



**Kassimu v Mutemi & 2 others (Civil Appeal E005 of 2023)
[2024] KEHC 14885 (KLR) (25 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14885 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL APPEAL E005 OF 2023**

**FR OLEL, J
NOVEMBER 25, 2024**

BETWEEN

ERASTUS MULI KASSIMU APPELLANT

AND

STEPHEN SYANDA MUTEMI 1ST RESPONDENT

JACKSON MUTEMI MBITI 2ND RESPONDENT

THE HON ATTORNEY GENERAL 3RD RESPONDENT

(Being an appeal from the Judgment of Hon M.K.Mwangi (CM) delivered on 21st December 2022 in the Mwingi Chief Magistrate Court Civil suit No. E34bof 2020)

JUDGMENT

A. Introduction

1. This appeal challenges the judgment/decree of Honourable M.K Mwangi, Chief Magistrate delivered on 21st December 2022 in Mwingi Chief Magistrate court case no. E34 of 2020, where he awarded the 1st and 2nd respondents a sum of Kshs.300,000.00/= as general damages for malicious prosecution as well as the costs of the primary suit.
2. The 1st and 2nd Respondents, who were the plaintiffs in the primary suit, which they filed claiming damages for malicious prosecution and defamation of character. They averred that the Appellant, in in conjunction with the agents and/or servants of the 1st defendant in the primary suit did cause them to be arrested and charged with the offense of malicious damage to property and giving false information to a person employed in the public office contrary to section 339(3) of the Penal code and Section 129(a) of the Penal Code, vide Mwingi CMCR NO 120 OF 2018. The said suit was heard on merit and eventually, they were acquitted under section 215 of the Criminal Procedure Code on 22nd September 2020.



3. The respondent further averred that their prosecution was maliciously instigated and commenced when it was very clear from the material before the 3rd respondent agents that the charges preferred were not maintainable against them and it was therefore proper to infer that the Appellant and 3rd respondents' action, were actuated by malice and ill will. The respondents prayed that the court finds in their favour and award them damages as prayed for in the plaint.
4. The 1st defendant in the primary suit (The Attorney General) and the Appellant herein filed their respective statement of defence and denied all the averments made by the 1st and 2nd respondents in their plaint. They contended that the police received a valid complaint from the Appellant, which upon thorough investigations, was found to have reasonable and probable cause and therefore the 1st and 2nd respondents herein were rightly called to answer to the charge. The fact that they were acquitted did not entitle them to sue for malicious prosecution as acquittal in and of itself was not proof of malice. The Appellant and the 1st defendant in the primary suit thus urged the trial court to dismiss the appellant's claim.

B. Trial Evidence

5. PW1 Jackson Mutemi Mbiti, testified and averred that he was a civil servant deployed as an assistant chief of Ndaluni Sub location and adopted his statement as evidence in chief. It was his evidence that on 09.09.2017 his son, the 1st respondent herein requested to use his motorcycle registration Number KMCZ 255H,(hereinafter referred to as the suit motor cycle) to travel to the home of the Appellant herein, where he had been contracted to fix floor tiles. At around 5.00 pm on the said date, he received a call from the Appellant who told him that he had forcefully detained the suit motor cycle on the basis that the 1st respondent had damaged his tiles and was demanding Kshs.14,000/= as compensation.
6. The following morning, while still accompanied by the 1st respondent, they went to the Appellants residence to discussed the issues arising herein but did not reach an agreement on that day or later despite communicating severally. On 26.09.2017, he did report the matter to Migwani Police Station under OB NO. 21/26/9/2017 because the Appellant had completely refused to release the suit motorcycle. On 29.10.2017, The Appellant was arrested by the police and he directed his brother Roy Mwangela Muthangya to bring the suit motorcycle to the police station. No further action was taken and his motorcycle was detained at the said police station.
7. On 26.02.2018, the 2nd Respondent went to the police station and sought for release of the suit motorcycle, which was not given to him, but his complaint about the delay of the matter was again booked under OB.NO 20/26/2/2018. On 18.09.2018, about one year later at about 4.00 pm, he was arrested and on 19.09.2018 arraigned before Mwingi Magistrate court where he was charged with the offence of giving false information to an officer employed in a public office. Later on, 30.10. 2018, his son was arrested and charged with the offence of Malicious damage to property contrary to section 339(1) of the Penal Code and giving false information to an officer employed in a public office contrary to section 129(a) of the Penal Code. The two matters were consolidated under Mwingi Criminal Case No 120 of 2018.
8. The suit was prosecuted to conclusion and on 22.09.2020, they were acquitted under Section 215 of the Penal Code. It was his contention that the charges framed against them were malicious, false, and were not based on any tangible evidence. The agents of the 3rd Respondents herein and the Appellant were fully aware of the futility of their action, but still insisted on proceeding with the same thereby causing him to suffer loss and damage. The 2nd respondent produced all the documents relied upon into evidence.



