



REPUBLIC OF KENYA



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**Kioni v Mugo & another (Civil Appeal E016 of 2023)
[2025] KEHC 8993 (KLR) (24 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8993 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CIVIL APPEAL E016 OF 2023
LN MUTENDE, J
JUNE 24, 2025**

BETWEEN

MAINA NJIRI KIONI APPELLANT

AND

FRANCIS KAGIKA MUGO 1ST RESPONDENT

HON. ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

1. The Appellant herein was arraigned following a complaint lodged by the 1st Respondent to the 2nd Respondent's agents for allegedly omitting to take precautions against any probable danger from any animal in his possession namely a dog that purportedly bit the 1st Respondent's sheep occasioning its death. The trial culminated into an acquittal of the Appellant under Section 202 of the *Criminal Procedure Code*.
2. Following the legal outcome, the Appellant instituted a civil case against the 1st Respondent who lodged the complaint at Kwa-Wanjiku Police Post, Ng'arua Police Station and the 2nd Respondent on behalf of the National Police Service. The claim was for general damages for malicious arrest, imprisonment and malicious prosecution; special damages in the sum of Kshs.2,650/-, costs and interest. In a counterclaim, the 1st Respondent averred that indeed his sheep were attacked by the Appellant's dogs and he incurred expenses of Kshs.9,330/- which he claimed. The trial court heard and determined the matter and dismissed both the claim and counterclaim in their entirety.
3. Aggrieved by the decision of the court, the Appellant preferred the instant appeal on grounds that;
 1. The learned trial Magistrate erred in law and fact by failing to find that the 1st Respondent report to the police was actuated by malice.



2. The learned trial Magistrate erred in law and fact by failing to find that the 1st Respondent did not have a justifiable complaint against the Appellant.
 3. The learned trial Magistrate erred in law and fact by failing to find that the police did not conduct proper investigations to the criminal complaint lodged by the 1st Respondent against the Appellant.
 4. The learned trial Magistrate erred in law and fact by failing to find that there was no justifiable cause for the police to charge the Appellant with a criminal charge pursuant to the complaint lodged by the 1st Defendant.
 5. The learned trial Magistrate erred in law and fact by failing to find that the arrest, detention and prosecution of the Appellant were actuated by malice.
 6. The learned trial Magistrate erred in law and fact by dismissing the Appellant's claim.
4. In the Result the Appellant seeks the judgment delivered on 20th March, 2023, to be set aside and an award of general damages Kshs.800,000/- in general damages for malicious arrest, imprisonment and malicious prosecution, plus costs of the appeal.
 5. The appeal was disposed through written submissions. The Appellant relying on the elements of the tort of malicious prosecution as stated in *Murunga v The Attorney General (1976 – 1980) KLR 1251* submits that the 1st Respondent admitted having lodged the criminal complaint against the Appellant hence the prosecution was instituted by the 1st Respondent.
 6. That the 1st Respondent failed to appear in court. That although he appeared to blame the police for not summoning him, he took no action against the police for the omission. That the prosecution was determined in favour of the 1st Respondent who was acquitted under Section 202 of the *Criminal Procedure Code*. Reliance was placed on the case of *Reuben H. Muli v Republic [1998] eKLR* where the Court of Appeal held that;

“An acquittal under section 202 of the *Penal Code* is a bar to any subsequent information or complaint for the same matters against the same accused person as provided for in section 218 of the *Penal Code*.”

Hence proof that the case was terminated in the Appellant's favour.
 7. Guided by the finding in *Hawkins Jin Hicks v Faulkner (1878) 8 Q.B.D 167 at 171* it is urged that the purported eye – witness, DW2 did not identify the dogs as belonging to the Appellant hence ownership of the dogs was not linked to the Appellant. (Also see *Samson John Nderitu v The Attorney General (2010)*).
 8. That the place was accessible to any stray dogs and without proof that the sheep were attacked by dogs that belonged to the Appellant, the arrest and detainment by the 2nd Respondent's agents was without reasonable and probable cause.
 9. That there having been no evidence to adduce at trial leading to an acquittal under Section 202 of the *Criminal Procedure Code* was evidence of the prosecution having been actuated by malice.
 10. The 1st Respondent submitted that the withdrawal of the case did not absolve the Appellant from blame as the criminal case was not heard and determined on merit. He was guided by the case of *Murunga (supra)* on the ingredients of malicious prosecution.



11. Therefore, it is urged that the only role the 1st Respondent played was to report to the police who investigated and the Director of Public Prosecutions made a decision to prosecute the Appellant as an independent party. That although the criminal case terminated in favour of the Appellant there is no evidence of malice on his part.
12. That there is proof that his sheep died of excess hemorrhage resulting from canine bite at the udder and cervical region. Therefore, he had sufficient cause to report the matter to the police.
13. That as found by the trial court, the question of malice could not be determined since the witness did not testify.
14. The 2nd Respondent neither made appearance nor filed submissions.
15. This being a first appellate court, the duty of the court is to analyze a fresh evidence adduced at trial, re-evaluate and reconsider it so as to reach an independent determination bearing in mind the fact of not having seen or heard witnesses who testified. In the celebrated case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 it was stated as follows;

“This being a first appeal, it is trite law, that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the High Court is by way of 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 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 allowances in this respect. See *Selle and Another v Associated Motor Boat Company Limited and Others* [1968] EA 123 and *Williamson Diamonds Ltd. v Brown* [1970] E.A.I.

