**Kenya Wildlife Service v Njiiri & another (Civil Appeal 12 of 2020) [2023] KEHC 18191 (KLR) (Civ) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18191 (KLR)

**REPUBLIC OF KENYA**

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

**CIVIL**

**CIVIL APPEAL 12 OF 2020**

**CW MEOLI, J**

**MAY 25, 2023**

**BETWEEN**

**KENYA WILDLIFE SERVICE ........................................................... APPELLANT**

**AND**

**MUNDIA JOSEPH NJIIRI ...................................................... 1ST RESPONDENT**

**ATTORNEY GENERAL .......................................................... 2ND RESPONDENT**

***(Being an appeal from the judgment of Hon. M.W. Murage (SRM) delivered on 6th December 2018 in Nairobi Milimani CMCC No. 7293 of 2012)***

## JUDGMENT

1. This appeal emanates from the judgment delivered on December 6, 2018 in Nairobi Milimani CMCC No 7293 of 2012. The suit was commenced by way of a plaint filed on December 11, 2012 by Mundia Joseph Njiiri, the plaintiff in the lower court (hereafter the 1st Respondent) against Kenya Wildlife Service and The Attorney General the 1st and 2nd defendants, respectively, in the lower court (hereafter the Appellant and 2nd Respondent respectively).

2. The claim was premised on the tort of malicious prosecution for which the 1st Respondent sought damages. It was the 1st Respondent's contention that on or about 16.09.2005 the Appellant and 2nd Respondent maliciously, in bad faith, and without reasonable and probable cause preferred criminal charges against him before the Chief Magistrate in Nairobi Criminal Case No 2104 of 2005, on ten counts of making a document without authority contrary to Section 357(a) and 275 of the *Penal Code*. That by reason of the said charges, the 1st Respondent was wrongly imprisoned and deprived of his liberty and was greatly injured in his business and reputation resulting in considerable mental and physical pain, and expense.

3. The Appellant filed a statement of defence on March 20, 2013 denying the key averments in the plaint and or liability. The 2nd Respondent on its part filed a statement of defence on February 3, 2016 denying the key averments in the plaint and in the alternative averred that the acts complained of were carried out in execution of its statutory duty. The suit proceeded to full hearing during which the parties adduced evidence in support of the averment in their respective pleadings.

4. In its judgment, the trial court found in favour of the 1st Respondent and entered judgment against the Appellant and 2nd Respondent in the sum of Kshs. 500,000/-. Aggrieved with the outcome, the Appellant filed a memorandum of appeal dated January 6, 2020 challenging the judgment of the trial court on the following grounds: -

> “1. That the trial court erred in law and fact by finding and holding that the Appellant liable for malicious prosecution contrary to the evidence on record and in total disregard of the law.
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> 2. That the trial court erred in law and in fact in failing to find and hold that the Appellant was not the prosecutor but only a genuine complainant with reasonable grounds to complain to the police to investigate and prosecute if they deemed it fit.
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> 3. That the trial court erred in law and in fact by totally ignoring the Appellant’s evidence.
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> 4. That the trial court erred in law and in fact in failing to find and hold that the 1st Respondent was acquitted under Section 215 of the *Criminal Procedure Code* confirming that a prima facie case had been made against him and as such there were reasonable grounds and probable cause for his prosecution.
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> 5. That the trial court erred in law and in fact by failing to find and hold that the mere fact that the 1st Respondent had been acquitted of the criminal charge does not necessarily connote malice on the part of the prosecutor and or the Appellant.
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> 6. That the trial court erred in law and in fact by failing to find and hold that a complainant cannot be held liable for malicious prosecution in the absence of clear evidence of malice.
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> 7. That the trial court erred in law and fact by failing to find and hold that the 1st Respondent had failed to prove that his prosecution was out of spite rather than for the public benefit.
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> 8. That the trial court erred in law and fact by failing to find and hold that there was practically nothing on record to show that the Appellant had improper, indirect or malicious motives in pursuing a false charge against the 1st Respondent.
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> 9. That the subsequent decree issued on February 20, 2019 is bad in law for failure to comply with the provisions of Order 21 Rules 8 & 9 of the Civil Procedure Rules.

