



REPUBLIC OF KENYA



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**Khasakhala v Oyaywa & 2 others (Civil Appeal E002 of 2024)
[2025] KEHC 5430 (KLR) (28 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5430 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CIVIL APPEAL E002 OF 2024**

**JN KAMAU, J
APRIL 28, 2025**

BETWEEN

ROBERT KHASAKHALA APPELLANT

AND

SAMSON OYAYWA 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

INSPECTOR GENERAL OF POLICE 3RD RESPONDENT

(Being an appeal from the Judgment and Decree of Hon R. M. Ndombi (PM) delivered at Vihiga in the Senior Principal Magistrate's Court Civil Case No 28 of 2018 on 20th April 2023)

JUDGMENT

Introduction

1. In her decision of 20th April 2023, the Learned Trial Magistrate, Hon R. M. Ndombi, Principal Magistrate apportioned liability equally against the Appellant and the 2nd Respondent herein and entered Judgment in favour of the 1st Respondent in the following terms:-

General damages Kshs 150,000/=

Appellant Kshs 75,000/=

2nd Respondent(sic) Kshs 75,000/=

Plus costs and interest from time of filing suit and interest on general damages from the date of judgment.

2. Being aggrieved by the said decision, on 1st February 2024, the Appellant herein filed a Memorandum of Appeal dated 26th January 2024. He relied on six (6) grounds of appeal.



3. His Written Submissions were dated 16th August 2024 and filed on 20th August 2024 while those of the 1st Respondent were dated and filed on 28th August 2024. The 2nd and 3rd Respondents did not file any written submissions. The Judgment herein is therefore based on the said Appellant's and 1st Respondent's Written Submissions which parties relied upon in their entirety.

Legal Analysis

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
5. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
6. Having looked at the Grounds of Appeal and the parties' Written Submissions, it appeared to this court that all the Grounds of Appeal were related and the issue that had been placed before it for determination was whether or not the 1st Respondent had proven his case against the Appellant on a balance of probabilities as required in civil cases.
7. Right from the onset, this court noted that the Trial Court's judgment relating to the apportionment of liability was confusing as it referred to the 2nd Respondent as the 3rd Respondent interchangeably. This court took judicial notice that it was the 2nd Respondent who represented the 3rd Respondent and hence it was the 3rd Respondent who ought to have been found liable.
8. Notably, the Appellant submitted that the 1st Respondent was arrested and charged in court pursuant to a complaint by one Risper Anyona (hereinafter referred to as "PW 2"). He asserted that the 1st Respondent never produced a copy of the Charge Sheet or Investigation Diary to ascertain which offence he was charged with or who made the report that led to his said arrest.
9. He contended that he produced copies of photos showing damage to his house and that the Investigating Officer also testified that he visited his house and saw the damage. He therefore submitted that he had probable cause in making his statement to the Police contrary to the holding of the Trial Court. He was emphatic that that it was PW 2 who reported the matter to the Police but the 1st Respondent did not sue her.
10. He contended that the Trial Court failed to analyse whether there was malice on his part. He reiterated that the dispute in issue was not between him and the 1st Respondent but between that it was between the 1st Respondent and PW 2. He pointed out that the 1st Respondent did not adduce evidence to rebut his assertion regarding destruction of his property. He asserted that he did not have a grudge against the 1st Respondent so as to have recorded a statement against him.
11. He added that the Trial Court which heard the criminal case noted in its decision that the Police had conducted their investigations hurriedly. He submitted that he complained of the said poor investigations to the Regional Commander, Kakamega.
12. He further asserted that the 1st Respondent did not lead evidence on the injury that he suffered so as to have attracted the damages that he was awarded by the Trial Court. In this regard, he placed reliance on the cases of *Samson Jumba & 3 Others vs Hellen Jendeka Ndagadwa & 2 Others* [2021]eKLR and *Socfinaf Kenya Limited vs Peter Guchu Kuria & Another*[2002]eKLR where the common thread



was that the mere fact that a prosecution terminated in favour of a party was not sufficient proof of malicious prosecution or false imprisonment and that evidence of spite, ill will, lack of reasonable and probable cause had to be established.

