



**Koech v National Bank Of Kenya Ltd & 3 others (Petition
E002 of 2019) [2023] KEHC 3179 (KLR) (30 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 3179 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
PETITION E002 OF 2019
TM MATHEKA, J
MARCH 30, 2023**

BETWEEN

RICHARD KOECH PETITIONER

AND

NATIONAL BANK OF KENYA LTD 1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT

THE HON. ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

1. Richard Koech, the Petitioner has brought this Petition against National Bank of Kenya Limited, 1st Respondent, the Inspector General of Police, 2nd Respondent, the Director of Public Prosecutions, 3rd Respondent and Hon. AG, 4th Respondent.
2. He seeks the following prayers;
 1. A declaration that the actions of the respondents above are and were unconstitutional hence null and void for violating the rights and freedoms of the petitioners under article 27, 28, 47 and 49 of the Constitution.
 2. An order that the Petitioner be adequately and promptly compensated by the Government of Kenya for violation of his Constitutional Rights above.
 3. General and exemplary damages.
 4. Special damages of Kshs. 700,000/=



5. A declaration that the persons holding the offices of the 1st and 2nd Respondent at the time when the alleged offence occurred, infringed and/or violated the rights and freedoms of the Petitioner enshrined in Articles 21, 27, 28, 29, 47, 49, 50(2), 157(10) and (11) and 244 of the Constitution of Kenya, 2010.
 6. The Petitioner be paid costs of this Petition.
3. The basis for the said prayers are set out in the particularized wrongs and malice as hereunder;
- a. Discriminating against the Petitioner by Arresting and charging the Petitioner with stealing on account that the Petitioner attempted to withdraw monies from his account which not fully operational when it was common for the 1st Respondent to find accounts that were not fully operational for lack of sufficient details, clearly in contravention of Article 27 of the Constitution.
 - b. Arrest and detention of the Petitioner without being informed of the reason for his arrest or the charges preferred upon him in contravention of Article 49.
 - c. Arresting, detaining and prosecuting the Petitioner when there was no crime committed by the Petitioner in attempting to withdraw monies from his account, clear contravention of Petitioner's rights provided under Articles 21, 29, 157 (10) (11) and 244 of the Constitution.
 - d. Subjecting the Petitioner to cruel, inhuman treatment, coercion and harassment thereby causing his physical, psychological torture and mental anguish contrary to Article 25 of 29 of the Constitution and Article 5 of the Universal Declaration of Human Rights 1949.
 - e. Through incarceration at Police Station without any legal justification and as the 2nd and 3rd Respondent acted merely on wild suspicion which have no reasonable basis violated the Petitioner's right to liberty under Article 49(1) of the Constitution as well as Article 9(1) and (5) of the International Covenant on Civil and Political Rights and Article 8(3) (a) of the Universal Declaration of Human Rights 1949.
 - f. Depriving the Petitioner his freedom and security of person provided under Article 28 of the Constitution of Kenya.
 - g. Depriving the Petitioner's liberty arbitrarily and without just cause being arrested, detained, arraigned in court and being subjected to psychological torture for a crime he did not commit.
 - h. Institution of criminal proceedings against the Petitioner without any reasonable, probable or justifiable excuse whatsoever and while actuated by malice and in contravention of Article 47 of the Constitution.
 - i. Prosecuting the petitioners without any scintilla of concrete evidence.
 - j. Engaging in acts that are psychologically torturous to the petitioners' mind and exposing him to inconsiderable inconvenience, anxiety and expense.
 - k. Dragging the petitioner through a shambolic criminal case.



