



Chitembwe v Ethics and Anti - Corruption Commission & another (Civil Suit 528 of 2012) [2024] KEHC 11192 (KLR) (Civ) (25 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11192 (KLR)

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

**CIVIL
CIVIL SUIT 528 OF 2012**

**JN MULWA, J
SEPTEMBER 25, 2024**

BETWEEN

SAID JUMA CHITEMBWE PLAINTIFF

AND

ETHICS AND ANTI - CORRUPTION COMMISSION 1ST DEFENDANT

ATTORNEY GENERAL 2ND DEFENDANT

JUDGMENT

1. At all material times relevant to this suit, the Plaintiff was an employee of the Board of Trustees of the National Social Security Fund (hereinafter referred to as NSSF) serving as the Board secretary after which he was appointed Judge of the High Court of Kenya in 2009.
2. By a plaint dated 30/10/2012 the Plaintiff sued the Ethics and Anti-Corruption Commission established under the *Ethics and Anti-Corruption Commission Act* no. 22 of 2011 (hereinafter referred to as EACC) as the first defendant and the Honourable The Attorney General (AG) on behalf of the Director of Public Prosecutions (DPP) jointly and severally seeking judgment against them for:-
 - a. General and Exemplary damages
 - b. General and exemplary damages for defamation
 - c. Special damages of Kshs. 500,000/-
 - d. Costs and interest.
3. Undisputed material facts leading to the institution of this suit is that on 28/12/2009 the plaintiff was arrested, detained in custody and on 29/12/2009 charged prosecuted and acquitted on 31/10/2011 in Nairobi Anti- Corruption case No. 36 of 2009 with two counts of conspiracy to defraud NSSF and



abuse of office contrary to Section 45 as read with Section 48 of the *Anti-Corruption and Economic Crimes Act* no. 3 of 2003.

4. The plaintiff's claim against the defendants arose from a conveyancing transaction of NSSF's properties namely: LR No. 209/11412, 209/12220, 209/12219, 209/12287 and 209/11331 whereof NSSF Board of Trustees appointed external lawyers M/S Kipkenda Lilan & Company Advocates to undertake the sale and transfer of the named properties. As secretary to the Board the plaintiff had to foresee performance of the transactions by following up on the sale agreements and transfer of the properties.
5. It is the plaintiff's claim that in cause of the performance of the agreement for sale, it was established by joint surveyors of NSSF and the purchaser that one of the properties-LR 209/12287 was smaller on the ground as opposed to what was stated at the Certificate of Title a fact that neither the seller nor the purchaser knew prior to the verification on the ground by the surveyors.
6. As a result the purchaser refused to complete the transaction and NSSF's external Lawyers declared a dispute demanding reduction in the agreed purchase price.
The sellers (NSSF) Advocates were Kipkenda Lilan & Co. Advocates as earlier stated while the purchasers (Delta Square Limited) Advocates were M/S Muriu Mungai & Company Advocates.
7. Following the dispute over of the intended sale of NSSF's properties the matter was widely publicized in electronic and print media in Kenya and the EACC took it over, instituted investigations of alleged loss of taxpayers money held at NSSF.
Upon its investigations EACC by its report recommended prosecution of both the plaintiff and the then Managing Trustee of NSSF for the irregularities in the aborted sale of NSSF's properties.
8. The plaintiff claims that on 28/12/2009 while at his Ukunda home he read prime time lunch news in electronic media that the spokesperson and publicist of EACC Mr. Nicholas Simani had issued a statement that he-the plaintiff, a High Court Judge had been charged with an offense of corruption.
9. He further states that the same afternoon, he was picked from his Ukunda home and flown to Nairobi by a prearranged flight, was remanded at Kilimani Police Station overnight and on 29/12/2009 was arraigned in the Anti-Corruption Court at Nairobi Anti-corruption Case no. 36 of 2009, with two counts of conspiracy to defraud contrary to Section 237 of the Penal Code and a further count of Abuse of Office Contrary to Section 45 (2) as read with Section 48 of the Anti-Corruption and Economic Crimes Acts no. 3 of 2003. He pleaded not guilty and was released on cash bail.
10. The plaintiff states that the trial took a winding process with several applications being made in courts all the way upto the Court of Appeal in NAI 95 of 2010 (UR 70 of 2010) and that on 11/06/2010 the Court of Appeal granted a stay of proceedings pending the hearing and determination of the applications before it.
11. Eventually the trial commenced at the Anti-Corruption Court where 35 prosecution witnesses testified but on 13/06/2011 the plaintiff and his co-accused persons were acquitted under Section 210 of the Criminal Procedure Code.
12. The plaintiff claims that in these events, he read malice and ill-will by the EACC in his prosecution and recklessness by the Attorney General in authoring the malicious prosecution.
13. Particulars of malice by the first defendant (EACC) and/or the second defendant are stated at Paragraph 23 of the plaint as hereunder;



