

## MALICIOUS PROSECUTION

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Legal Alert

20<sup>th</sup> September 2022**Introduction**

The tort of malicious prosecution is committed in circumstances where a defendant (s) causes the arrest and prosecution of the plaintiff or claimant without reasonable and/or probable cause and the proceedings so instituted terminate in favour of the plaintiff. Reasonable and/or probable cause denotes an honest belief in the guilt of the accused person, based upon a full conviction, founded on reasonable grounds of the existence of a state of circumstances which, assuming to be true, would reasonably lead any ordinary, prudent and cautious man, placed in the position of the accused person to the conclusion that the person charged was probably guilty of the same imputed

**Essential Ingredients**

The commonly accepted essential ingredients of malicious prosecution which a plaintiff in a malicious prosecution suit must fulfil in order to be awarded damages against the defendant (s) are as follows:

- a) The prosecution ought to have been instigated by the defendant or by someone for whose acts he is responsible.
- b) That the matter was finalized or the prosecution terminated in the plaintiff's favour.
- c) That the prosecution was instituted without reasonable and probable cause.
- d) The prosecution or its continuance was actuated by malice on the part of the defendants

The Courts have pronounced themselves on the issue of malicious prosecution in various cases including **Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another Nairobi HCCC No. 1729 of 2001** and **G.B.M Kariuki v Attorney General (2016) eKLR**. From jurisprudence, it emerges that the main characteristics for the Court to consider in determining a claim for malicious prosecution are that:

Firstly, the arrest and subsequent prosecution complained of were determined in the plaintiff's favour; and,

Secondly that in so prosecuting, the defendant (s) acted with malice. Malice denotes the presence of some improper and wrongful motive that is to say, an intent to use the legal process in question for some other than its legally appointed and appropriate purposes and the aim of the tort is to protect the rights of defendants to be free of frivolous lawsuits brought by malicious plaintiffs

It is, however, important to note that the mere fact that an accused person has been acquitted of criminal charges does not necessarily prove malice on the part of the prosecuting authority. (see **James Karuga Kiiru v Joseph Mwamburi & 3 others, Nairobi Civil Appeal No. 171 of 2000**)

**Damages for Malicious Prosecution**

In order to be awarded damages for a claim for malicious prosecution, the plaintiff must not only establish the above elements but also provide evidence on a balance of probabilities to prove the claim.

In **Chrispine Otieno Caleb v Attorney General [2014] eKLR** where the Plaintiffs were awarded **Kshs 2,000,000.00 general damages for malicious prosecution, punitive exemplary damages in the sum of Kshs 500,000.00 for being held in custody unlawfully and Kshs 800,000.00 pleaded and proved special damages.**)

In **Jacob Juma & Another vs. The Commissioner of Police & Another Nairobi HCCC No. 661 of 2007**, the Court awarded to the plaintiff a sum of Kshs 2,000,000.00 for each Plaintiff in respect of general and aggravated damages for malicious prosecution on 14<sup>th</sup> January, 2013. The plaintiff was a private contractor.

In **Samuel Kiprono Chepkonga vs. Kenya Anti-Corruption Commission & another [2014] eKLR** the Court awarded Kshs. 5,000,000/= in January 2014 to the Plaintiff who at the time of his prosecution was the Chief Executive of a State Corporation and was facing two criminal cases. I agree that the position of a Judge is held at a higher pedestal than that of either a private engineer or a Chief Executive of a State Corporation. The position of Judge depends on the trust that the public has in the holder of that office to dispense justice and where the holder himself is charged with a criminal offence that confidence is bound to be eroded.

In **G.B.M Kariuki v Attorney General (2016) eKLR** the Court, in awarding damages, considered the Plaintiff's position as a Judge as well as the inflationary tendencies, the nature of the offence which carried life sentence (attempted murder), and awarded the Plaintiff **Kshs 5,000,000.00** as general damages for malicious prosecution.

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