I. Using police and prosecutorial powers to serve malevolent intentions.

4. The background to this petition is set out in the facts, set out in the Petition and the Affidavit in support sworn by the Petitioner on 20th January 2022. It is important to point out that the petition arises out of the happening around the Petitioner's Bank Account No. 01285122081900 opened on 7th June 2016 in the name of Rich-Ko Motor Bazaar, with the 1st Respondent. These happenings led to the arrest, the prosecution of the Petitioner and two others in Nakuru CMCR 2713 of 2017.
5. A reading of the record brings up the following facts; On 7th June 2016, the Petitioner opened the account, but did not fully operationalize it, and hence it remained dormant until 24th October 2017. On that day a sum of Kshs. 18,145,161/60 entered the account. On the same date he called the bank seeking to carry out certain transactions through mobile banking. He went to Kericho Branch of the 1st Respondent seeking to transfer 4.85 million from his account 4.85 million to Family Bank, 1.8 million to NIC Bank and to make a cash withdrawal of Kshs. 400,000/= . Because of the status of his account he was referred to Nakuru Branch where he had opened the account. It was while he was in the process of regularizing the account so that he could effect the said transactions that he was arrested by officers from DCI. According to the Head of Security and Investigations of the 1st Respondent, when he learnt of the Petitioner's account, and the transactions he was trying to effect, he conducted his own investigations, confirmed that the Kshs. 18,145,161/60 had wrongfully been credited to the Rich-Ko Motor Bazaar Account, as it was a payment from Kenya Revenue Authority to Schindler Ltd upon that discovery the payment was stopped, the transaction was reversed and processed to the appropriate account.
6. This officer reported to the CBK Banking Fraud Investigations Unit, Officers from DCI who came to the Bank and collected the documents that the petitioner and his colleagues had, arrested them and went away with them. He said the Petitioner and his co-accused were charged because an electronic fraud had been committed, and they were beneficiaries of the funds.
7. The record shows that upon arrest the three were charged with the offence of Stealing Contrary to Section 268 (1) as read with Section 275 of the *Penal Code* where it is alleged that on 27th October 2017 at National Bank of Kenya Limited Harambee Avenue Nairobi County jointly with others not before court stole Kshs. 18,145,161/60 the property of National Bank of Kenya Limited.
8. *Vide* a Ruling dated 19th November 2019 the learned trial court found that the prosecution had failed to establish a prima facie case against the accused persons, dismissed the charges, and acquitted each of the accused persons under Section 210 of the *Criminal Procedure Code*.
9. In addition, the freezing order that had been made over the accused's account was lifted. It is evident from the record that soon thereafter the Petitioner's advocate obtained a court order from the subordinate court directing the 1st Respondent to release Ksh. 7,000,000/= to him for onward transmission to the Petitioner.
10. The record further shows that this application in which this order and an order to the effect that the money subject of the criminal proceedings belonged to the Petitioner was the subject of the High Court Criminal Revision Number 2 of 2020 between the 1st Respondent and the Petitioner, where Joel Ngugi J (as he then was) revised the lower court order, and made the following orders;

“The result is that the request for revision is allowed. The Court recalls the ruling of the Lower Court dated 03/12/2019 and reverses the order that the amount of Ksh. 18,145,161.60 or any part thereof in Mr. Richard Cheruiyot Koech's account number 01285122018900 held at the National Bank of Kenya Limited should be released to Mr. Richard Cheruiyot Koech



absent a Court Order to that effect issued in a civil suit related to the subject matter in which the Applicant, National Bank of Kenya Limited and Mr. Koech are direct parties.”

11. The Petition is opposed.
12. The 2nd and 4th Respondents filed a joint response dated 2nd March 2023. They laid emphasis on the 2nd Respondent’s was the statutory duties;
 - a. To receive and act upon information that an offence cognizable in law has been or is likely to be committed.
 - b. Further to (a) above, to cause investigations to be undertaken and pursue every credible evidence upon reasonable cause.
 - c. To apprehend and detain in custody suspected offenders for the purpose of and incidental to the furtherance of (b) above.
 - d. To institute and undertake criminal proceedings against any person before any court in respect of offence alleged to be/have been committed by that person.
13. The 2nd and 3rd Respondent denied any wrongdoing and emphasized that they had only done their job in the circumstances of the case.
14. The 1st Respondent responded to the Petitioner through the Replying Affidavit of Willy Tanui sworn on 24th March 2023.
15. He demonstrated that the petitioner is the owner of the said account, that the account received Ksh. 18,145,161/60 from KRA Account Number 010230xxxxx000; that the account had zero balance before this enormous amount of money got in on 24th October 2017. That the Petitioner attempted withdrawals on 27th October 2017. The account was flagged as required by Prudential Guidelines of the Central Bank of Kenya, for inquiries as to the source of the money to avoid fraud and money laundering.
16. He said that the source of the funds was found to be Kenya Revenue Authority and that the money was destined for Schindler Limited for services rendered. This money was fraudulently diverted to the Petitioner’s Account by unknown people using the salaries clearance section. Upon this discovery the transaction was reversed, the money credited to the correct beneficiary. The 1st Respondent alerted the Bank’s Fraud Investigation Unit.
17. Consequent to the foregoing the Petitioner was arrested while trying to withdraw the money from the said account. The petitioner’s explanation that this money was refund to him from Kenya Revenue Authority and some documents he produced did not persuade the witness hence his report to the investigative authorities. He was persuaded that the 1st Respondent was a victim of an attempted fraud, but averted it due to diligence on its part. His position was that the 1st Respondent did not in any way violate the Petitioner’s rights, but acted within the law. He annexed documents in support of the 1st Respondent’s position.
18. The Petition was canvassed by way of Written Submissions.