- i. Commencing investigations merely on press reports and in the absence of any complaint from any member of the public or body.
- ii. Having concluded that there was no criminal culpability on the part of the Plaintiff in connection with the payment of land rent as stated in paragraph 12 of the plaint, and having published its findings in the Kenya Gazette, the First Defendant's predecessor maliciously decided to charge the Plaintiff with conferring a benefit to the Commissioner of Lands on the same issue of land rent and an alternative charge of abuse of office.
- iii. Despite all facts and circumstances showing that the sale transaction between NSSF and the purchaser merely gave rise to a civil dispute, the defendants, including the first defendant's predecessor decidedly and maliciously attempted to turn the civil dispute between the parties into a blame game against the Plaintiff and other accused's and which blame game they crystallized into a criminal case.
- iv. Despite full knowledge that the dispute regarding the sale transaction arose when the purchaser discovered that the actual area of LR No. 209/12287 was confirmed to be less than the size appearing on the certificate of title, the Defendants, including the 1st Defendant's predecessor maliciously decided to turn the contractual dispute into a criminal case against the Plaintiff and his co-accused.
- v. Charging and prosecuting the Plaintiff merely to please the public, to quench the public's thirst for action and to meet the defendants' public relations agenda.
- vi. Despite knowledge of the Plaintiff's cooperation throughout the investigations undertaken by the 1st Defendant's predecessor, the 1st Defendant's predecessor failed to summon the Plaintiff to their offices and instead frisked him from his rural home in Ukunda South Coast Province after issuing a well publicized statement of having charged a sitting judge, flew him to Nairobi at the expense of taxpayers, kept him in police custody at Kilimani Police Station on the night of 28ⁿ December 2009 and then charged him on the next date, 29th December 2009.
- vii. Despite full knowledge that the Plaintiff was a sitting judge at Kakamega law courts, the 1st Defendant's predecessor did not find it necessary to summon the Plaintiff even before the High Court vacation which traditionally begins on 21st December of every calendar year, but instead waited until the Plaintiff had gone for the vacation only to arrest him without first giving him a chance to surrender himself to the police station or Integrity Centre to be taken to court.
- viii. In order to complicate and harass the Plaintiff, the 2nd Defendant's Deputy Chief Prosecutor, prosecuting the case attempted to press separate charges against the Plaintiff in Anti-Corruption Case Number 6 of 2009 and further made applications to enhance the bond terms, all of which smacked of malice.
- ix. At the trial and despite calling 35 witnesses and the Investigating Officer, none of the witnesses incriminated the Plaintiff with any criminal conduct such that the evidence tendered substantially constituted of formal procedures by witnesses whose evidence bore no relevance to the charges before court.
- x. At the trial it transpired that by the time the Plaintiff was arraigned before court on 29th December 2009, NSSF had already filed a civil suit, High Court Civil Case Number 353 of 2008; NSSF vs Delta Resources Limited and Delta Square Limited, which suit was by and large a claim for rescission of the sale agreement entered into between NSSF and the purchaser of NSSF's properties.



- xi. It also transpired that by the date when the Plaintiff was arraigned in court on 29th December 2009, the civil case, NSSF had filed High Court Civil Case Number 353 of 2008; NSSF vs Delta Resources Limited and Delta Square Limited, was fully and finally settled by way of a consent judgment and decree made on 23rd June 2009 pursuant to which suit NSSF's properties were re-transferred to NSSF while all monies incurred by NSSF by way of costs were refunded to NSSF and the money held in an eScrow account was released to the purchaser's nominees.
 - xii. It therefore transpired that the trial of the Plaintiff and his co-accused was really a charade, a sham, a make-believe meant to undertake a public relations exercise that the Plaintiff and his co-accused had committed a felony.
 - xiii. At the trial, a witness from the lands office gave evidence that the land rent of Kshs. 112,648,108.50cts was duly assessed by the lands office and was payable and was therefore regularly paid by the Plaintiff and NSSF.
 - xiv. At the conclusion of his testimony at the trial, the Investigating Officer admitted that had he been aware that the dispute between NSSF and the purchaser had been resolved, he would not have charged the Plaintiff.
 - xv. At the conclusion of his testimony at the trial, the same Investigating Officer admitted that had he been aware that the 1st Defendant's predecessor had concluded that there was no Criminal culpability on the part of the officers of NSSF in connection with payment of Kshs. 112,648,108.50cts as land rent, he would not have charged the Plaintiff and his co-accused.
 - xvi. In her considered ruling Hon. Lucy Nyambura, Principal Magistrate (as she then was), ruled that there was no case to answer and acquitted the Plaintiff and his co-accused under Section 210 of the Criminal Procedure Code.
 - xvii. The entire trial and evidence was so much of a sham that the learned trial magistrate ruled that had the 2nd Defendant's officer, Director of Public Prosecutions carefully assessed the evidence availed to him, the Gazette Notice published by the 1st Defendant's predecessor and the decree issued by consent in Nairobi HCCC NO. 353 of 2008, he would not have charged the Plaintiff and his co-accused..
14. Further Particulars of Malice on the part of the 1st Defendant's predecessor, The Kenya Anti-Corruption Commission
- i. Despite collating numerous documents and calling 36 witnesses, the 1st Defendant's predecessor failed and or neglected to analyze the same and make recommendations supported by the law of the land.
 - ii. Despite there being no plausible ground to charge the Plaintiff and his co-accused, the 1st Defendant's predecessor acted in pique and its officers abused their powers in order to undertake window dressing and pretend that they were combating corruption.
 - iii. The 1st Defendant's predecessor used the Plaintiff, a judge of the High Court, as a guinea pig in order to get media mileage and coverage that it was taking the so-called "big fish" to court on corruption charges.
 - iv. The 1st defendant's predecessor was apparently influenced as to who it would arraign in court in connection with the case and thereby charged the plaintiff as a sacrificial lamb.