9. Upon cross-examination, he confirmed that he was charged with giving false information to a public officer. Under the OB recorded at Migwani Police Station, he had stated that the complainant had forcefully taken the suit motorcycle and not stolen it. He later learned that there was no agreement, between the Appellant and the 1st respondent and if the Appellant so alleged, it was a lie. Further at no time had he pledged the suit motorcycle as security for the alleged debt owed and therefore Appellant had no reason for detaining the suit motorcycle. The police had also acted maliciously as they ignored the first information, he had given them, which was recorded under OB NO. 21/26/9/2017.
10. On further cross-examination, the 2nd respondent confirmed that he was the assistant chief for the Ndaluni sub location and part of his duty revolved around solving disputes. He was not a party to the agreement between the Appellant and the 1st respondent and was not privy as to their work agreement. When he went to get his motorcycle, the Appellant told him that his son had destroyed his floor tiles and he had detained the suit motorcycle until he was paid the sums owed by the 1st respondent was settled.
11. The police wanted proof of ownership of the motorcycle, and he presented cash sales receipts under his name issued by Makindu Motors, who sold had him the suit motorcycle and was thus the legal owner thereof. The complaint made was malicious as the police alleged that he had lied to them, when in fact that was not true and the Appellant shared the blame as he is the one who reported him and lied to the police. In re-examination, the 2nd respondent confirmed that there was no agreement with the Appellant that he detains the suit motorcycle and despite the police seeing the original ownership records, they ignored the same and had him charged based on allegations which they knew were false.
12. PW2 Stephen Syanda Mutemi adopted his witness statement dated 10.12.2020 as his evidence in chief. He stated that sometime in 2017 he was contracted by the Appellant to install floor tiles at his house situated in Thokoa location and after agreeing on payment terms, he contracted five other Masons to help execute the said works. After working for one week and upon inspection of the works carried out, the Appellant sent him Kshs.32,200/= leaving a balance of Kshs.42,500/=. The following week they continued to work and upon completion, the Appellant again inspected the completed work and raised issues regarding the fast pace with which the works were completed and also with the number off-cut tiles, which he insisted were negligently wasted. The Appellant demanded compensation for his damaged tiles, before he could clear the balance of the labour charges owned.
13. On 09.09.2017, he visited the Appellant's home to sort out the pending issues and the Appellant forcefully detained his father's motorcycle demanding a refund of Kshs.14,000/= for the wasted floor tiles. He informed his father, the 2nd respondent and on 10.09.2017 they both went back to the Appellant's house and sought for release of the suit motor cycle to no avail. His father reported the matter to the police on 26.09.2017 and later on 29.10.2017, the Appellant was arrested and ordered to take the motorcycle to the police station.
14. One year later on 18.09.2018 his father was arrested and charged in court on 19.09.2018, while he was arrested on 30.10.2018 and charged before court on 01.11.2018. The two matters were consolidated and the same continued under Mwingi Principal Court Criminal Case No 120 OF 2018, which was heard on merit and they were acquitted on 22.09.2020. He blamed both defendants in the primary suit for continuing with their prosecution, yet they knew that the charges against them were fabricated, maliciously motivated, and were not based on any tangible evidence thus exposing them to unnecessary trauma, and anguish and ultimately tarnishing their reputations.
15. Upon cross-examination by the 1st defendant's counsel, he stated that he was employed by the Appellant and worked for 3 weeks. He went to the Appellant's house with his father's motorcycle



