.
 2. The Learned Magistrate erred in Law and fact in failing to take into account the Appellants' submissions.
 3. The award of Kshs. 3,000,000 as global sum ,awarded as general damages is excessive and not based on any judicial precedent and/or submission by counsel
 4. The judgment of the Learned Magistrate is a miscarriage of the justice and an affront to the constitutional right to the appellant to enjoy protection of law.
10. The Appeal proceeded by way of written submissions.

Appellants' submissions

11. The Appellants submit that for a claim of malicious prosecution to succeed, the plaintiff must prove that the suit was instituted by the defendant or by someone for whose acts he is responsible; that the prosecution was instituted without reasonable of probable cause , that it was actuated by malice and finally that the prosecution was terminated in the plaintiff's favour.In this regard reliance has been



placed on the decision of Justice C. Kariuki in Susan Mutheu Muia Joseph Makau Mutua (2018) eKLR.

12. It is further submitted that the role of the Appellants ended at the point of reporting the offence and that they played no role in what happened thereafter. The Appellants has relied on the cases of Susan Mutheu (Supra), the case of James Kanga Kiiru v Joseph Mwomburi & Others CA No. 171 (2000 and Wambua v Mboya & 2 Others [2022] KECA 84 (KLR).
13. The Appellants further submit that no malice was proved, as the Appellant were not responsible for the prosecution; that it was not sufficient to simply state that he was inhumanly treated without any proof; that pursuant to Section 107,108 and 109 of the *Evidence Act*, the burden of proof was on the 1st Respondent; that consequently, he had the burden to prove that he was tortured or subjected to inhuman treatment, but he failed to.
14. On the mental torture, that the 1st respondent is alleged to have suffered, it is submitted that the DNA test was for his own benefit and was done under an order of the court , in any event.
15. On defamation, the Appellants urge the court to take judicial Notice of the fact, people are being prosecuted every day in the courts and facing a charged do not constitute defamation against a person.
16. while relying on the decision of Justice Aburili in Elisha Ochieng Odhiambo v Booker Ngesa Omolo (2021) eKLR, the Appellants argue that the defamatory words complaint of, should demonstrate that they injured the reputation of the person’s character or dignity in the eyes of others.

1st Respondent’s submissions

17. The respondent adopts the definition of the tort of malicious prosecution as set out in the case of Murunga v A.G [1979] KLR.
18. The respondent submits that it is not disputed that the charges preferred at the instance of the Appellants.
19. On whether there was reasonable or probable cause, the respondent has relied on the case of Kagane & Others v A.G & Anor (Citation not provided), where it was held; “the test whether the prosecution was instituted without reasonable and probable cause is whether the material known to the prosecution would have satisfied a prudent and cautious man that the plaintiff was probably guilty of the offence”.
20. The respondent argues that his arraignment 2 years after the alleged commission of the crime, and the conducting of the DNA long after he had already been charged demonstrates malice on the part of the Appellants and the Other respondents. That, despite the outcome of the DNA test, which ruled him out as the father of the child, the alleged product of defilement, there was no evidence that further investigations were done to identify the father of the child with a view to prosecuting him.
21. It is argued that there was no probable cause to charge the 1st respondent. It is further submitted that the 1st respondent spent 10 months in jail before being retried and perhaps the trial court took it as a factor in awarding the amount of damages.

Analysis and determination

22. The first appeal is considered a retrial, and the role of the first appellate court is to review the evidence ,evaluate it and arrive at its own conclusions. An allowance must however be made for the fact that unlike the Appellate court, the trial court had the benefit of hearing and seeing the witnesses first hand.(see : Selle & Associated Motor Boat & Co Ltd [1968] E.A 123)



23. A brief background to the suit is necessary: On 20/2/2014, the 1st respondent was charged with the offence of defiling a child. He pleaded guilty. He was convicted on his own plea and sentenced to 15 years in prison. It emerges from the proceedings that the 1st respondent went to the High Court to appeal against the conviction and the High Court reversed the guilty verdict, and ordered for a retrial.
24. The re-trial began on 6/11/2014, when the respondent took plea. This time round he denied the charges. Thereafter the trial was characterized by several adjournment and a lot of going back and forth on issues pertaining to the paternity test on the child who was allegedly born out of the defilement. Eventually the test was done on 13/4/2017, and the result excluded the 1st respondent as the father of the child.
25. The prosecution sought to withdraw the case under Section 87 (a) of the CPC, the defence opposed the Application and the court sided with the defence. The court thereafter went ahead to discharge the 1st respondent under Section 210 of the criminal procedure code, for want of evidence. Pursuant to the discharge the 1st respondent filed the lower court suit herein, seeking prayers as earlier referred to.
26. I have identified the following issues for determination.
 - a). Whether the tort of malicious prosecution was proved
 - b). whether the damages was excessive.