10. That the trial court's decision is against the weight of the evidence on record and bad in law and the awarded damages were given without any legal basis at all." (sic)

5. The appeal was canvassed by way of written submissions. Counsel for the Appellant began by restating the evidence before the trial court. He contended that it was not enough for the 1st Respondent to prove merely that the Appellant made a report to the police; he ought to have proved that the complaint was lodged maliciously against him and without reasonable grounds. It was further submitted that the decision to prosecute was solely made by the 2nd Respondent and the Appellant cannot be held liable for the decision to prosecute.

6. Citing the authority of *Stephen Gachau Githaiga & Anor v The Attorney General* [2015] eKLR, counsel contended that the pertinent facts and complaint against the 1st Respondent would have led a reasonable man to the conclusion that the 1st Respondent was probably a beneficiary of illegality, hence necessitating a report to the police for purpose of investigations. Counsel called to aid the decision in *Susan Mutheu v Joseph Makau Mutua* [2018] eKLR in faulting the trial court for failure to appreciate absence of proof by the 1st Respondent, of malice or collusion on the part of the Appellant and 2nd Respondent. Conceding that the 1st Respondent was eventually acquitted under Section 215 of the *Criminal Procedure Code*, counsel pointed out that the acquittal was not proof of malice on the part of Appellant. The court was thus urged to allow the appeal as prayed.

7. The 1st Respondent naturally defended the trial court's findings. Stating that a first appellate court ought to proceed with caution in deciding whether to interfere with the findings of fact made by a trial court. Counsel proceeded to anchor his submissions on the decision of *Murunga v Attorney General* [1979] KLR 138 as cited in *Risper Nyomenda v George Martin Kenyatta* [2021] eKLR and the decision in *Mbowa v East Mengo District Administration* [1972] EACA 352 regarding the requisite ingredients to be established by a party to succeed in a suit grounded on malicious prosecution.

8. Counsel asserted that both the Appellant's and 2nd Respondent's action to arraign the 1st Respondent in court was illegal and actuated by malice as the 1st Respondent was merely a driver working for a different company and not an employee of the Appellant hence having no access whatsoever to the Appellant's systems. Yet he was falsely charged with an offence relating to material that was not found in his possession. Counsel argued that the 2nd Respondent failed to conduct proper investigations regarding the complaint that was lodged by the Appellant. He asserted that the 1st Respondent proved his case on a balance of probabilities and defended the award of damages. The court was urged to dismiss the appeal with costs, counsel calling to aid the decision in *Thomas Nyaga Njuki v Alexander Ireri Karimi* [2020] eKLR.

9. The 2nd Respondent failed or opted not to participate in the appeal despite due notice.

10. The court has considered the memorandum of appeal, the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. This is a first appeal. The Court of Appeal for East Africa spelt out the duty of the first appellate court in *Selle v Associated Motor Boat Co*. [1968] EA 123 in the following terms:

> "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 allowance in this respect.

In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

11. As rightly submitted by the 1st Respondent, an appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another v Duncan Mwangi Wambugu* [1982 – 1988] 1KAR 278. Upon review of the memorandum of appeal and submissions by the respective parties, it is the court's view the appeal turns to the question whether the trial court's finding that the Appellant and 2nd Respondent were liable for malicious prosecution was well founded, and if so, whether the damages awarded were reasonable in the circumstances.