and while inspecting the works carried out, the Appellant alleged that he had spoilt his floor tiles and proceeded to unlawfully confiscate the suit motorcycle. He informed the 2nd respondent and on the following day they went to have the issues sorted out but no progress was made. On 31.10.2018, the Appellant caused the police to arrest him and he was charged with the offence of Malicious damage to property and giving false information to a public officer. They never agreed that the Appellant would hold the suit motorcycle as security and unfortunately, the Appellant had made false allegations against them to avoid paying him Kshs.14,500/= which was the outstanding balance for work done.

16. On further cross-examination by the Appellants Advocate, he stated that he was trained as a tile's fundi through apprenticeship. They had used a machine to cut the floor tiles and it is the unfitting cut tiles, which remained unused. These are the tiles the Appellant alleged that he had smashed and were not accounted for. He confirmed that the Appellant had a right to make a complaint to the police but the problem was that the allegations made were false and it led to them being charged before court. The 1st respondent also confirmed that the Appellant was not the investigator nor was he the person who gave consent for them to be charged, but all in all, he provided the false information and they underwent trial before eventually they were acquitted as it was proved that they had not done anything wrong. He reiterated the fact that his workmanship was good, and the Appellant had wrongfully and without proper basis detained the suit motorcycle.
17. In re-examination, the 1st respondent affirmed that they were arrested due to the false complaint made by the Appellant yet he never damaged the Appellants tiles nor did they agree with his unilateral decision to detain the motorcycle. They were therefore justified to seek compensation for their prosecution was ill motivated.
18. DW1 No 69629 Corporal Optat Damien Sang'awe testified that he was the investigating officer in the criminal case. He adopted his witness statement as his evidence and confirmed that he knew both the 1st and 2nd respondent. The 2nd respondent herein had made a report to Police constable Shisia of his lost motor cycle. From his investigations both plaintiffs were culpable as they had a common goal to refuse to pay for the damaged tiles. After the report was made, he was tasked with conducted investigations pertaining thereto. The 1st respondent denied damaged the Appellant's property, but when he went to the construction site, he found two heaps of proper off cuts and other tiles which in his observation, clearly showed that they were maliciously damaged.
19. About 15 boxes of titles were maliciously damaged. One of the Appellants workers had informed him that he had seen the 1st respondent maliciously breaking cartons of tiles. The 1st and 2nd respondents arrest was done with no ill will or spite. He had reasonable basis to charge the duo because they conspired to give false information to the police, but before charging them he had called both parties to try amicably settle the dispute but his attempt was not successful.
20. Upon cross examination by the 1st and 2nd respondents counsel, he confirmed that upon completion of his investigations, he charged the 1st and 2nd respondents for giving false information to a police officer Constable Geoffrey Shisia. He also charged the 1st respondent with the offence of malicious damage to property for wilfully destroying 15 cartons of tiles. He further also confirmed that the agreement between the parties was a gentleman's agreement and his action was not motivated by malice or ill will.
21. Upon further cross examination by the state counsel, he stated that 1st report made to the police was by the 2nd respondent and the Appellant was bonded to report to the police station as investigations continued. The Appellant told the police that he retained the suit motorcycle waiting to be paid Kshs 14,100/= based on the gentlemen's agreement which they had with the 1st and 2nd respondent. It was police constable shisia, who recorded the witness statements and he believed the report made by the 1st and 2nd respondent was false. As part of the investigation undertaken, he visited the incident scene and