Petitioner’s Submissions

19. The petitioner submitted two issues.



1. Whether the petitioner's constitutional rights under Articles 21,27,28,29,47,49,50(2),157(10) and (11) and 244 were violated
 2. Whether the petitioner is entitled to the reliefs sought in terms of declarations, special damages for medical expenses, financial loss, general damages, loss of business, and aggravated and exemplary damages.
20. On the first issue, the petitioner submitted that 1st respondent having failed to question him or give him an opportunity to disclose the source of the money in his account as the 1st respondent would do to other customers in the event the source of money is in question, the 1st respondent violated his rights to equal treatment, non-discrimination and equal benefit of law as enumerated under Article 27 of the Constitution of Kenya, 2010.
 21. The petitioner also submitted that the 1st respondent cannot fault him for trying to transact from his account which was not operational when it was its mandate to ensure the same is fully operational. That Doing so and having the same be a basis to call for his arrest is not only malicious and spiteful but also in violation of his right to reasonable and procedurally fair decisions as provided for under Article 47 of the Constitution of Kenya, 2010.
 22. The petitioner faulted the 1st respondent for not conducting due diligence before arresting him and stated that had due diligence been conducted, the information as to the source of his money would have been discovered from his account statement within the 1st respondent's custody and accessible to every person working in the 1st respondent's bank.
 23. The petitioner submitted that paragraph 5.15 of the Central Bank of Kenya Prudential Guidelines requires that in cases of suspicious transaction and being guided by prudential guidelines as procedure demands that the 1st respondent report the suspicion to the Financial Reporting Center (FRC) who would then investigate the suspicion and proffer appropriate action upon the petitioner. That this was not done hence the 1st respondent violated the petitioner's rights as enshrined under Article 47 of the Constitution which guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 24. The petitioner submitted that evidence on record shows that the 1st respondent, Kenya Revenue Authority and Schindler Limited did not lose any money.
 25. The petitioner submitted that his arrest by the 2nd respondent was unlawful and it resulted in false arrest and detention. On what constitutes a false arrest, reliance was placed on Daniel Waweru Njoroge & 17 Others v Attorney General [2015] eKLR in which the court adopted the position in Jorgensen v Pennsylvania R.R., 38 N.J Super 317{App. Div. 1955} where the court held that false imprisonment is unlawful detention without more and held that false arrest consists of unlawful restraint of an individual's personal liberty or freedom of movement by another person purporting to act according to law... where a police officer arrests a person without probable cause or reasonable cause the officer is said to have committed a tort or false arrest and confinement...False imprisonment is an intentional tort.
 26. On what is "probable and reasonable cause" the petitioner cited Hicks v Faulkner (1878) 8QBD 167 where the court stated;

“...to be an honest belief in the guilt of the accused, based upon full conviction, founded on reasonable grounds, of the existence of a state of circumstances which assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position



of the accused, to the conclusion that the person charged was probably guilty of the crime imputed.”

And *Kagane and Others v Attorney General and Another* (1969) EALR 643 which court aligned itself with the above definition.

27. The petitioner argued that no arrest should be made by the police officer without a reasonable satisfaction reached after some investigation as to genuineness and bona fides of a complainant and a reasonable belief both as to the person’s complicity and even so as to the need to effect arrest. In support of this position the petitioner referred this court to the Canadian case of *Republic v Dakes* 1986 1SCR 103 which laid down the constitutionally permissible parameters as:-

“first, the offence must be materially connected to its objective and not to be arbitrary ,unfair or based on irrational consideration... secondly, the offence even if rationally connected to the objective ,should impair as little as possible the right or freedom in question and... thirdly, there must be proportionality between the effects of the offence which are responsible for limiting the right or freedom and the objective which has been identified as of sufficient importance to warrant overriding of a constitutionally protected right”

The petitioner submitted that our courts established a similar framework in *Keroche Industries Ltd v Kenya Revenue Authority & 5 Others* 2007 2 KLR where it was held that one of the ingredients of the rule of law is certainty and regularity of law and that enforcing the law and maintaining public order sufficient procedural safeguards must be adhered to to ensure respect for the human person.

