



Kavuna v Sanlam (Pan African Life Assurance Ltd & another (Civil Appeal E254 of 2022) [2025] KEHC 11649 (KLR) (Civ) (31 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11649 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E254 OF 2022

REA OUGO, J

JULY 31, 2025

BETWEEN

LEAH KAVUNA APPELLANT

AND

SANLAM (PAN AFRICAN LIFE ASSURANCE LIMITED) 1ST RESPONDENT

THE HON ATTORNEY GENERAL 2ND RESPONDENT

(An appeal from the judgment and decree of the Chief Magistrate's Court at Milimani (E.M. Kagoni, PM.) delivered on 31st March 2022 in MCCC No. 1841 of 2019)

JUDGMENT

1. The appellant sued the respondents for malicious prosecution and false imprisonment. A summary of the facts leading to the dispute is necessary for context. In her plaint dated 18th March 2019, the appellant stated that on 29th August 2014, she was arrested, detained, and charged with theft under section 313 of the *Penal Code* in Nairobi Criminal Case No. 1243 of 2014. The charges were initiated following the complaint of the 1st respondent. After the trial, the appellant was acquitted.
2. According to the appellant, her acquittal indicated that the prosecution was motivated by malice on the part of the 1st respondent. Furthermore, she incurred legal fees of KShs. 250,000.00 to defend herself in the criminal case. The appellant detailed malice, pain, anguish and loss in her plaint. She therefore sought judgment against the respondents for general damages for false imprisonment and malicious prosecution, and special damages of Kshs. 250,000.00. The appellant also requested exemplary damages for mistreatment and harassment, along with costs and interest.
3. In a judgment dated 31st March 2022, the trial court found that the suit lacked merit. It was dismissed with costs awarded to the respondents. These findings prompted the present appeal. The appellant



submitted her memorandum of appeal dated 19th April 2022. She raised seven grounds contesting those findings, summarised as follows: the trial court's conclusion was incorrect because it failed to consider the evidence on record as well as her submissions; the investigations conducted by the 1st respondent could not have held her criminally culpable; the respondents failed to produce evidence in court supporting the charges levied against her — a sign of actual malice; and the appellant was not given the benefit of an internal disciplinary process before being handed over to the state. This in itself was another clear sign of malice. For these reasons, the appellant urged this court to allow her appeal by setting aside the impugned judgment and substituting a finding that her suit is merited. She further requested costs for both the suit and this appeal.

Submissions

4. This appeal was canvassed through written submissions. The appellant relied on her written submissions dated 21st March 2024 to argue that the prosecution against her was malicious and met the threshold outlined in our jurisdiction. She submitted that the respondents failed to demonstrate probable cause to initiate or sustain the cause of action against her for four years. She also argued that the 1st respondent fabricated a criminal case with the ulterior motive of justifying her dismissal from employment by the 1st respondent.
5. Relying on the letter dated 22nd September 2014, which terminated her employment, the appellant argued that the 1st respondent ended her contract due to her conduct that was the subject of IRA investigations, leading to criminal charges. She accused the 2nd respondent of being used as a conduit to initiate prosecution against her without proper investigations or evidence.
6. For those reasons, the appellant submitted that she was entitled to general damages for false imprisonment amounting to Kshs. 1,000,000.00, general damages for malicious prosecution amounting to Kshs. 4,000,000.00, damages for unfair termination of Kshs. 2,287,561/- and exemplary damages for mistreatment and harassment of Kshs. 2,000,000.00 due to her name being circulated in print, video, and online media platforms, totaling Kshs. 9,287,561.000. She further justified her claim by stating that she was unable to secure employment and was distressed as she was a nursing mother. She prayed that her appeal be allowed.
7. The 1st respondent opposed the appeal. It filed its written submissions and a bundle of authorities both dated 24th June 2024. It is submitted that the trial court arrived at a proper finding when it found that the appellant's claim for malicious prosecution was without any basis.
8. The 1st respondent further argued that it was a complainant in the criminal proceedings and therefore could not be held culpable. It relied on the appellant's testimony confirming that she was responsible for the accounts affected by suspicious activity. The decision to charge, it explained, was within the authority of the Office of the Director of Public Prosecutions. There was reasonable and probable cause to file a complaint and subsequently have the appellant charged in a court of law.
9. The 1st respondent noted that the appellant was acquitted because the police failed to avail witnesses, and the investigation officer did not attend court. Consequently, it could not be established that there was no real and probable cause. Additionally, the 1st respondent argued that the prosecution was not driven by malice. It is argued that although the appellant was acquitted, this was done under section 202 as read with section 206 of the *Criminal Procedure Code* due to the unavailability of witnesses. Nevertheless, the fact that proceedings were terminated in her favour does not equate to a finding of malicious prosecution.
10. On false imprisonment, the 1st respondent argued that it was not proved on a balance of probabilities. In this case, there was no false report motivated by malice. Furthermore, after taking a plea, the