- v. Despite full knowledge that the plaintiff was already a judge in the High Court sitting in Kakamega, who could be summoned with ease even by using protocol. The 1st defendant's predecessor saw it fit to fly him to Nairobi only to remand him in police custody in Kilimani police Station overnight on 28th December, 2009 with a view to humiliate him and achieve and or mete out maximum pain and anguish even before the plaintiff was charged in court.
 - vi. Trying the plaintiff through the media even before he was arrested to tarnish his image, depict him as being guilty even before he was charged and further to depict him as a corrupt person in the eyes of the public whom he was serving as a judge.
15. The plaintiff states that as a result of the malicious prosecution by the defendants he incurred and suffered loss in special damages that he pleads as Kshs. 500,000/=expended towards legal fees. He claims the same from the defendants.
 16. Additionally the plaintiff claims that following the publicized arrest and repeated publicity during the trial and in view of his status as Judge of the High Court of Kenya, his good reputation and standing in society was seriously tarnished as well as his good reputation and seeks damages as stated at paragraph 26 of the plaint.

Particulars of Defamation.

- a. The publicity accorded to the plaintiff's case and the manner of his arrest depicted him as an outlaw who deserved maximum security attention otherwise he was bound to escape from the lawful custody of the officers of the 1st defendant's predecessor and possibly hurt the public.
 - b. The publicity accorded to the plaintiff's arrest created an impression that the plaintiff had abused the office of the judge of the High Court and needed to be arrested and charged expeditiously and the entire public needed to be informed.
 - c. The manner of the plaintiff's arrest created the impression that the plaintiff had caused loss of the NSSF in billions of shillings and that he was most careless, culpable and guilty.
 - d. By timing the plaintiff's arrest to a time of the year when the High Court was on vacation, the actions of the officers of the 1st defendant's predecessor and the 2nd defendant were most callous, vindictive and left an impression that the plaintiff was suspected of a very serious offence which needed action even over the Christmas holidays.
17. The plaintiff states that the circumstances of his arrest, arraignment in court and treatment was most callous, unfair, demeaning, insensitive and undeserving and that his name, image, career and good reputation have been severely tarnished and undermined, hurt and diminished by the deliberate, conceited and premeditated actions of the 1st Defendant's predecessor in conjunction with officers of the 2nd defendant.
 18. The 1st Defendant (EACC) denied the plaintiff's claim by a statement of defence dated 23/01/2013. The 2nd Defendant filed an appearance but failed to file a defense.

Plaintiff's Case

19. The plaintiff testified as PW1. He relied on his pleadings witness statement dated 30/10/2012 and two bundles of documents dated 29/10/2012, which he adopted as his evidence in chief. The documents are marked as P. Exhibit 1-68; and P. Exhibit 1-69 respectfully.
20. On cross examination by Mr. Nyoike Advocate for the 1st Defendant (EACC), it was his evidence that he was employed by NSSF in 2003 when the NSSF Act had already been enacted, that the property that



gave rise to his arrest detention and prosecution in chief Magistrates Anti-corruption case No.36 of 2009 were NSSF's properties no. LR 209/11412, 209/12287, 209/12219/ 209/11331 and 209/12220 that was being sold to Delta Services Resources Vide a sale agreement dated 9/01/2008 and transfer made to Delta Square Limited as its nominee.