28. He submitted that the respondents that the police did not act within their Constitutional mandate under Article 244 of the *Constitution* and did not advance reasonable cause which necessitated the arrest on any elements of the law.
29. He submitted that his arrest, detention, and investigation was not carried out within constitutionally permissible parameters and that this court should find that his rights under Article 49,25,29,28 and 244 of the *Constitution* were violated on account of not being informed of the reason for arrest, being subjected to beatings and harsh conditions of being forced to sleep in a waterlogged cell yet no offence was committed in the final analysis.
30. On the second issue, the petitioner submitted that he was subjected to inhuman treatment and prayed for general and exemplary damages of Kshs. 100,000,000/= .
31. On the principles applicable to the award on of costs in Constitutional Petitions he relied on Rule 26 of the *Constitution* of Kenya (*Protection of Rights and Fundamental Freedoms*) *Practice and Procedure Rules* 2013 and *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR. He submitted that he had suffered torture and relied on the definition in Article 1 of the *Convention Against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment*, 1987, and NBI HCPET N. 94 of 2014 *Kenneth Stanley Njindo Matiba v the Hon AG*.
32. He urged the court to find that he had established torture vide the documentary evidence he had produced showing his treatment for back injury allegedly resulting from beatings by the police and prison officers.
33. On special damages it was submitted for the Petitioner that the special damages must be specifically pleaded and proved. He relied on the Court of Appeal in *Sande v Kenya Co-operative Creameries Ltd*. (1992) LLR 314(CAK) cited in *Moses Tengenya Omweno v Commissioner of Police & Another* [2018] the petitioner submitted that the specific claim for medical expenses had not been controverted by the



respondents hence he was entitled to the same. He argued that the same was not controverted by the respondents.

34. He prayed that he be awarded special damages of Kshs.700,000/= for legal expenses.
35. He submitted that following violation of his rights under Article 27, 28, 29 and 31, he is entitled to the reliefs sought.

The 1st Respondent's Submissions

36. The 1st Respondent reiterated the entire averments contained in its replying affidavit. In addition, it submitted that it was rightly entitled to lodge a complaint when it discovered that some amount of Kshs.18, 145,161/160 belonging to its customer Kenya Revenue Authority and meant to pay a Kenya Revenue Authority Service Provider, Schindler Limited, had been fraudulently credited to the petitioner's account. It faulted the petitioner for failing to explain the source of the big deposit and not claiming that amount as his in this petition.
37. It submitted that the petitioner was arrested by DCI Officers (CID), the 1st respondent did not detain him and there was nothing unlawful, illegal or unconstitutional in reporting a crime and having the suspect arrested.
38. It submitted that the petitioner at plea taking never raised a claim of torture. He had no complaints at all. It relied on the case of *Odbiambo Olel v Republic* [1989]eKLR where the court held that;

“a person who had an allegation of torture or unlawful detention should raise it before the magistrate during plea or at the earliest opportunity”
39. It was the 1st respondent's submissions that acquittal per se did not mean the charges were malicious or false. For this proposition reliance was placed on *Dickson Chebuye Ambeyi v National Police Service & another; Peter Sifuna Wesonga & another (Interested Parties)* [2020] eKLR
40. The 1st respondent argued that in *Dickson Chebuye Ambeyi v National Police Service & another; Peter Sifuna Wesonga & another (Interested Parties)* (*supra*) enumerated the essential ingredients of malicious prosecution as;
 1. 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 for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority;
 2. 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;
 3. 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
 4. 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.”
41. The 1st respondent submitted that in the instant case the petitioner failed to establish the individual who it claims was actuated by malice or ill will in reporting the conduct of the petitioner.



42. On general damages, the 1st respondent urged this court to dismiss the same as the same were made without basis.
43. On special damages the 1st respondent argued that the same should be specifically pleaded and strictly proved as was held in the case of *Peter Ndegwa Kiai t/a Pema Wines & Spirits v Attorney General & 2 others* (Civil Appeal 243 of 2017) [2021] KECA 328 (KLR). That no receipt was adduced to prove that the petitioner had paid Kshs.700, 000/- for legal services.