appellant was granted favorable bail conditions. Additionally, the cash bail was refunded to her upon the conclusion of the criminal proceedings. For these reasons, the 1st respondent contended that the appellant was not entitled to the reliefs sought. It requested that the appeal be dismissed with costs to the 1st respondent.

11. The 2nd respondent did not file its written submissions by the time I retired to prepare this decision. Nevertheless, I have considered the submissions available, reviewed the record of appeal, and analysed the law. As a first appellate court, my duty is to re-examine the evidence afresh, bearing in mind that I did not see or hear the witnesses testify. [See *Peters vs. Sunday Post Limited* [1985] EA 424.]

Analysis And Determination

12. In this appeal, the record indicates that PW1, the appellant herein, testified that she was arrested on 29th August 2014. The 1st respondent employed her as the corporate unit leader. She was arrested by the Insurance Fraud Investigation Unit of the 1st respondent and was handed over to the police on account of an incident involving loss of money. She faced a raft of offences. She was charged with inter alia, the offence of conspiracy and intent to defraud contrary to section 317 of the [Penal Code](#) in Nairobi Criminal Case No. 1243 of 2014.
13. The particulars of the offence were that on 20th August 2014, she was at the Standard Chartered Bank, Kenyatta Avenue branch, when, with others, she defrauded and obtained Kshs. 14,042,000.00 from Pan African Life Assurance Company Limited by falsely pretending that Prime Movers Insurance Brokers Limited had reported a death claim of Teka K. Shamalla. The appellant's charges were based on a transaction involving the deceased, Joseph Osobolo, and Sammy Njema, both from Kenya Wildlife Services, Kengen, and Egerton University, respectively.
14. According to PW1, she was taken through a humiliating and degrading trial that spanned four years. After all that, she was acquitted on account of the prosecution failing to adduce witnesses. She complained that in the process, she endured pain, expenses on litigation in the sum of Kshs. 250,000.00 and lost time. She contended that the investigations were not proper and as such, the prosecution was malicious. She opined that the prosecution arose out of a vendetta because she maintained her innocence.
15. Furthermore, her name was tarnished in the media, causing her mental distress and embarrassment in the eyes of the public. As a result, she was unable to secure employment and was completely dependent on her relatives. She relied on her list of documents dated 15th March 2019 to support her evidence, which was produced as part of her evidence.
16. DW1 Eric Muthengi, the 1st respondent's team leader in the customer services department, produced the 1st respondent's list of documents dated 16th November 2021. He recalled that on 20th August 2014, the 1st defendant wrote to the Insurance Fraud Investigation Unit, reading suspicious transactions on the account of Egerton University, Kenya Electricity Generating Company and Kenya Wildlife Services. In turn, the unit wrote to the affected accounts confirming that indeed suspicious activities had been carried out.
17. The officers proceeded with their investigations that ultimately led to the arrest and charge of the appellant together with Lamech Otieno Mooten and Ibrahim Odhiambo Ololo. Though he was ready to testify, he was never called as a witness. He recalled attending court on several occasions but never testified. He maintained that the decision to charge was left at the preserve of the Director of Public Prosecutions.