21. Upon full payment of the purchase price part of which was placed in an escrow account, he testified that the full purchase price was paid to NSSF by cheque dated 19/12/2007. It was his further testimony that upon completion, he handed over the completion documents to NSSF then Advocates Muriu Muingai Advocates with instructions for extension period for payment of Land rates and Land rent that NSSF had not been paying and were late beyond 60 days hence penalties had to be paid as by then, NSSF was not paying land rents as a policy.
22. Upon computation, the unpaid land rent came to Kshs. 112,648,108/= which sum he testified was paid through National Bank Account at the Ministry of lands. It was his testimony that upon hand over of the plots to the purchaser, one plot was found to have been smaller in size on the ground and a dispute arose whereof NSSF advocates referred the dispute to Arbitration.
23. He told the court that these events caused public outcry capturing EACC's attention for investigation with blessing of the Attorney General who referred the matter to the EACC who then recommended his arrest and prosecution in the Anti-Corruption Court.
24. PW1 told the court that he was charged together with four others with the offence of conspiracy to defraud the NSSF by causing land parcel LR No. 209/11412, 209/12220, 209/12219, 209/12287 and 209/11331 belonging to NSSF to be transferred and registered in the name of Delta Square Limited without payment to NSSF of the balance of purchase price of Kshs. 1,237,500,000/= contrary to directives of the Board of Trustees of the NSSF and in breach of the terms of the sale agreement in respect of the five parcels of land between NSSF and Delta Resources Limited.
25. PW1 told the court that he was in custody for one night and that he never testified before the anti-corruption court as he, together with the others were acquitted under Section 210 CPC.
26. The 2nd Defendants' advocate Mr. Munene cross examined the plaintiff. He testified that the then NSSF advocates agreed that the purchase price of the five plots was to be paid into an Escrow account though he did not sanction the opening of the account as it was not a term in the sale agreement and that NSSF did not receive the balance of purchase price as its advocates wanted to retain some of it.
27. It was his further evidence that NSSF nor the purchaser knew that one of the plots was smaller on the ground. He confirmed having authorized payment of the sum of Kshs. 112,648,108/= to the ministry of Lands to facilitate obtaining land rent clearance certificates.
28. In Re-examination PW1 testified that the Sale Agreement provided for a nominee of the purchaser upon completion of the sale transaction. He testified that he was acquitted together with the others and that the acquittal was not appealed from.
29. PW2 was one Patrick Ochwa who is an advocate of the High Court of Kenya of over 30 years practice. He relied on his witness statement dated 30/09/2022 as his evidence in chief.

On cross examination by Advocate for the 1st defendant, Mr. Nyoike testified that he had known the plaintiff since 1987 when they were students at Nairobi University, that when the plaintiff was arrested and charged for fraudulent dealings, doubts were raised on his integrity but upon his acquittal, it was clear to him that the arrest and prosecution was malicious.
30. It was his further evidence that the plaintiff, then a judge of the High Court of Kenya should not have been charged, having looked at the sale agreement which did not provide for opening of an escrow



account which did not confer any benefit to the plaintiff, as he was not part of the management of NSSF.

31. It was his testimony that he holds the plaintiff with high esteem.
32. On cross-examination by the EACC advocate, PW2 testified that the commission has its own procedures and sets its modalities on investigations. He testified that he did not know whether proper investigations were done but knew that the plaintiff was charged and eventually acquitted for lack of evidence.

1st Defendant's Case EACC

33. The Deputy Director Ethics and Anti-corruption commission testified as DW1. He relied on his witness statement dated 28/06/2022 which he also adopted as his evidence in chief.

It was his evidence that the escrow account into which the balance of the purchase price was not provided for in the sale agreement, but the lawyers opened the same and the plaintiff as the NSSF secretary facilitated opening of the Escrow account and that the money was never received by NSSF.

He added that the plaintiff was the main person who facilitated closely with the commission advocate and purchaser's advocate who facilitated the whole transaction. He further testified that payment of Kshs. 112,648,108/= as land rent was suspicious hence reason for investigations.

The 2nd defendant's advocate did not cross examine the plaintiff.

34. The plaintiff's Advocate Mr. Okeyo cross-examined DW1.
He testified that by a letter dated 22/02/2008 the completion documents forwarded to the purchaser's advocates was to be accompanied by the cheque for the balance of the purchase price but the commissioner of lands issued a demand for land rent for one plot LR. 209/1141 for Kshs. 112,648,108/50 payable to KRA, upon which the land Rent Clearance certificate was issued.
35. DW1 further testified that he received authority and consent to charge the plaintiff from the AG, then Senior Counsel Mr. Githu Muigai and further that he arrested the plaintiff on 28/12/2009 from his Ukunda coastal home and flown him to Nairobi placed him in custody and arraigned him in court at Milimani Anti Corruption Court on 29/12/2009.
36. The defendants closed their cases without calling any other witness.
37. Parties thereafter filed written submissions to urge their respective positions.