The 2nd,3rd & 4th Respondents' Submissions

44. They submitted on three issues;
 1. Whether the arrest of the petitioner was malicious and unlawful?
 2. Whether the petitioner's constitutional rights and freedoms as enshrined in Articles 21,27,28,29,47,49,50(2),157(10) and (11) and 244 of the *Constitution* of Kenya,2010 have been violated
 3. Whether the petitioner is entitled to the reliefs sought.

1. Whether the arrest of the petitioner was malicious and unlawful?

45. The respondents submitted that the arrest was lawful and justified as they were undertaking their statutory mandate to maintain the law and order. That they only responded to information relayed to them by the 1st respondent herein and there were no grounds for malice as the petitioner was not known to any of the officers who arrested him and as such there was no personal issues or vendetta against him.
46. They submitted that based on the complaint by the 1st respondent they carried out investigations and formed an opinion that an offence had been committed by the petitioner and it was on that basis that the petitioner was arranged in court.
47. The 2nd, 3rd and 4th respondents while placing reliance on *Dickson Chebuye Ambeyi v National Police Service & another; Peter Sifuna Wesonga & another (Interested Parties)* (*supra*) submitted that it was the duty of the petitioner to prove that his arrest had no basis in law at all and not to merely state that the arrest was unlawful.
48. On what constitutes malicious prosecution they cited *Dr. Lucas Ndungu Munyua v Royal Media Services Ltd & Anor* [2014] eKLR where the court reiterated the principles governing a claim founded on malicious prosecution as was laid down in *Murunga v AG* (1979 KLR, 138, and also *Mbowa v East Mengo Administration* [1972] EA 352 They submitted that the charge against the petitioner was not maliciously instigated as the information relayed to them by the 1st respondent was credible enough to satisfy a prudent and cautious man that the petitioner had committed an offence. They also relied on *Kagane & others v The AG & Anor* [1969] EA, *James Karuga Kiiru v Joseph Mwamburi & 3 others* Nrb CA no 171 of 2000, that all the police needed to show was that they took reasonable measures after the arrests, and *Nzoia Sugar Company Ltd v Fungutuli* [1988] eKLR that an acquittal per se is not proof or sufficient ground for malicious prosecution. Spite/ill will must be demonstrated against the prosecutor and cannot be raised against an artificial person.
49. They urged this court to find that there was reasonable basis for their actions against the petitioner.



2. Whether the petitioner's constitutional rights and freedoms as enshrined in Articles 21,27,28,29,47,49,50(2),157(10) and (11) and 244 of n the Constitutionof Kenya,2010 have been violated

50. They submitted that the petitioner has not adduced any proof of inhuman and cruel treatment through physical beatings and blows, torture, back injury among other claims.

3. Whether the petitioner is entitled to the reliefs sought.

51. Relying on National Social Security Fund Board of Trustees v Sifa International Limited (2016) eKLR specifically, they submitted that on the claim for special damages the petitioner fell short of specifically pleading and strictly proving the same, and that the claim for special damages of Kshs.700, 000, was exaggerated and completely unsupported by any tangible evidence.

52. Relying on Dickson Ambuye Chebuye Ambeyi v National Police Service & Another [2020] eKLR where the court stated that in any claim for general damages, the party claiming must formally prove their claim and that couching such a claim as a constitutional suit does not provide the parties with a shortcut in cases of this nature being claims for unlawful arrest, false imprisonment and malicious prosecution all of which are torts, they argued that the claim for damages for malicious prosecution could succeed because the petitioner failed to prove/ show that their institution of proceedings against him was actuated either by malice or ill will or by direct or improper motives. They submitted that the petitioner is not entitled to the prayers sought, the petition lacks merit and should be dismissed with costs.

Analysis & Determination

53. After looking at the pleadings and parties' submissions, the following questions arise for determination:

1. Whether the petitioner proved his claim against the respondents to warrant grant of the reliefs sought
2. Who should bear the costs of the suit?

ISSUE NO.1 Whether the petitioner proved his claim against the respondents to warrant grant of the reliefs sought

54. The petitioner claims that his arrest, detention and prosecution were unlawful and malicious.

55. In Sylvanus Okiya Ongoro v Director of Criminal Investigations & 4 others [2020] eKLR, the court stated:

“ 103. What I gather the petitioner to be complaining about is that his prosecution was malicious as it was unjustified.

