



REPUBLIC OF KENYA



**Wahanya v Akama (Civil Case E085 of 2024) [2025] KEMC 141 (KLR) (13 June 2025) (Judgment)**

Neutral citation: [2025] KEMC 141 (KLR)

**REPUBLIC OF KENYA  
IN THE SIAYA LAW COURTS**

**CIVIL CASE E085 OF 2024**

**JP MKALA, RM**

**JUNE 13, 2025**

**BETWEEN**

**MANUEL OMINDE WAHANYA ..... PLAINTIFF**

**AND**

**HENRY OPIYO AKAMA ..... DEFENDANT**

**JUDGMENT**

**Introduction**

1. The Plaintiff instituted this suit through a Plaint dated 6<sup>th</sup> November, 2024 seeking for compensation for malicious prosecution stemming from Siaya MCCR No. E055 of 2020.

**Background**

2. The Plaintiff claims that he was maliciously arrested on malicious report by the 1<sup>st</sup> Defendant to the police on malicious damage of a pit latrine on 12<sup>th</sup> September, 2020, where he was temporarily held for some hours before he was released on personal bond and was charged on 15<sup>th</sup> September, 2020.
3. He claims to have suffered immensely from the date he was charged until the year 2023 when the court acquitted him of the charges.
4. The Defendants deny the Plaintiff's allegations and put him to strict proof. The 1<sup>st</sup> Defendant avers that he made a report to the police after the Plaintiff destroyed his pit latrine. After investigation, the ODPP decided to charge the Plaintiff and he can therefore not be blamed for the prosecution.

**Issues for determination**

5. I have considered the Pleadings, documents and submissions by all the parties and this court finds the following issues commends themselves for determination: -
  - i. Whether the Plaintiff has proved his claim on a balance of probability.



- ii. Whether the appellant is entitled to orders sought?

### **Analysis of the issues**

6. The onus of proving that the Plaintiff's arrest and his prosecution was malicious lies with the Plaintiff. Section 107 (1) of the *Evidence Act* provides that:
  1. Whoever desires any Court to give Judgment as to any legal right dependent on the existence facts which he asserts must prove that those facts exist.
  2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
7. It is trite law that for a claim for malicious prosecution to succeed, the Plaintiff must particularly prove four elements. In *Kagane & Others v Attorney General & another* [1969] EA, outlined the elements of malicious prosecution as follows:
  - i. the prosecution was instituted against the plaintiff by the defendant;
  - ii. that the prosecution was terminated in favour of the plaintiff;
  - iii. that the prosecution was instituted without reasonable and probable cause; and
  - iv. That the prosecution was actuated by malice.On element (i) and (ii) above on prosecution against the Plaintiff by the Defendant and prosecution being terminated in favour of the Plaintiff:
8. It is not in dispute that the prosecution of the Plaintiff was instituted by the ODPP following a complaint lodged by the 1<sup>st</sup> Defendant, and judgement was delivered in favour of the Plaintiff on 23<sup>rd</sup> November, 2023 acquitting him.
9. It is my holding that the Plaintiff has proved to the required standard element 1 and 2 of the claim for malicious prosecution.

### **On element (iii) above on reasonable and probable cause:**

10. In *Clerk & Lindsell on Torts* (12<sup>th</sup> edition) at paragraph 1712 states:

“What is reasonable and probable cause. As has been already seen, reasonable and probable cause depends upon the information and belief of the defendant. There must be a reasonable cause in such as would operate on the mind of the party making the charge otherwise there is no probable cause for him:

I cannot say that the defendant acted in probable cause, if the state of facts was such as to leave no effect on his mind.”
11. In *Kagane v Attorney General* (supra), set the test for reasonable and probable cause was set as follows:

“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 lead to 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.”



12. Was there a reasonable and probable cause to believe that a crime had been committed by the Plaintiff? A complaint was made by the 1<sup>st</sup> Defendant herein to the police, the Plaintiff was arrested on 12<sup>th</sup> September, 2020. He was held temporarily and later released on a personal bond and later charged on 15<sup>th</sup> September, 2020.
13. This to me does not appear as malicious or lack of probable cause. The police did not act on malice, they first investigated the 1<sup>st</sup> Defendant's complainant for about 3 days before the decision to charge was made.
14. However, an acquittal of an accused person alone does not necessarily mean the prosecution was malicious. After hearing the prosecution case, the trial magistrate determined that a prima facie case had been established against the accused (Plaintiff) and placed him on his defence. This means that the Honourable Court found that the Plaintiff (Accused person), based on the evidence tendered by the prosecution, had a case to answer. Implying that there was enough factual basis necessitating the prosecution of the Plaintiff (Accused) herein and thus the said prosecution cannot be termed as malicious.

**That the prosecution was actuated by malice:**

15. As I have indicated hereinabove that an acquittal does not necessarily mean that the prosecution was actuated by malice. An individual accused of an offence does not have to be guilty on the face of it in order to be arrested and charged with an offence. The Law even provides that an individual is innocent until proven guilty. However, in as much as suspicion does not infer guilt, it neither aspires confidence in innocence. Thus, how else would guilt or innocence be reached conclusively without and/or before undergoing the due process? The due process being investigations, arrest, detention, and finally prosecution in a court of law. It is not upon police officers to pass the guilt or otherwise of a person accused of a criminal offence, that is the role of an impartial Court of law to determine based on evidence tendered before it; whether it meets the required standard of proof by the set laws or not.
16. The Plaintiff testified that he was unknown to investigating officer prior to his arrest and prosecution this therefore means that the investigating officer was doing his constitutional mandate following a complaint made by the 1<sup>st</sup> Defendant.
17. In *Susan Mutheu Muia v Joseph Makau Mutua* (2018) eKLR, Civil Appeal 128 of 2017 held that;  

“ Even if a complainant in a criminal case makes a malicious complaint, that malice cannot automatically be transferred to the prosecutor unless it is proved that there was collusion between the complainant and the prosecutor in bringing up the prosecution. The trial magistrate made a clear finding that there was no collusion between the complainant and the police who were the prosecutors. He absolved the police of the issue of malice. In the circumstances he could not make a finding that the prosecution was actuated by malice.”
18. In *Nzoia Sugar Company Limited v Fungututi* (1988) KLR 399, the Court opined that, “an acquittal per se on a criminal charge is not sufficient basis for grounding a suit for malicious prosecution, as 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. ”
19. Further, the power to make a decision to charge or not, is a preserve of the office of the director of public prosecution which the Plaintiff failed to enjoin in this suit. The police do not make decision to



charge, their duty is to investigate and forward the file and their findings to the ODPP for perusal. The AG does not represent the ODPP. These are two independent constitutional offices.

**Whether the appellant is entitled to orders sought?**

20. I have considered the evidence presented before me, I find that the Plaintiff has failed to prove his case on a balance of probability. Consequently, this suit is hereby dismissed with no orders as to costs.

So orders the Court.

**SIGNED, DATED AND DELIVERED VIRTUALLY AT SIAYA COURT THIS 13<sup>TH</sup> DAY OF JUNE, 2025**

**HON. J. P. MKALA**

**RESIDENT MAGISTRATE**

Judgment Delivered in the presence of;

Plaintiff/Counsel - Ms. Wanyangu

1<sup>st</sup> Defendant/Counsel - Mr. Ooro F

2<sup>nd</sup> Defendant/Counsel- Ms. Gacheri Mwenda h/b for Ms. Grace Esendi (State counsel)

Court Assistant - Kevin Akwany