18. To succeed in an action for malicious prosecution and false imprisonment, the allegation must establish four conjunctive elements that were the subject of discussion in the case of *Bethwel Omondi Okal vs. Attorney General & another* [2018] eKLR the court held as follows:

“21. The law on false imprisonment and malicious prosecution is now well settled. For one to succeed, he/she must prove four elements. First that the criminal proceedings were instituted by the defendant who was instrumental in setting the law in motion against the plaintiff, second, that the defendant acted without reasonable or probable cause. Otherwise there must exist facts which show that the defendant genuinely believed that the criminal proceedings were justified; third, that the defendant must have acted maliciously. That is the defendant in instituting the criminal proceedings acted with improper or wrongful motive. and fourth, the criminal proceedings must have terminated in the plaintiff’s favour having been acquitted of the charge laid against him. (See *Egbema vs. West Nile District Administration* [1972] EA 60)

22. From the above principles, it is therefore the law that a party who claims that he was unlawfully arrested falsely imprisoned and or maliciously prosecuted, bears the responsibility of proving that the arrest had no basis in law at all. It will not be enough for him to merely state that the arrest was unlawful. In the present case, the 2nd respondent’s duty was to report that the accused was illegally connected to electric energy. The responsibility of investigating, charging and conducting prosecution was that of the police and the 1st respondent.

23. In this petition, it is true that the petitioner’s wife was arrested, charged in Court and prosecuted. It is also true that the prosecution ended in her favour because she was acquitted of the charge. Even with these, there was a duty to prove that there was malice in making the report that lead to the arrest and prosecution. Acquittal alone cannot amount to proof of malice. There must be something more than just acquittal. In the case of *Nzoia Sugar Company Limited vs. Fungutuli* [1988] elk, the Court of Appeal observed;

“It is trite learning that acquittal, per se, on a criminal case charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill will must be proved against the prosecutor. The mental element of ill will or improper motive cannot be found in an artificial person like the appellant. But there must be evidence of spite in one of its servants that can be attributed to the company.”

24. In the case of *Jediel Nyaga vs. Silas Mucheke* 1987 (*CA No. 59 of 1987*) the Court of Appeal again stated;

“The appellant having reported to the police about the respondent’s action of damaging his crops, the police took over the matter to investigate the respondent for a possible offence ... Once the appellant gave the report, he ceased to have anything to do with the matter.”



25. And in the case of Robert Okeri Ombaka vs. Central Bank of Kenya [2015]) eKLR, the Court of Appeal observed;

“In this appeal there is no evidence that the respondent made a “false” report or that the it was actuated by “malice”, or that his prosecution was brought “without reasonable or probable cause”. That a suspect was acquitted of a criminal case is not a ground for filling a civil suit to claim damages for malicious prosecution or false imprisonment. Evidence of spite, ill will, lack of reasonable and probable cause must be established.”

26. A party who suspects that there has been a violation of the law, has an obligation to report the matter to the police who carry out investigations and decide whether or not to charge and prosecute the person depending on the strength of the evidence. The fact that an accused person, though charged and prosecuted, was acquitted is not proof of malice. There must be proof of existence of malice in making the report. In other words, the petitioner must prove that there was no reasonable basis for making the report. The decisions referred to above are clear that there must be unreasonable basis for reporting a complaint to the police and that the report was actuated with malice. In the present petition the petitioner did not even show that the complaint was false and that it was full of spite or malice.”