104. The principles governing a claim founded on malicious prosecution were laid down by Cotran, J in Murunga v Attorney General (1979) KLR, 138 as follows: -

- (a) The Plaintiff must show that the prosecution was instituted by the Defendant, or by someone for whose acts he is responsible;
- (b) The Plaintiff must show that the prosecution terminated in his favour;



- (c) The Plaintiff must demonstrate that the prosecution was instituted without reasonable and probable cause;
- (d) He must also show that the prosecution was actuated by malice.”

56. These elements were summarized by the former East Africa Court of Appeal in *Mbowa v East Mengo Administration* [1972] EA 352as follows:

“The plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage. 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.”

57. Accordingly, a party who claims that he was unlawfully arrested and falsely imprisoned and or maliciously prosecuted, bears the burden of proving that the arrest had no basis in law at all. It will not be enough for him to merely state that the arrest was unlawful. Similarly, an acquittal alone cannot amount to proof of malice. There must be something more than just acquittal. In the case of *Nzoia Sugar Company Limited* supra, the Court of Appeal observed:

“It is trite learning that acquittal, per se, on a criminal case charge is not sufficient basis to ground a suit for malicious prosecution. 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.”

58. In view of the above decision it is apparent that for this petition to succeed the petitioner must prove that there was malice on the part of the respondents.

59. I have clearly set out the facts of the case herein above.

60. It is the petitioner’s position that that the 1st respondent out of spite, ill will and speculations abruptly caused his arrest, freezing of his account and thereafter transferring the said monies from the his account to itself without the petitioner’s authorization or order of the court.

61. This position is not supported by the facts. The facts clearly demonstrate that there was an electronic transfer of funds to Petitioners Account from KRA as Salary. This is clear from the WT1 the Bank statement of the Petitioner’s account demonstrating the transactions in his account. It states that on 24th Oct 2017 he received Salary from KRAPY-0020000002972 of Ksh. 18,146,161.60. On 1st November, 2017 there was a reversal. Through WT3 RTGS payment it is shown that the reversal sent the money to the account of Schindler Limited, and WT4 a statement from KRA showing that the money was originally intended to enter the Schindler Limited account.

62. All these documents are not controversial. The Petitioner at no time demonstrated that he was an employee of KRA so as to receive salary from them. In fact his own explanation that this was a refund from KRA for some tax related transaction clearly contradicted the record of the account. Hence the 1st respondent was justified in making the complaint to the police and the DCI to carry out further investigations and decide what crime was committed. They cannot be faulted for doing that because *prima facie* fraudulent action had been committed and the Petitioner’s explanation was not adding up. The accusation of spite, malice etc. cannot sustain against the witness or the 1st respondent. It must fall off.