- found evidence of damage, which he photographed and they eventually had the 1st and 2nd respondent charged, though they were eventually acquitted under section 215 of the Criminal Procedure Code.
22. DW2 Erastus Muli Kasimu adopted his witness statement dated 14.05.2021 as his evidence in chief. In the said witness statement, he confirmed that he had contracted the 1st respondent to fix floor tiles in his house, and was called by one Kalundi, who informed him that he had seen the 1st respondent deliberately spoiling tiles behind the house. He immediately called him, and though the 1st respondent initially denied the said allegation, eventually agreed that they could sit down and iron out the issue. He asked the 1st respondent how he would guarantee payment of the destroyed floor tiles and he offered to leave the suit motorcycle behind as security for the debt incurred.
 23. He did a NTSA search of the suit motorcycle and discovered it was still registered under the name of Makindu Motors, and the 1st respondent told him he was in the process of transferring the ownership thereof to his name. Earlier on 09.10.2017, he travelled to the building site and estimated the damages to be worth Kshs.50,000/= and on the following day he met the 1st and 2nd respondents at his home and after protracted negotiations and reconciliation, they agreed to have the damages assessed at Kshs.19,500/=, but he owed the 1st respondent Kshs.5,000/= which was to be offset from this sum and the final figure agreed, which the 1st respondent would pay him came down to Kshs.14,500/=.
 24. After two weeks, the 2nd respondent through his brother, Roy Muthangya offered to pay part of the debt in exchange of having the suit motorcycle release, but he did not buy into that idea. The 2nd respondent decided to play rough and made a report to Migani police station that he had stolen his motorcycle. On account of this report, he was arrested on 29.09.2017, where he was confronted with the said allegations, though he was not given a chance to look at the OB report made. He recorded his statement and was released as the police conducted further investigations.
 25. He did not do anything to follow up on this matter, nor did he make any independent complaint against the 1st and 2nd respondent. They were charged based on independent investigations conducted and concluded by the police. He was later he was summoned to testify in court and though the 1st and 2nd respondents were acquitted, the ODPP had Appeal against the said trial court finding.
 26. Upon cross examination the Appellant confirmed that he was summoned to the police station and recorded gave his statement/ complaint regarding the 15 cartons of tiles which were destroyed and had assessed the damages caused to be at about kshs.50,000/=. He clarified that though the police prosecuted the 1st and 2nd respondent based on his statement, he had not initiated the prosecution process and was not aware of the initial report filed by the 2nd respondent. He also confirmed that the suit motorcycle was recovered from his house.
 27. On further cross examination, the Appellant reiterated that they had agreed with the 2nd respondent that he would force the 1st respondent to settle the debt. He was arrested by the police based on the 2nd respondent's complaint, but was eventually released after explaining himself. Further the 1st respondent had willingly left the suit motorcycle at his compound to guarantee the debt and the police had recovered it from his compound.
 28. The trial Magistrate did consider all the evidence tendered and vide his judgment dated 21st December 2022, found that the 1st and 2nd respondents had proved their case on a balance of probability and proceeded to enter judgment in their favour to the tune of Kshs.300,000/= each plus costs and interest.