Plaintiff's Submissions.

38. By his submissions dated 24/04/2024 the plaintiff submitted that the defendants ought not have instituted the criminal proceedings against him pursuant to court arbitration orders issued in High Court Commercial Case no. 353 of 2008 where by its decree, all the transactions of sale and transfer of NSSF properties to Delta Resources Ltd & Delta Square Ltd were canceled and nullified in the arbitration proceedings, had the defendant heeded to the decree.
39. Further it is submitted that the ruling in the Anti-corruption case no. 36 of 2009 was on point that had the director of public prosecutions taken careful consideration of the evidence by the investigations by EACC the criminal prosecution of the plaintiff would not have taken place and therefore as a result of ignoring the decrees stated above, the prosecution of the plaintiff was malicious as no criminal culpability had been established and/or attached to the plaintiff to warrant the prosecution.



40. Additionally, it was submitted that the plaintiff never facilitated the deposit of the purchase price into the escrow account pointing to plaintiff exhibit no. 36 (page 93) that clearly confirms that:-
- a. Kipkenda Lilan & C. Advocates were procured for the subject services by the NSSF Board and not the Plaintiff.
 - b. The said advocates were answerable to NSSF Board not to the plaintiff
 - c. That it was Kipkenda & Co. Advocates who resolved to have the balance of the purchase price deposited in an escrow account not the plaintiff.
41. On the matter of malicious prosecution and defamation, the plaintiff relied on the cases of Crispine Otieno Caleb V. The AG 2014 Odunga J, as he then was) Kagane & Others v. The Attorney General & Another [1969] EA 643 and Samson Nderitu v. The Attorney General [2010]e KLR for the proposition that there must be probable cause for the prosecution based on an objective test that the material facts must be within the prosecutors knowledge at the time the prosecution is instituted and such information must be such as to be capable of satisfying an ordinary reasonable prudent and cautious way to the extent of believing that the accused is probably guilty.
42. It was thus urged that the plaintiff having been a High Court Judge during the period of his arrest and prosecution, he is entitled to compensation by an award of damages proposed as:
- a. General damages for malicious prosecution –Kshs. 25,000,000/=
 - b. General damages for false imprisonment – Kshs 2,000,000/=
 - c. Exemplary damages for malicious prosecution Kshs. 10,000,000/=
 - d. Exemplary damages for false imprisonment Kshs. 2,000,000/=
 - e. Damages for defamation Kshs. 5,000,000/=
 - f. Special damages for legal representation in the criminal prosecution Kshs. 500,000/=
43. In support of the proposed quantum of damages, the plaintiff cited the case of G. B. M Kariuki vs. the Attorney General [2016] eKLR and Daniel N. Muchiri v. Barclays Bank of Kenya & Another [2016] eKLR.

1st Defendants Submissions.

44. The defendant (EACC) submitted that it was prompted by widespread public reports and allegations that NSSF was about to lose pensioners funds through irregular transactions involving the ministry of Lands and other Governments agencies hence commissioned the investigations inline with its mandate and upon completion, prepared its report, forwarded the same to the Attorney General as per law required under Section 35 of the [*Anti-Corruption and Economic Crimes Act*](#).
45. It submitted that the Attorney General took an independent review and gave its consent to charge the plaintiff with others in Anti-corruption case no. 36 of 2009 and upon hearing of 36 prosecution witnesses, the court acquitted the plaintiff together with his co accused persons under Section 210 of Criminal Procedure Code for lack of evidence which resulted to this suit for malicious prosecution.
46. EACC submitted further that the investigations it undertook was within its mandate and was not malicious but to meet the ends of justice as complaints raised reasonable grounds to prefer charges against the plaintiff and the co-accuseds, citing the case of Lawrence Onyango Oduori v Attorney



General & Another [2022]eKLR for suggestion that a malicious prosecution is one instituted without reasonable and probable cause, and further citing *Wanga v. the Attorney General* [1979]KLR, 138.

47. The 1st defendant further submitted that it was its duty and responsibility to investigate all reports of allegations on corruption or give reasons for not investigating them as mandated at Section 25 of the Act. It further relied on the testimony of DW1 the Investigating officer whose report showed existence of reasonable and probable cause to suspect that the plaintiff had been involved in collusion to defraud NSSF.

48. Additionally, the 1st defendant submitted that relying on the case of *Gachau Githaiga & Another vs. Attorney General* [2015]eKLR and *Nzoia Sugar Company Ltd vs. Fungututi* [1988] KLR 339 wherein the court of Appeal pronounced itself that an acquittal on a criminal charge is not sufficient basis to file a suit for malicious prosecution, further adding that existence of reasonable and probable cause that leads to arrest confinement and prosecution follows naturally and equally that no malice can be attached to the relevant government agencies in the arrest confinement and prosecution of the appellant.