13. He argued that the mere fact that the 1st Respondent was acquitted did not mean that there was sufficient evidence to prove malicious prosecution. He was categorical that in the court's ruling on a no case to answer stage (sic), the criminal court made a finding that there was sufficient evidence to put the 1st Respondent on his defence.
14. To buttress his point, he cited the case of *Mbowa vs East Menjo District Administration* [1972]EA 352, cited in the case of *Samson Jumba & 3 Others vs Hellen Jendeka Ndagadwa & 2 Others* (Supra) which laid out the elements to be proved in a malicious prosecution being that there must be no legal reason for instituting the criminal proceedings, the purpose of the prosecution should be personal and spite rather than for the public benefit, the proceedings must have been instituted by the defendant and the same must have been terminated in the plaintiff's favour.
15. He was emphatic that he made no malicious report to the police and that in criminal proceedings, one could be charged with an offence where a report had not been made to the police especially where an offence emanated from another reported offence as was the case herein.
16. He pointed out that the 1st Respondent failed to plead particulars of any damage he suffered. He faulted the Trial Court for not giving the reasons that it based to award damages to the 1st Respondent. He urged this court to allow his appeal as prayed.
17. On his part, the 1st Respondent referred to the evidence tendered by witnesses during trial and submitted that a tort of malicious prosecution was well founded. In this regard, he placed reliance on the case of *Anthony Shiveka Alielo vs Kenya Post Office Savings Bank & Another* [2019] eKLR which set out the ingredients to be proved in a case for malicious prosecution.
18. He contended that although the Appellant denied having instituted any prosecution as against him, he was the complainant in the criminal case and hence instituted the prosecution case against him. He further asserted that the Appellant did not object to the suit being terminated in his favour (sic).
19. He pointed out that the said Prosecution case was instituted without any probable cause. He asserted that from the record, it was evident that although the Appellant never made any report at the police station, he did not testify as a witness but as the Complainant in respect of the second Count (sic).
20. He further contended that the prosecution was actuated by malice and that there was no reasonable and probable cause to mount the same as the Appellant had not filed any report.
21. He was categorical that he had proved the tort of malicious prosecution and that the award of damages would suffice. He urged this court to dismiss the Appellant's appeal.
22. The tort of malicious prosecution constituted an arrest and prosecution of a claimant without reasonable and/or probable cause. The Court of Appeal for Eastern Africa in *Mbowa vs East Menjo District Administration* (Supra) stated that the essential ingredients of the tort of malicious prosecution were as follows:-
 - a. the criminal proceedings must have been instituted by the defendant;
 - b. the defendant must have acted without reasonable or probable cause;
 - c. the defendant must have acted maliciously;
 - d. the criminal proceedings must have been terminated in the plaintiff's favour.



23. This court also had due regard to the case of Attorney General vs Peter Kirimi Mbogo & Another [2021] eKLR, where it was held that all the aforementioned four (4) elements had to apply conjunctively and had to be proved to successfully claim for damages for malicious prosecution.
24. It was not in dispute that the 1st Respondent was charged in a criminal case and acquitted. There was therefore no need to analyse whether or not he had demonstrated two (2) ingredients namely, that a case was instituted against him and that the criminal proceedings were terminated in his favour.
25. However, it was in dispute as to whether it was the Appellant who instituted the said criminal proceedings against the 1st Respondent or not and if there was any malicious prosecution.
26. This court assessed, evaluated and analysed the evidence that the 1st Respondent adduced at the Trial Court to establish if he had demonstrated that the criminal proceedings were instituted by the Appellant without any probable or sufficient cause and that the same were actuated by malice.
27. Notably, the 1st Respondent testified that his claim was for unlawful arrest and confinement at Luanda Police Station. His evidence was that he was not given reasons for his arrest. He blamed the Appellant for having reported him to the police on allegations of destroying his property. He pointed out that he was acquitted of the Criminal Case No 62 of 2017.
28. When he was cross-examined, he further stated that there were two (2) issues involved, that is, land and damage to property and that there was a dispute between PW 2 and her father but that the Appellant claimed that he had destroyed his property.
29. He averred that the Police could only conduct investigations when a report had been made. He stated that it was PW 2 who reported the matter to the police that she saw him throw stones at the Appellant's home.
30. He further testified that the Appellant took photos of his alleged damaged property and presented them to the Police resulting in his arrest. He produced the proceedings and Judgment of the Criminal Case No 62 of 2017 as exhibits in his case.
31. In his testimony, the Appellant said that he and PW 2 reported the said criminal case against the 1st Respondent and they were given Occurrence Book (OB) number. He confirmed that he testified as a witness in the said case. In his cross-examination, he added that the 1st Respondent did not sue PW 2.
32. A reading of the criminal proceedings indicated that the 1st Respondent was jointly charged with another on two (2) counts of malicious damage to property contrary to Section 339(1) of the [Penal Code](#) Cap 63 (Laws of Kenya).
33. The substance of the charges was read to the 1st Respondent which he denied. The matter proceeded for hearing whereupon he was acquitted under Section 215 of the [Criminal Procedure Code](#) Cap 75 (Laws of Kenya).
34. Right from the outset, this court noted that there were two (2) conflicting evidence on whether the Appellant reported the 1st Respondent matter to the Police. Notably, from the evidence on record, it was clear that the Appellant and PW 2 reported the matter to the police. However, this court noted that the 1st Respondent in his Complaint, pleaded that the Trial Court dealing with the Criminal Case No 62 of 2017 had held that the Appellant did not make any report to the police to sustain the charges against him, a position which the Trial Court herein also relied upon.