C. The Appeal

29. Being completely dissatisfied by the said judgment/decreed the Appellant filed his Memorandum of Appeal, and raised the following grounds of Appeal;
- a. That the learned Magistrate erred in law and in fact when he found and held that the appellant had maliciously caused and pressed prosecution of the 1st and 2nd respondents despite there being overwhelming evidence that the appellant made no report to the police.
 - b. That the learned magistrate erred and misdirected himself in law and fact when he failed to appreciate that in a case of malicious prosecution, existence of a reasonable cause or belief that an offence had been committed would be enough to deny a plaintiff damages.
 - c. That the learned Magistrate erred and misdirected himself when in his judgement found that the mere fact that the appellant being the complainant in the criminal case was enough basis for finding for the 1st and 2nd respondents.
 - d. That the learned Magistrate erred and misdirected himself in law and in fact when he held that the appellant was the complainant in the count of giving false information to the person employed in public service whereas he was a mere witness in the count.
 - e. That the learned Magistrate erred and misdirected himself in law and in fact when he found the claim for malicious prosecution had been proved against the appellant and awarded the 1st and 2nd respondents kshs 300,000 each as general damages.
30. The Appellants urged that this court finds that the Appeal had merit and proceed to set aside the entire judgment of the trial court and instead substitute the same with an order dismissing the primary suit with costs.

D. Submissions

Appellant's Submissions

31. Reliance was made to the case of George Masinde Murunga vs The Attorney General (1979) e KLR which established the ingredients of malicious prosecutions. It was submitted that the 1st and 2nd respondents had failed to establish all the ingredients/elements applicable conjunctively in order to successfully make a claim for Malicious prosecution. They had failed to prove that their prosecution was initiated by the appellant and the evidence as captured by the court proceedings in Mwingi CMCR No 120 of 2018 confirmed this fact. He only responded to the complaint made by the 2nd respondent.
32. The main basis for the 1st and 2nd respondent filing their claim under tort, was that of giving false information to the police, which meant that the police were the compliant and this was confirmed by the evidence of Corporal Damien Sangwe, who confirmed that the 2nd Appellant made a report of theft of his motorcycle to the police, vide the OB recorded on 10.09.2017. As a result, the Appellant was arrested on 29.09.2017 and also to record his statement to explain his side of the story.
33. Therefore, even though the criminal proceedings were terminated in favour of the 1st and 2nd respondent, that alone did not entitle the 1st and 2nd respondent to claim damages for malicious prosecution. Once the evidence lead showed that one of the elements lacked, it would lead to automatic dismissal of the case. Reliance was placed in the case of Chrispine Otieno Caleb vs AG (2014) Eklr, to buttress this point.



34. The Appellant further faulted the 1st and 2nd respondents for failing to establish other elements to prove his allegations of malicious prosecution, including the presence of malice. It was to be noted that the particulars of Malice pleaded were not proved to the required standard as the police had probable cause to charge the 1st and 2nd respondents in court. Further, the decision to charge the 1st and 2nd respondents was approved by the office of the ODPP, and the blame in prosecution could therefore not be shifted or placed on the door step of the Appellant. Reliance was placed on the case of Stephen Gachau Githaiga & another v AG [2015] and the case of National Oil Corporation v John Mwangi Kaguenyu & 2 others [2019] eKLR.
35. The Appellant also finally submitted that an acquittal of a suspect in a criminal case was not sufficient ground for filing a civil case to claim damages for malicious prosecution or false imprisonment. Evidence of spite, ill will, lack of reasonable and probable cause had to be established for such a claim to succeed. The trial court erred in his application of law relating to a claim for malicious prosecution and thus arrived at a wrong conclusion. The Appellant urged the court to find that this Appeal has merit and proceed to set-aside the award made against him.