For the above, the 1st defendant urged the court to find that the claim for damages for malicious prosecution must fail.

49. On the claim for defamation the 1st defendant submitted that the same is time barred, that it never defamed the plaintiff in any manner as it never invited the media to the prosecution of the case. It further submitted that Public interest policy favours exposure of crime and cooperation from the public and urged for dismissal of the suit.

Submission's by the 2nd Defendant

50. On the basis of an allegation that five NSSF plots were transferred to a purchaser without payment of 90% of the purchase price, it was submitted that the AG pursuant to an investigation report by the 1st defendant (EACC), it recommended the prosecution of the plaintiff and the Managing Trustee of NSSF and others for crimes under the *Anti-Corruption and Economic Crimes Act*, 2003.

51. Additionally it was submitted that the prosecution was not actuated by malice nor was it without reasonable and probable cause citing the cases of *Attorney General v. Attorney General* [1973] EA 289, and *Socfinaf Kenya Ltd v. Peter Guchu Kuvia* (HCCA No 595 of 2000 at Nairobi).

52. On the claim of defamation, the 2nd defendant submitted that the claim being based on the charges before the court was made in good faith and was not made or caused to be made by itself and that it lacked basis and ought to be dismissed as well as the claim for costs of the suit.

Issues for Determination

1. Whether the plaintiff has made out a case for malicious prosecution and defamation by the defendants jointly and/or severally
 2. Whether the defendants are liable to compensate the plaintiff and if so, the quantum of damages.
 3. Who should bear the costs of the suit?
53. The court has considered the parties' pleadings evidence and submissions.



54. The principles upon which a claim for malicious prosecution is premised were laid down by Conran, J in the case of *Murunga V. Attorney General* (supra) that:-

The plaintiff must show that the prosecution was instituted by the defendant or by someone for whose acts he is responsible.

That the plaintiff must show that the prosecution terminated in his favour.

That the plaintiff must demonstrate that the prosecution was instituted without reasonable and probable cause.

The plaintiff must also show that the prosecution was actuated by malice.

55. There is no dispute that the prosecution was instituted against the plaintiff by the 2nd Defendant through the Director of Public Prosecutions upon a report of investigations undertaken by the 1st defendant pursuant to its mandate stated at Section 35 of the *Anti-Corruption and Economic Crimes Act* 2003. Consent to prosecute the plaintiff was given by the Hon. The Attorney General upon its independent consideration of the investigation report undertaken by the 1st defendant.

56. There is no dispute too that after 36 prosecution witnesses had testified the court found no sufficient evidence to sustain the charges against the plaintiff and his co-accused and acquitted them under Section 210 of the Criminal procedure Code. The prosecution was terminated in favour of the plaintiff and his co-accused persons, and therefore the conditions set at *Murunga v A. G* case (supra) were duly satisfied.

57. On whether the prosecution was instituted without reasonable and probable cause it is appropriate to examine the period preceding the arrest, detention and prosecution of the plaintiff. The plaintiff was arrested on 28/12/2009, detained and arraigned in court to answer to the charges on 29/12/2009.

58. Events leading to the plaintiff's woes arose from the aborted sale of NSSF plots to Delta Resources Ltd and its nominee on or about December 2007 to 2009. When a dispute arose in the conveyance transaction it was referred to arbitration as per the subject sale agreement. The arbitration proceeded and concluded. Vide Nairobi Hccc Number 353 of 2008 between the parties-NSSF Delta Resource Limited & its nominee, and the Registrar of Titles. A consent order was recorded in court on 23/06/2009. Pursuant to the consent order NSSF plots were re-transferred back to NSSF and NSSF was paid Kshs. 30 million on account of costs in the suit and the aborted sale transactions. The balance of the purchase price was paid back to the purchaser. In effect the dispute was settled and concluded as between the disputants, with non-complaining thereafter that was in June.

59. As stated earlier the case proceeded with 36 prosecution witness. In her ruling delivered on 31/10/2011, the Hon. L. Nyambura PM the accused persons including the plaintiff were acquitted under Section 210 of the CPC. At this stage it is appropriate to quote the court's observations at the last page of the very detailed well-analyzed and rationalized ruling;

“This is one case the court finds that if the Director of Public Prosecution had taken careful consideration of the evidence gathered by the investigators from the Kenya Anti-Corruption commission and also considered the Decree of Milimani Commercial Courts civil case No. 353 of 15/01/2008 and the Kenya Gazette notice no 353 of 15/01/2010 KACC/F1/INQ/23/2009, then this case should not have seen the light of the day”.