35. Be that as it may, it was immaterial who reported the matter to the police as the criminal proceedings were still instituted and the Appellant was one of the complainants. Thus, the element of the Appellant having instituted the criminal proceedings against the 1st Respondent had been proved.
36. Once a complaint was made, investigations and the decision to charge was undertaken by the National Police Service (NPS) and the Office of Director of Public Prosecution (ODPP). Both the NPS and ODPP were not under the control or direction of any person or authority to investigate or to charge the 1st Respondent herein.
37. Article 158 (10) of *the Constitution* of Kenya, 2010 provides as follows:-
- “The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.”
38. Article 245 (4) (a) and (b) of *the Constitution* of Kenya further states as follows:-
- “The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to—
- (a) the investigation of any particular offence or offences;
- (b) the enforcement of the law against any particular person or persons; or...”
39. Malice cannot automatically be transferred to the prosecutor unless it was proved that there was collusion between the complainant and the prosecutor prosecuting the matter as was held in the case of Music Copyright Society of Kenya vs Tom Odhiambo Ogowl [2014] eKLR.
40. The 1st Respondent was required to prove that the prosecution was actuated by malice. He ought to have led evidence to prove malice on the part of the Appellant and the 3rd Respondent. A keen analysis of the evidence on record showed that he did not demonstrate that there was any malice on the part of the NPS and/or the ODPP.
41. He seemed to have focused only on blaming the Appellant and overlooked the burden of proving his case against the 3rd Respondent. He seemed to assume that his acquittal was enough to prove his claim in malicious prosecution. If there was malice and/or probable cause, he did not demonstrate and/or prove the same.
42. This court also noted that he did not plead particulars of malice in his Plea as the Appellant submitted. Indeed, it was trite law that parties were bound by their pleadings, a position that the Trial Court failed to consider and address in its decision.
43. Accordingly, having carefully considered the Written Submissions by the respective parties, this court found and held that the 1st Respondent failed to prove his case for malicious prosecution to the required standard, which in civil cases is proof on a balance of probability. This court therefore faulted the Trial Court for having found that the 1st Respondent had proved his case on a balance of probabilities. Consequently, the 1st Respondent’s prayer for general damages was not justified and the same hereby fails.
44. In the premises, Grounds of Appeal Nos (1), (2), (3), (4), (5) and (6) of the Memorandum of Appeal were merited and the same be and are hereby allowed.



Disposition

45. For the forgoing reasons, the upshot of this court's decision was that the Appellant's Memorandum of Appeal dated 26th January 2024 and lodged on 1st February 2024 was merited and the same be and is hereby allowed. The effect of this Judgment is that the Judgment by the Trial Court in Vihiga SPMCC No 28 of 2018 delivered on 20th April 2023, be and is hereby set aside and/or vacated and the same be and is hereby substituted with the order that the 1st Respondent's suit be and is hereby dismissed with costs to the Appellant herein.
46. As this matter emanated from criminal proceedings that were instituted by the Republic of Kenya, there will be no orders as to costs. It is hereby directed that each party will bear its own costs of the Appeal herein.
47. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 28TH DAY OF APRIL 2025

J. KAMAU

JUDGE