As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this court said in *Peters vs Sunday Post Ltd* [1958] EA 424. In its own words;

“whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide...”

16. The tort of malicious prosecution emanates from common law but has been structured by case law. The claim succeeds when an individual is subjected to prosecution without justification. The *Murunga* case (*supra*) relied on by both the Appellant and 1st Respondent have listed the test to be established by the party alleging in order to establish the claim. These elements have also been upheld by other authorities to be that;
 - i. The proceedings/prosecution was initiated by the Defendant.
 - ii. The claim was determined in favour of the Plaintiff/Claimant.
 - iii. The claim was instituted without any reasonable and/or probable cause.
 - iv. The legal action was actuated by malice.
 - v. The Plaintiff suffered damage.



17. It is admitted by the 1st Respondent that he made a report to the police although he argues that he had been wronged and it was not in his place to effect arrest, investigate and prefer charges. The criminal prosecution was propelled into action by the police following the complaint by the 1st Respondent.
18. The criminal proceedings were terminated in favour of the Appellant hence the acquittal.
19. This therefore brings us to the issue whether the claim was instituted without reasonable and/or probable cause. Evidence was adduced of proof of the 1st Respondent's sheep having been examined by a Livestock Officer, Mugo J.N who opined that the sheep died of excess hemorrhage resulting from canine bite at the udder and cervical region. Evidence of photographs of the dead sheep was adduced in the civil case. However, he did not see the dogs attacking the sheep.
20. The 1st Defendant was acquitted under Section 202 of the [Criminal Procedure Code](#) which provides thus;

If, in a case which a subordinate court has jurisdiction to hear and determine, the accused person appears in obedience to the summons served upon him at the time and place appointed in the summons for the hearing of the case, or is brought before the court under arrest, then, if the complainant, having had notice of the time and place appointed for the hearing of the charge, does not appear, the court shall thereupon acquit the accused, unless for some reason it thinks it proper to adjourn the hearing of the case until some other date, upon such terms as it thinks fit, in which event it may, pending the adjourned hearing, either admit the accused to bail or remand him to prison, or take security for his appearance as the court thinks fit. [Emphasis added]

21. The record shows that there is no occasion that the police forwarded the file to court. The court noted that the prosecution was granted 7 chances to avail witnesses or the police file but they failed. Of importance was the fact that the 1st Respondent was not notified of the matter coming up for hearing all along. Therefore, it cannot be said that there was lack of regard to the consequences of the action of the 1st Respondent having reported the matter to the police. The recklessness was however apparent on the part of the police who did not bother to avail the file in court or bond witnesses including the 1st Respondent.
22. In *Samson John Nderitu v The Attorney General* [2010] KEHC 3039 (KLR) Nambuye J (as he then was) held that;

“It is trite and this court, has judicial notice of the fact that before an accused person is taken to court, and arraigned in court for criminal prosecution, the prosecuting authority namely the police or whatever unit, whose functions fall under the office of the Defendant, usually carry out investigations, record statements from potential witnesses, analyze the facts to determine if the facts disclose an offence before arraigning such a person in a court of law.”
23. The 1st Respondent made a report to the police who were expected to record statements of witnesses, examine the information and come up with a conclusion that indeed the offence was committed then forward the file to the Director of Public Prosecutions for advice and ultimate charging of the suspect.
24. The 1st Respondent called a witness Martha Mwhaki Mwai who stood by her statement of having seen the dogs owned by the Plaintiff attack the sheep. This is what prompted the 1st Respondent to report to the police who were obligated to investigate the allegations prior to arraigning the suspect. These were a state of facts that the 1st Respondent based on to make a report, however, circumstances under



which the police formed the opinion to charge the Plaintiff and why they failed to avail the file and witnesses in court remaining unexplained.

25. Without any explanation by the 2nd Respondent whose agents acted by causing the Appellant to be arraigned and subsequently making him appear in court severally without making an effort of availing witnesses to testify. The only reasonable inference that can be drawn is that although the 1st Respondent had a probable cause of lodging the complaint the 2nd Respondent through their agents did not investigate the matter had no probable cause of bringing the charges against the Appellant, that they would not support in a court of law.
26. Without any explanation being rendered there is proof on a balance of probabilities that the arraignment was following a wrongful and improper motive; with a desire to harass/oppress the Plaintiff.
27. The Appellant averred that he suffered actual financial losses that he classified as special damages on the sum of Kshs.2,650/- which was specifically proved by receipts issued.
28. The upshot of the above is that the appeal partially succeeds in that the judgment entered in Nyahururu CMCC No. E141 of 2021 by the trial court dismissing the Appellant's case be and is hereby set aside and substituted with orders as follows;
 - i. The appeal against the 1st Respondent is dismissed with no orders as to costs.
 - ii. Judgment is entered for the Appellant(Plaintiff) against the 2nd Respondent whereby the Appellant is awarded Kshs.200,000/- in general damages, special damages of Kshs.2,650/- plus costs of the suit both in the lower court and on appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24TH DAY OF JUNE, 2025.

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L.N. MUTENDE

JUDGE