60. A dissection of the above court's observations and the ruling in my viewpoint show clear to lack of and failure by the defendants, more specifically the Attorney General to carefully and decisively consider and understand the meaning and purport of the court ruling in HCC. No. 353 of 2008 wherein



all disputes between the parties over the subject matter were resolved. This was six months prior to the arrest and prosecution of the plaintiff. The court further made a finding that the charges the plaintiff was facing in Anti-Corruption case no. 36 of 2009 were normal procedures in conveyancing procedures.

61. In the face of the above clear Court findings and directions the 2nd Defendant ignored the same and proceeded to recommend prosecution of the plaintiff including a charge for careless failure to comply with applicable procedures and guidelines relating to management of funds contrary to Section 45 (2) (b) as read with section 48 of the Anti-corruption Economic Crimes Act.

62. It is trite that the 1st Defendant had the mandate to Investigate the alleged fraudulent commissions and omissions by the plaintiff. However, the decision to charge fell at the feet of the DPP who in this case failed to do its work thoroughly and thus prosecuted the plaintiff when it knew, or ought to have known that there was no sufficient evidence to sustain the preferred charges. That is what the court in *Nderitu vs. AG (supra)* held– that:

“---the Defendant usually carry out investigations, record statements from potential witnesses analyze the facts to determine if the facts disclose an offense before arraigning such a person in a court of law....”

63. Additionally the court in *Kagane & Others (Supra)* the court rendered itself on whether there was reasonable and probable cause for prosecution upon material within the knowledge of the prosecutor at the time he instituted the prosecution constitute sufficient information that is sufficient of satisfying an ordinary reasonable prudent and cautious person to sustain a conviction. In *Samon Nderitu v. Attorney General case (supra)* were the court held – that:-

“----- the defendant usually carry out investigations record statements from potential witnesses analyze the fact to determine if the facts disclose an offense before arraigning such a person in a court of law....”

64. Odunga J. (as he then was) in *G. B. M. Kariuki v. Attorney General [2010]eKLR*, citing the case of *Mbowa v. East mengo District administration[1972]EA 352* observed that:

a. “.....the tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than for the public benefit..... it suggests the existence of malice and the distortion of the truth..... the defendant must have cited without reasonable or probable cause, ie there must have been no facts which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified..... the defendant must have acted maliciously in instituting the criminal proceeding with improper and wrongful motive with an intent to use the legal processes in question for some other than its legally appointed an appropriate purpose....”

65. It is also trite that to prosecute a person is not prima facie tortuous but to do so dishonestly and unreasonably is tortuous as held in *Kagane v. Attorney General [1969] EA 643* which set the test for reasonable and probable cause.

In malicious prosecutions circumstances surrounding the prosecution is key. The prosecution agencies are required to investigate the complaint and act impartially and independently be thorough taking into account versions presented by both the complainant and the suspect.



66. In this case, it cannot be said that the Attorney General while granting consent for the prosecution of the plaintiff did not have full details of all material facts within its knowledge.

I agree with the 1st defendant (EACC) that once it presented its investigation report to the DPP, it was upon the AG to act on it independently as it (EACC) had no powers to prosecute. The DPP is mandated to analyze the report and make a finding on whether reasonable and probable cause for prosecution and sustenance of the charges exist in the material facts placed before it in the investigation report not be found, in the reasons for prosecution it can only be viewed as malicious and actuated by the prosecution agency.

67. In the circumstances of the case before the court, I find no probable or reasonable bona fide belief upon the court orders that were in possession of the prosecution six months before the decision to prosecute the plaintiff was made and effected despite all the material facts before it. It is the reason why the court in *R. V. Attorney General exp. Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2021* had to deal with and rendered that:-

“A criminal prosecution which is commenced in the absence of proper factual foundation on basis is always suspect for ulterior motive or improper purpose. Before institution criminal proceedings there must be the existence of material evidence on which the prosecution can say with certainty that they have a prosecutable cause.... otherwise the prosecution will be malicious and actionable.

68. Malice in a prosecution can also be inferred from deliberate or reckless and negligently ignoring of facts. There is no doubt that in this case, the Attorney General (2nd Defendant) while recommending and giving consent for the prosecution of the plaintiff was deliberate, reckless careless and negligent, by ignoring all the facts placed before it.

69. In the end, I come to a finding that and in agreement with the ruling of the court in *Milimani Anti-Corruption case No. 36 of 2009*, that had the AG, (2nd defendant) taken its duties seriously and properly interrogated the material facts before it more carefully and purposefully, it would not have given its consent to prosecute the plaintiff for lack of legal foundation.

70. The court is acutely aware that an acquittal of a person of a criminal charge is not sufficient basis or ground for a malicious prosecution, but it is persuaded that this is a case of clear malicious prosecution of the plaintiff by the 2nd Defendant.