19. Turning to the present dispute, it is not in dispute that the appellant was arrested and charged on 29th August 2014 with the offence of conspiracy to defraud, contrary to section 317 of the *Penal Code*, in Nairobi Criminal Case No. 1243 of 2014. In the same case, the appellant faced another ten counts for offences under the *Criminal Procedure Code*, which charges were included in her charge sheet. These charges were based on a complaint raised by the 1st respondent. It is also not denied that the 1st respondent employed the appellant as its corporate unit leader.
20. The 1st respondent was concerned when it became aware that suspicious activities and transactions had occurred on the accounts of Tekka K. Shamalla, Joseph Osobolo, and Sammy Njema, who are associated with Kenya Wildlife Services, Kengen, and Egerton University respectively. Its Insurance Fraud Investigation Unit referred the matter to the police due to an incident involving financial loss. It is also acknowledged that the criminal trial lasted four years, during which the appellant was acquitted under section 202 as read with section 206 of the *Criminal Procedure Code*, since the prosecution failed to present any witnesses.
21. Indeed, it is true that criminal proceedings were initiated against the appellant jointly with others. Although the appellant has shown that the proceedings were terminated in her favor, this alone is not enough to establish this tort. As correctly stated by the 1st respondent, the decision to charge was at the discretion of the Director of Public Prosecutions. Every Kenyan citizen, whether natural or juristic, has a duty to report suspected criminal activities. Therefore, I find no fault in the 1st respondent filing the complaint.
22. The appellant argued that the respondents acted without reasonable or probable cause and did so maliciously with improper or wrongful motives. Were these elements proven? The court in the case of



Joseph Wamoto Karani vs. C. Dorman Limited & another [2018] KEHC 7962 (KLR) explained what constitutes reasonable and probable cause as follows:

“ 141. What amounts to reasonable and probable cause for the purposes of malicious prosecution was explained by Rudd, J in Kagane and Others vs. Attorney-General and Another (supra). Citing Hicks vs. Faulkner [1878] 8 QBD 167 at 171, Herniman vs. Smith [1938] AC 305 and Glinski vs. McIver [1962] AC 726 the learned judge stated:

“Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed...Excluding cases where the basis for the prosecution is alleged to be wholly fabricated by the prosecutor, in which the sole issue is whether the case for the prosecution was fabricated or not, the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of objective test. That is to say, to constitute reasonable and probable cause the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material consisted of facts discovered by the prosecutor or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty. If and insofar as that material is based on information, the information must be reasonably credible, such that an ordinary reasonable prudent and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for the prosecution...If it is shown to the satisfaction of the judge that a reasonable prudent and cautious man would not have been satisfied that there was a proper case to put before the court, then absence of reasonable and probable cause has been established. If on the other hand the judge considers that prima facie there was enough to justify a belief in an ordinary reasonable prudent and cautious man that the accused was probably guilty then although this would amount to what I call primary reasonable and probable cause the judge may have to consider the further question as to whether the prosecutor himself did not believe in the probable guilt of the accused, and this is obviously a matter which is to be judged by a subjective test. This subjective test should only be applied where there is some evidence that the prosecutor himself did not honestly believe in the truth of the prosecution...In as much as this subjective test only comes into operation when there were circumstances in the knowledge of the prosecutor capable of amounting to reasonable and probable cause, the subjective test does not arise where the reason alleged as showing absence of reasonable and probable cause is merely the flimsiness of



the prosecution case or the inherent unreliability of the information on which the case was based, because this is a matter for the judge alone when applying the objective test of the reasonable prudent and cautious man. Consequently the subjective test should only be applied where there is some evidence directly tending to show that the prosecutor did not believe in the truth of his case. Such evidence could be afforded by words or letters or conduct on the part of the prosecutor which tended to show that he did not believe in his case, as for example a failure or reluctance to bring it to trial, a statement that he did not believe in it and, I think possibly, an unexplained failure to call an essential witness who provided a basic part of the information upon which the prosecution was based”.