Whether malicious prosecution was proved

27. The tort of malicious prosecution is founded on four main ingredients. These are :
 - a) The plaintiff must show that prosecution was instituted by the defendant, or by someone for whose acts he is responsible;
 - b) That the prosecution terminated in the plaintiff's favour
 - c) That the prosecution was instituted without reasonable and probable cause;
 - d) That the prosecution was actuated by malice

(Ref. Mbowa v East Meno District Administrator [1972] E.A 352)
28. On whether the prosecution was instigated by the Appellants, the Appellants have argued that their role ended at the reporting the crime, and that they had no role in any subsequent process that followed. The imperative question in this regard is, who triggered the prosecution? Did the police get up on their own and started looking for the 1st respondent? The report which the appellants admit to have made is what set in motion the entire prosecution. In this regard I find reliance on the case of Gitau v A.G [1190] KLR 13 in which the court while explaining "setting in motion" a prosecution stated as follows: "setting the law in motion" in this context has not the meaning frequently attributed to it of having a police officer take action such as effecting arrest. It means being actively instrumental in causing a person with some judicial authority to take action that involves the plaintiff in a criminal charge against another before a magistrate" (Emphasis added). Thus I am satisfied that the people who set in motion the prosecution are the Appellants, who were the daughter and father at the time.
29. On the 2nd element, it is not disputed that the prosecution was terminated in favour of the 1st respondent.
30. The next issue is whether the prosecution was instituted without a reasonable or probable cause. In Kagane v A.G [1969] E.A 643, the court had this to say about "reasonable & probable cause"; it held: "Reasonable cause is an honest belief in the guilt of the accused based upon a full conviction founded



on reasonable grounds of existence of a state of circumstance which, assuming them to be true, would lead an ordinary prudent and cautious man placed in the position of the accused to the conclusion that the person charged was probably guilty”.

31. To address this issue what needs to look at the basis of the criminal charge. There was no witness who testified in the criminal case , not even the complainant. Indeed in the trial court she admitted during cross- examination that she never recorded a statement at the police station. The 2nd Appellant was the victim and what I would therefore call “ the star witness”. How was it possible that her statement had not been recorded even after the case had been in court for a while? On what basis did the police commence investigation, if any investigation was done at all? Why was the prosecution hanging onto the DNA test as if their case was wholly dependent on it, yet the law allows conviction of a perpetrator in sexual offences to be convicted on the complainant’s evidence , subject to certain conditions being met? In my view there was no investigations done and that may explain why no witness had testified by the time the court discharged the accused. It would also explain why with the DNA test returning a negative outcome the prosecution was quick to seek for a withdrawal . It is sad that a man’s freedom and image was treated so casually by the 2 to the 5th respondents. They did not even bother to come and defend themselves in court. In a nutshell there was no reasonable or probable cause to prosecute the 1st respondent.
32. Was the prosecution actuated by malice? It is trite law that an acquittal on a criminal trial does not per se connote malice on the part of the complainant or the prosecutor. In *James Karuga & 2 Others [2001] eKLR*, the court held: to prosecute a person is not prima facie tortious but to do so dishonestly is unreasonably is -----”.
33. The Appellant told the court she was told by one Millicent on what to come and say in court. There was no need for the 2nd Appellant, who was the alleged victim , to be told what to say if she knew her truth. Further the absence of evidence adduced, failure to record statements meant that the prosecution was unreasonable and thus malicious as per the finding in *James Kanga’s case.*(supra)
34. In the end , I am satisfied that the 1st respondent established a case of malicious prosecution against the Appellants and the 2nd to the 5th respondents.
31. On damages, the Appellants argues that the award was excessive. In assessing damages the guiding principle are well settled. In the case of *power lighting Company v Zakayo Saitoti & Anor [2008] KEHC 504 (KLR)* the principle was stated as follows;
 - “(1) Damages should not be inordinately too high or too low.
 - (2) They are meant to compensate a party, for the loss suffered but not to enrich a party, and as such they should be commensurate to the injuries suffered.
 - (3) Where past decisions are taken into consideration, they should be taken as mere guides and each case depends on its own facts.
 - (4) Where past awards are taken into consideration as guides an element of inflation should be taken into account as well as the purchasing power of the Kenyan shillings, then at the time of the judgment.”
35. I have considered the findings of the trial court in this regard. The magistrate stated “the plaintiff was charged after completing his secondary education and was not able to further his education; he spent 10 months in jail on a mistrial. I award the plaintiff global sum of Kshs. 3,000,000 general damages for malicious prosecution”



36. I agree with the appellant that the trial Magistrate factored in some irrelevant factors. Further it was erroneous for the trial Magistrate to take into account the 1st trial which was nullified by the High court . The respondent had pleaded guilty during the first trial. Further the 1st respondent claim is not based on that first prosecution. Indeed the first prosecution ought not to have featured completely in the magistrate's findings
37. I have further noted that the trial court did not cite any authority for purpose of comparison.
38. I have had a look on some of the past decisions on damages for malicious prosecution. In the case of National Transport Authority & 2 Others v Eustance Ongota [2020] KEHC 2818 (KLR) the high court reduced an award of Kshs. 3,500,000 to Kshs. 500,000. In the case of Mbure (Supra) the high court upheld the trial court award of Kshs. 700,000 for malicious prosecution. In Joseph Simiyu Prichane & 11 Others v A.G & 2 Others [2020] KEHC 4984(KLR) the high court awarded Kshs. 1,000,000 for malicious prosecution.
39. Taking into account the above stated decisions and the inflationary trends since the decisions were made, I consider an award of Kshs 1,500,000 a fair compensation. The trial court award was excessive and is accordingly set aside.
40. In conclusion I hereby proceed to make orders as follows;
- a. The trial court finding on liability is hereby upheld.
 - b. The award of Kshs. 3,000,000 is hereby set aside, and substituted with Kshs. 1,500,000
 - c. The Appeal, having partially succeeded ,each party to meet their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY, AT ISIOLO THIS 29TH DAY OF APRIL 2025 .

S. CHIRCHIR

JUDGE.

In the presence of :

Godwin Luyundi- Court Assistant

Mr. Iddi for Mr. Nandwa for the 1st respondent.