1st and 2nd Respondents' Submissions

36. The 1st and 2nd respondent submitted that on first Appeal, the court had power to examine and re-evaluate the evidence presented and exercise caution before coming to a different conclusion. The Appellate court could only interfere with a finding of fact where the finding was based on no evidence or misapprehension of the evidence or where the trial court had demonstrably acted on wrong principles in reaching the finding. Reliance was made to the case of Mwanasokoni vs Kenya Bus service Limited (1985) ECLR on the duty of the first appellate court to examine and re-evaluate the evidence presented.
37. To succeed in a claim for malicious prosecution, the claimant had to establish that; the prosecution was instituted by the defendant or someone for whose act the defendant is responsible, the prosecution was determined in favour of the plaintiff, the prosecution was instituted without reasonable cause and finally that the said prosecution was actuated by Malice. Reliance was also made to the case of Gitau vs AG where the said principles were discussed.
38. It was not in dispute that the appellant was the complainant that led to the charging and prosecution of the 1st and 2nd respondents, prosecution had been terminated in their favour and the trial court had properly analysed the evidence presented during trial and correctly found that there was no reasonable or probable cause to undertake the prosecution. The 1st and 2nd respondents had therefore established all the ingredients for malicious prosecution and the trial court arrived at the correct decision, which did not warrant any interference by the Appellant court.
39. On quantum it was submitted that it was a matter of discretion of the court, which the Appellate court will not interfere with unless it was demonstrated that the trial court had acted on some wrong principle or that the award was so inordinately high or low as to amount to an injustice. The trial court award was fair and the 1st and 2nd respondent urged the court not to interfere with the same. Reliance was placed in the case of Kemfro Africa Limited T/A Meru Express Services (1976) & another vs Lubia & another (1985)eKLR.
40. The 1st and 2nd respondent thus urged this court to find that the appeal urged was not merited and be pleased to dismiss the same with cost.



3rd Respondent's Submissions

41. The 3rd respondents associated themselves with the appellant's submissions and further submitted that the trial magistrate ought to have considered that the police had established a reasonable and probable cause to the effect that, the 1st and 2nd respondents had committed the offence of malicious damage to property and giving false information to a person employed in the public service and their subsequent acquittal ought not to entitle them to succeed in a claim for malicious prosecution.
42. They urged this court to allow the appeal and set aside the judgement of the trial court.

Analysis & Determination

43. I have considered this Appeal, parties submissions and the impugned judgment. I have also considered the decisions relied on and perused the trial court's record. This being a first appeal, it is by way of a retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyse and re-consider the evidence afresh and draw its own conclusions on it. The court should however bear in mind that it did not see the witnesses as they testified and give due allowance for that. (See *Selle v Associated Motor Boat Co Ltd & Others* [1968] EA 123).
44. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal held:

“This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”
45. In *Nkuba v Nyamiro* [1983] KLR 403, the same court stated:

“A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”
46. In this appeal, it is clear that the central question for determination revolves around the question of whether the tort of malicious prosecution was proved by the 1st and the 2nd respondents.
47. The law is clear that the mere fact that a person has been acquitted of criminal charges does not necessarily connote malice on the part of the complainant and/or prosecutor. As was held in *James Karuga Kiiro vs Joseph Mwamburi and 3 Others*, Nrb C.A No. 171 of 2000, to prosecute a person is not prima facie tortious, but to do so dishonestly or unreasonable is, the burden of proving that the prosecutor did not act honestly or reasonably being on the person prosecuted.
48. This position was adopted by Mativo, J in *Stephen Gachau Githaiga vs Attorney General* (2015) eKLR, that:

“...the initiation of criminal proceedings in the absence of reasonable and probable grounds does not itself suffice to ground a plaintiff's case for malicious prosecution, regardless of whether the defendant is private or public actor. Malicious prosecution, as the label implies, is an intentional tort that requires proof that the defendant's conduct in setting the criminal process in motion was fuelled by malice. The malice requirement is the key to striking the



balance that the tort was designed to maintain: between society's interest in the effective administration of criminal justice and the need to compensate individuals who have been wrongly prosecuted for a primary purpose other than that of carrying the law into effect."

49. The same position was held by the Judges of the East African court of Appeal in *Mbowa Vrs East Menjo District Administration* (1972) EA 352 where they held that follows;

a. "The action from damages for malicious prosecution is part of the common law of England..... 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 public benefit originates in the medieval writ of conspiracy which was aimed against combinations to abuse legal procedure, that is, it was aimed at prevention or restraint of improper legal proceedings..... It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion of the truth.