In respect thereof the court absorbs the 1st Defendant (EACC) from blame and liability as by the facts placed before the court, it carried its duty and mandate as granted to investigate, prepare a report and submit the same to the Hon. The Attorney General who independently upon review makes a decision whether to charge or not, as by its Act, EACC has no powers to prosecute any suspect.

71. Consequently, having found that there was no reasonable and probable cause for the arrest, confinement and prosecution of the plaintiff the court finds that the prosecution was maliciously actuated by the relevant agencies under the office of the Hon. Attorney General. They are hereby held liable in damages for malicious prosecution of the plaintiff.

72. On the claim for damages for defamation Cap 36 Laws of Kenya, Section 6 states that a fair and accurate report in any newspaper of proceedings heard before any court exercising judicial authority within Kenya shall be absolutely privileged. Provided that nothing in this section shall authorize the publication of any blasphemous, seductions or indecent matter.

Section 7 states



Subject to provisions of this section, the publication in a newspaper of and such report or other matter as mentioned in the schedule to this act shall be privileged unless such publication is proved to be made with malice.

73. Limitations of Actions Act Cap 22 laws of Kenya prohibits initiating a defamation case upon expiry of twelve months. Section 27 and 28 thereof does not incorporate extension of time in defamation claims.

In any event, no leave was ever sought by the plaintiff for extension of time.

The court shall not act in vacuum to grant orders that have not been sought. There is no doubt that the impugned publications in both the Media and Electronic Media were in respect of the reports in proceedings of judicial process which are absolutely privileged under Section 6 and 7 of the Defamation Act as stated above. I therefore decline the invitation to find that the plaintiff is entitled to a claim for damages for defamation.

Damages for Malicious Prosecution

74. The plaintiff was appointed Judge of the High Court of Kenya in 2009 shortly after he had ceased working for NSSF as its Board Secretary for six years and in the midst of the prosecution subject of this case when he served as a judge of the High Court of Kenya upto 2022 when where his engagement was terminated.

75. The plaintiff's arrest and prosecution were publicly advertised and must have caused him mental pain and anguish for a period of about three years. The Judge/plaintiff underwent humiliation and was depicted as a corrupt Judge before the very public that he swore to defend and uphold the rule of law. In the case of *G. B. M. Kariuki v. Attorney General* [2016] eKLR, the retired was Judge arrested and maliciously prosecuted for a serious offence. He was awarded Kshs. 5,000,000/= in 2016 as damages for malicious prosecution.

76. The court in the case of *Daniel N. Muchiri v. Barclays Bank of Kenya & Another* [2016] eKLR the court awarded to an accountant on proof of malicious prosecution Kshs. 2 million in general damages and for malicious prosecution Kshs. 400,000/- as well as exemplary damages of Kshs. 5,000,000/- also in 2016.

77. The court in *Arn Security & Training Services & Another v. Cooperative Bank of Kenya & 3 others* [2024] eKLR the plaintiff who was a bank Manager was granted Kshs. 4,000,000/= damages for malicious prosecution in May, 2024.

78. There is no doubt that the malicious and unwarranted prosecution of the plaintiff had a direct impact on him in his personal capacity as well as in his professional career as a High Court Judge, a position held in high esteem in the society.

He faced indignity and humiliation. His feelings were negatively affected. His status in society was at stake at the material times. All these were not necessary and should not have happened in the first instant had the AG by its agents taken keen interest in the court pronouncements prior to the humiliating events leading to the malicious arrest, detention and prosecution of the plaintiff.

79. The Plaintiff also claimed exemplary damages.

In *Broome V. Cassell & CO. Ltd* [1971] 2 ALL ER 187 at 204-205, salmon J. stated thus:-

- a. "For centuries, the law has held that exemplary damages may be awarded against defendant in respect of certain torts committed in outrageous circumstances. This is because the law always recognizes that it is in the public interest that such conduct should be punished and deterred.



Providing such damages are reasonably assessed it does not lie in the mouths of defendants complain – public interest requires that in some exemplary damages should be awarded...”

80. I am persuaded that this is one such instances when exemplary damages must be awarded to the plaintiff.

Disposition

81. For the foregoing, the court finds and holds that the plaintiff has proved his case against the 2nd defendant, the Hon. Attorney general to the required standard of proof on the balance of probabilities.

82. The 1st Defendant-EACC-is absorbed from liability.

83. Judgment is entered for the plaintiff against the 2nd Defendant, The Hon. Attorney General as hereunder:-

- a. General damages for malicious prosecution in the sum of Kshs. 6,000,000/=.
- b. Exemplary damages in the sum of Kshs. 2,000,000/=
- c. Special damages – Nil (not proved)
- d. Interest at court rates shall accrue on (a) and (b) above from the date of this judgment until payment in full.
- e. The 2nd defendant shall bear costs of the suit.

Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF SEPTEMBER, 2024.

JANET MULWA

JUDGE

