

Malicious prosecution and conditions for award of damages.

THERE are instances whereby people are reported to have committed certain crimes, they get arrested and prosecuted only to be found not guilty by courts of law. If the alleged crimes are serious or unbailable, innocent people spend years in remand prisons and suffer huge losses.

This article intends to provide some highlights on what is required to be done for the claimant to be awarded damages in court for what is known in corridors of justice as ‘malicious prosecution.’

Malicious prosecution is a tort of civil wrong in which a person initiates criminal legal proceedings without justification against another person with intention of achieving unlawful purpose using available legal machinery.

The way criminal justice system is designed in our jurisdiction, police are the primary authority to receive crime reports and thereafter investigate the alleged offences then present their findings to the office of director of prosecution at the National Prosecution Services for further observation or opinion on whether the case has been established against the accused or not.

If the answer is in the affirmative, the file is referred to the court of law. It is the court of law which is vested with constitutional mandate to determine the right of the accused namely whether he or she committed the offence or not based on the evidence presented in that court of law.

Once the court finds the accused not guilty, then he or she can move to a civil court and ask for damages under tortious liability based on the law of malicious prosecution.

For the court to award damages asked by a claimant or plaintiff, law requires him or her to prove five ingredients which were established through case law.

In the case of Yonah Ngassa vs Makoye Ngasa (2006) TLR 123, the court pointed out five ingredients which a claimant is required to prove cumulatively for the court to award damages due to malicious prosecution.



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The ingredients are (i) the proceedings were instituted or initiated by the defendant (ii) the defendant acted without reasonable and probable cause (iii) the defendant acted maliciously (iv) the proceedings terminated in the plaintiff's favour and (v) the plaintiff must prove the damage suffered as a result of the malicious prosecution.

If a plaintiff fails to prove any of the requirements, he or she would fail to get the claimed damages as decided in the case of *Mbowa vs East Meno Administration* (1972) EA. 353.

Let's highlight a bit on each requirement. As a matter of procedure, all criminal disputes are instituted by government under the office of the Director of Prosecution, save for some instances where a private prosecution can be initiated by an individual,

However, at any time the director can take over, Therefore, it is the task of the claimant to be aware of the person who initiated the criminal accusation namely the actual initiator of the criminal charges.

There are moments when the name of a person who initiated a criminal proceeding is unknown because the only term used is the republic or director of public prosecution. In such circumstances, then claimant may proceed with those named such as the DPP along with the Attorney General but only upon issuance of a statutory notice of 90 days.

This happens rarely because every proceeding initiated by the republic, there is a person behind it unless the offence committed is considered to be of public interest.

It is also a matter of law that a claimant can sue any person provided he or she can establish that

Fourth ingredient is that the proceedings terminated in the plaintiff's favour. This is easy task to prove just by pleading and producing the

the initiated the case him or her. So, it is upon the claimant to select who to sue so that he or she can be awarded remedy in a court of law provided he or she can establish cause action..

Second, the defendant acted without reasonable and probable cause phrase refers to an honest belief founded on reasonable grounds that the institution of proceeding was unjustified.

The case of *Hicks vs Faulkner* (1878)8 QBD 167 page 171 defines reasonable and probable cause as "an honest belief in the guilt of the accused based on a full conviction founded upon reasonable grounds, of the existence of a circumstances, which assuming them to be true, would reasonably lead any ordinary prudent man and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed."

There is no hard and fast rules one can determine as to what constitutes honest belief. Rather, this is always depicted from each circumstance. What a plaintiff is required to show is that at the time of reporting the alleged offence, there were no facts available to substantiate that the offence was committed and that any reasonable person would think that the plaintiff should not be found guilty by the court.

Third is that the defendant acted maliciously. Malice means ill motive or wrongful act done intentionally without just cause or excuse.

Facts should be available before the court of law with the view of depicting that the defendant either acted with an intention to inflict injury to the plaintiff or acted negligently in reporting without caring for the affairs of the plaintiff or acted without good faith.

court decision stating that the plaintiff is not guilty of the offence alleged to have being committed.

However, one should take note that existence of criminal proceedings being terminated in his or her favour alone cannot be sufficient because other grounds must be proved. In the case of Audiface Kibala vs Adili Elipenda and two others, in the Civil Appeal No 107 of 2012, the Court of Appeal said that the acquittal of an accused person in a criminal case may not necessarily mean that he or she was prosecuted maliciously or without good and probable cause.

The fifth ingredient is the proof of damage suffered. There are two main types of damages: specific and general damage. For the specific damage, the claimant is required to plead and prove existence of loss incurred as result of the said malicious prosecution.

On the other hand, general damage is not mandatory but rather presentation of material facts that damages suffered are sufficient for the court to exercise its discretionary mandate to award the plaintiff general damages.