Its essential ingredients are;

- b. The criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant of arrest of the plaintiff or a person arrests the plaintiff and take him before a judicial authority;
- c. The defendant must have acted without reasonable or probable cause i.e there must have been no facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified;
- d. The defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose; and
- e. The criminal proceedings must have been terminated in the plaintiff's favour, that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge.....
- f. The plaintiff in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, has been fulfilled and that he has suffered damages.
- g. In other words, the four requirements must "unite" in order to create or establish a cause of action. If the plaintiff does not prove them, he would fail in his action. The damage that is claimed is in respect of reputation but other damages might be claimed, for example damages to property..... The damage to the plaintiff results at the stage in the criminal proceedings when the plaintiff is acquitted or, if there is an appeal when his conviction is quashed or set aside. In other words, the damage results at a stage when the criminal proceedings came to an end in his favour, whether finally or not. The plaintiff could not possibly succeed without proving any or all of the first three essentials of malicious prosecution without the fourth which forms part of the cause of action, would not take him very far. He must prove that the court has found him not guilty of the offence charged.....
- h. The law in action for malicious prosecution has been clearly defined and in so far as the ordinary criminal prosecution is concerned the action does not lie until the plaintiff has been acquitted of the charge.



50. From the first information report made by the 2nd respondent under OB.NO 21 of 26/9/017, the 2nd respondent stated that, “..... On 9th September 2017 his son was employed by one Muli Muthenya on a contract to fix floor tiles but on completion, of the work the said Muli started complaining that the said syendo intentionally broke the remaining tiles estimated at Kshs 14,000/= and he took by force the motorcycle registration number KMCZ 255H make Sykyo, which the said Syendo was using and detained it until he is compensated the damages to the said tiles. He states that efforts to receive the said motorcycle through negotiations failed and now seeks police assistance.”
51. The Appellant failed to respond to police summons and the investigation diary and evidence lead in court reveal that on 29.10.2017, under instructions given by the OCPD, Chief Inspector James Karuki, PC Opiat Damian Sangawe and PC Abdala Masud went and arrest the Appellant and booked him to be charged with the offence of theft of motorcycle vide OB 21/26/09/017. It is instructive to note that this is where the initial misdirection was made by the police, yet that was not the complaint made and from that point investigations went down downhill based on the wrong information self-reported by the arresting officers.
52. The Appellant also recorded his statement at the Migwani police station (on page 57 to 61 of the record of Appeal). In the said statement, the appellant did not make any allegation against the 1st and 2nd respondent, regarding give false information to a public officer. His entire complaint was based on his claim for malicious damage to property by the 1st respondent and his father’s subsequent intervention.
53. Further, there was no independent evidence presented at trial to show that the Appellant instituted a parallel complaint against the 1st and 2nd respondent which was independently investigated and prosecuted. Based on the above glaring facts, it is clear that the Appellant did not institute any complaint regarding the second count of giving false information to a public officer, and by extension was not instrumental in setting the law in motion against the 1st and 2nd respondent to be charged in court with the said offence.
54. The law is that there must be unity of the four principles before a claim of malicious prosecution can be established. Given that the first principle has not been established the 1st and 2nd respondents claim naturally fails as against the Appellant. The 3rd respondent did not Appeal as against the judgment of the trial court, and thus it is needless to proceed further in establishing their liability.

E. Disposition

55. The upshot having made the above analysis on the evidence adduced, I do find that this appeal is merited and do order that;
- a. The judgment /decree of Hon M.K. Mwangi (CM) dated 21st December 2022, in Mwingi CMCC NO E34 OF 2020 as against the Appellant is wholly set-aside.
 - b. The said decree and the costs of the primary suit and the costs of this Appeal will borne by the Hon Attorney General.
56. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF NOVEMBER, 2024.

FRANCIS RAYOLA OLEL

JUDGE



Delivered on the virtual platform, Team this 25th day of November, 2024

In the presence of: -

No appearance for Appellant

No appearance for Respondent

Sam/Susan Court Assistant