63. Having made the foregoing deduction there is no other conclusion other than that the 2nd and 3rd respondents cannot be said to have acted without reasonable cause. In arresting, detaining and prosecuting the Petitioner. Clearly there was something that warranted the arrest of the petitioner and the investigations that followed.
64. The fault that could lie was whether the charge of theft could stand in a court of law on the facts that were placed before the court. Obviously the charge did not hold because the facts spoke to different offence. The decision to charge was made by the ODPP. They had the facts and there is nothing to show that they charged the Petitioner based on malice.
65. It is true that the petitioner was arraigned in court and charged with stealing contrary to section 268(1) as read with section 275 of the penal code. The particulars were that on 27th October 2017 at National Bank jointly with others not before court stole Kshs.18, 145,161 the property of National Bank. The trial court acquitted him on 19th November 2019. What I can say here is that I agree with the Petitioner that any Kenyan who gets arrested is entitled to the highest professional services from the National Police Service. What if this was the furthest the Instigating Officer could go with respect to this case? I guess the next question would be whether the ODPP was not equipped to see the loopholes in the charge. All I am saying is that the 1st respondent's representative stated what he had seen: a fraudulent transfer which they reversed. Whether that transfer was theft or not was up to the court to decide. Nowhere along this justice chain do I see any malice. Maybe investigative capacity but malice, no. It is trite that an acquittal, per se, on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill will must be proved against the prosecutor. There must be evidence of spite. In *Jediel Nyaga v Silas Mubeke* 1987 (CA No. 59 of 1987) the Court of Appeal again stated that:
- “The appellant having reported to the police about the respondent's action of damaging his crops, the police took over the matter to investigate the respondent for a possible offence ... Once the appellant gave the report, he ceased to have anything to do with the matter.”
66. In *Robert Okeri Ombaka v Central Bank of Kenya* [2015] eKLR, the Court of Appeal observed that:
- “In this appeal there is no evidence that the respondent made a “false” report or that the it was actuated by “malice”, or that his prosecution was brought “without reasonable or probable cause”. That a suspect was acquitted of a criminal case is not a ground for filing a civil suit to claim damages for malicious prosecution or false imprisonment. Evidence of spite, ill will, lack of reasonable and probable cause must be established. ”
67. While the learned trial court found that no money was lost or stolen I have demonstrated that the institution of the charge against the Petitioner was not actuated by malice Prior to attempting to withdraw money from his account he had not deposited any sums therein. It is clear from customer transaction vouchers annexed and marked as WT2a-d that the petitioner on 27th October 2017 unsuccessfully attempted to withdraw a substantial total amount of Ksh. 7,650,000/= (seven million six hundred and fifty thousand shillings only) from his account at Kericho Branch. The petitioner has not offered any tangible evidence that he had monies in his account that he wanted to withdraw. It was thus probable and reasonable for the respondents to commence prosecution against him. There is no evidence that officers who arrested the petitioner knew the petitioner prior to his arrest and thus their actions cannot be said to be malicious.
68. It is the statutory duty 2nd and 3rd respondent to investigate and arrest a person when there is probable cause to do so. No material placed before this court to establish malice and that the Petitioner's arrest, detention and prosecution were undertaken without any reasonable probable cause.



69. With respect to the claim that the Petitioner's rights as an arrested person vide Article 49 of the Constitution were violated by not being informed of the reasons for his arrest, by being subjected to torture, inhuman and degrading treatment, I find that while the Constitution protects everyone's right from torture and inhuman treatment, it was incumbent upon the petitioner to prove these claims to the satisfaction of the court, for the court to remedy the same.
70. Such claims as to torture and inhuman treatment, bodily injury cannot be the subject of submissions. These are facts that would require to be established by way of evidence. The medical evidence attached to the Supporting Affidavit is illegible and this court cannot discern the sort of treatment he received and whether the same was as a result of being tortured. It would have been proper for the petitioner to adduce evidence that would have assisted the court determine these issues given that he was the one alleging that he was taken to hospital following the torture he was subjected to while in the hands of the police. In this I agree with the Judge in Dickson Chebuye Ambeyi v National Police Service and Anor [2020] eKLR, while dealing with a similar matter stated;
- “The final word. In any claim for general damages, the party claiming must formally prove their claim. It was foolhardy for the petitioner to have assumed that he could establish his claim by way of written submissions, instead of giving testimony to prove his claim. He should have sought to have the matter heard orally. This is a simple claim for unlawful arrest, false imprisonment and malicious prosecution, all of which are torts. At common law, the usual way of prosecuting them is by way of plaint, and formal proof. The mere fact that there are constitutional provisions which cover the same subject, and that there is provision for litigation under the Constitution for redress, besides the usual civil process, does not obviate the need for formal proof. The principles governing what ought to be proved, or the standards of proof, are the same. It would have been wiser for the petitioner to simply mount a civil suit, in common law, by way of plaint, for compensation for the torts of false imprisonment, unlawful arrest and malicious prosecution. Let no one assume that the route of constitutional litigation somewhat provides the parties with a shortcut of sorts in cases of this nature.”
71. In addition, in Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR, the Supreme Court stated on the evidential burden of proof:
- “(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.”
72. After considering every aspect of the claim for general damages for pain and suffering I found that the petitioner did not discharge his burden to warrant the award of general damages.
73. The claim for special damages of Kshs. 700,000/= was unsupported. The law is clear that such a claim should not be pleaded, it must be proved. It is not in doubt that he was represented by counsel. Where is the evidence that they paid any legal fees? Without that I can only decline it.
74. I have come to the end of this matter and my considered view is that Petitioner did not prove malice in the prosecution, or unlawful detention, he did not prove the claim for special and general damages. I find the petition is not merited. It is accordingly dismissed. Each party has to bear its own costs.



DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH MARCH, 2023.

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MUMBUA T. MATHEKA

JUDGE