23. In this case, the appellant’s argument was that the lack of reasonable and probable cause was because, since she was acquitted, the charges were maliciously brought against her to force her out of employment. She also argued that the investigations conducted were inadequate, and therefore, no witnesses were available for examination.
24. Considering the evidence in its entirety, I find the following: Firstly, the 1st respondent employed the appellant as the head of its corporate unit. Secondly, an alert was triggered by suspicious activity concerning transactions involving three individuals. This prompted the Insurance Fraud Investigation Unit to take control of the matter. The findings raised suspicions that the appellant was involved in the transactions.
25. Finally, the 1st respondent, in its letter dated 22nd September 2014, informed the appellant that she had been invited to a disciplinary hearing, but the appellant declined to attend. As a result, the 1st respondent found the appellant in gross violation of the terms of engagement with her employer. The appellant was summarily dismissed on grounds of gross misconduct.
26. From the totality of the material presented before the prosecution, the information that came to the attention of the Director of Public Prosecutions was capable of satisfying an ordinary, reasonable, prudent, cautious person that the appellant was possibly guilty. This is an objective test. The appellant was the head of the cooperation unit where suspicious transactions took place, facts that were not denied.
27. Furthermore, letters dated 29th September 2014 and 17th October 2014 from Egerton University, a letter dated 7th October 2014 from Kenya Wildlife Services, and a letter dated 9th September 2014 from Kenya Electricity Generating Company revealed suspicious activities on the subject accounts. Based on this, the Insurance Investigation Fraud Unit formed the view that the appellant was involved in manipulating the system to process fake death claims. The appellant was aware that investigations into the loss of money were ongoing. I, therefore, find that the complaint was lodged in good faith, leading to the conclusion that the criminal proceedings were not malicious.
28. Although the appellant lamented that she was never given an opportunity to defend herself, in fact, such an opportunity was provided, as evidenced by the letter dated 22nd September 2014. She, however, chose not to participate in the disciplinary hearing. Therefore, she cannot claim that the criminal proceedings against her were malicious.



29. The appellant also sought general damages for false imprisonment. This indicated that the appellant had also accused the respondents of false imprisonment. The court in Daniel Waweru Njoroge & 17 Others v. Attorney General [2015] eKLR outlined the elements of false imprisonment as follows:

“The gist of an action for false imprisonment is unlawful detention, without more. The commonly accepted definition of false imprisonment defines the tort as:

1. The unlawful restraint of another;
2. Against their will; and
3. Without justification.

Proving the first element of false imprisonment involves looking at the facts whether there was any force or threat or some kind used in restraining the accusing party. It is important to note that actual force is not necessary. Proving the second element of false imprisonment involves applying ‘reasonable person’ standard. Thus, the court will determine whether a reasonable person in the same factual situation would believe that they have been detained against their will. The final element of false imprisonment involves determining whether there is a legal basis for the detention. Many legal bases for detention exist such as a lawful arrest by law enforcement. Determining whether probable or a legal basis for the detention exists is the key in false arrest cases.”

30. The appellant did not demonstrate how the respondents committed this tort. Nonetheless, I find that the appellant was lawfully detained for being a suspect in a case of loss of money. According to the record before me, the appellant was, in the criminal proceedings, arrested and released on cash bail. I find no evidence was presented to show that there was no justification for her arrest, which would infringe on her right to liberty and could give rise to the tort of false imprisonment.

31. In my view, the charges brought against the appellant did not stem from malice. I agree that the trial court correctly considered whether the tort of malicious prosecution was proven on a balance of probabilities based on the evidence presented. I also agree that the tort of false imprisonment was not demonstrated and must therefore fail. Since the appellant did not meet the burden of proof to the required standard, I conclude that any claim for general and special damages must consequently fail.

32. Before concluding, I must address an issue raised by the appellant in her submissions concerning damages for unlawful termination. I will not tire in reminding parties that submissions are not pleadings and will never substitute for evidence. In this case, the appellant attempted to include that prayer in her submissions at this appellate stage, urging this court to grant it. That is not acceptable and cannot be justified. Even if the appellant were to succeed in her claim, which she has not, I would have dismissed that prayer on those grounds.

33. The upshot of the above findings is that the present appeal lacks merit. It is hereby Dismissed with costs to the 1st respondent.

DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 31ST DAY OF JULY 2025.

R.E.OUGO

JUDGE

In the presence of:

Miss Wacera h/b Mr. Ayieko -For the Appellant



Miss Muga -For the 1st Respondent

2nd Respondent - Absent

Wilkister - C/A