12. The trial court after restating and examining the evidence on record pronounced itself in its judgment as follows: -

> " I have carefully considered the evidence adduced against the pleadings filed. The issues of determination is whether the Plaintiff has proved malicious prosecution and whether he is entitled to the reliefs sought.
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> On the first issue it is not in dispute that criminal proceedings were instituted against the Plaintiff. It is also clear that the criminal case terminated in favour of the Plaintiff. The acquittal was based on massive doubt cast by the court on the evidence presented before it...............
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> Both defence witnesses testified that two employees involved in the collusion were never charged. The defence did not establish the reason as to why they choose to prosecute the Plaintiff. His only connection to the criminal case was his smart card. He was not involved in loading the same. It would be reasonable to conclude that the police did not conduct any investigations of their own as in their own pleadings, they agreed to only approaching two witnesses who they coincidentally share with the 1st Defendant...........
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> There is no reason as to why the prosecution choose to leave out two probable suspects and prosecute the Plaintiff without doing thorough investigations other than malice on their part......I therefore find that there was malice on the part of the 1st and 2nd Defendant and as such a tort of malicious prosecution has been satisfactorily proved.
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> Having established that the prosecution was malicious, I now assess damages. I consider the submissions of the Plaintiff as well as those of the Defendants on the issue of damages. I have also considered the cited authorities. Doing the best I can find that Kshs. 500,000/- under general damages." (sic).

13. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. The duty of proving the averments contained in the plaint lay upon the 1st Respondent. He bore the legal burden. In *Karugi & Another v Kabiya & 3 Others* [1987] KLR 347 the Court of Appeal stated that:

> " [T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal

proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant…--. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim." (Emphasis added)

14. The elements to be proved in an action for malicious prosecution are well settled since *Mbowa v East Mengo District Administration* [1972] EA 352, where the East African Court of Appeal summarized the law as follows:

> "The action for 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 the public benefit. 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:
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> 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;
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> 2) the defendant must have acted 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;
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> 3) the defendant must have acted maliciously. In other words, the defendant must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, he must have had, "an intent to use legal process in question for some other than its legally appointed and appropriate purpose" Pike v Waldrum [1952] 1 Lloyd's Rep. 431 at p 452; and
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> 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…"
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> See also Murunga v Attorney General [1979] KLR 138

15. The foregoing ingredients must be conjunctively established for a claimant to succeed. The undisputed events leading to Nairobi Milimani CMCC No 7293 of 2012 are that pursuant to a complaint lodged by the Appellant to the police, the 1st Respondent, a tour guide then working for Abercrombie & Kent Tours and Travels Limited, was arrested and charged with nine (9) counts of the offences of making a document without authority contrary to Section 357(a) of the *Penal Code* and Stealing contrary to Section 275 of the *Penal Code*. The criminal court proceeded to hear the prosecution and defence cases and in its judgment delivered on July 28, 2011 found the 1st Respondent not guilty on all nine (9) counts and acquitted him accordingly under Section 215 of the *Criminal Procedure Code*.

16. These facts formed the basis of the case by the 1st Respondent in the trial before the civil court. Undisputedly, the Appellant's complaint to police set the ball rolling regarding the criminal

proceedings eventually brought against the 1st Respondent. It is further not disputed that the criminal proceedings terminated in the 1st Respondent's favour thereby resolving ingredient 1 and 4 in *Mbowa* (supra).

17. That said, the Appellant's contention is that the court erred in finding it liable for malicious prosecution yet its role in the criminal proceedings was confined to lodging a complaint to the police and the eventual the decision to prosecute was solely made by the 2nd Respondent. The sticking point is whether there was reasonable and probable cause for the Appellant and 2nd Respondent's admitted actions or whether the same were actuated by malice.

18. According to *Halsbury's Laws of England, 4th Edition* – Reissue, Vol.45 (2):-

> " [R]easonable and probable cause for a prosecution has been said to be an honest belief in the guilt of the accused person based on a full conviction, founded upon 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 an accuser, to the conclusion that the person charged was probably guilty of the crime".

19. In Murunga (supra) the court applied the test in *Kagane & Others v Attorney General & Anor* [1969] EA 643, namely that, whether there was a reasonable and probable cause for the prosecution is primarily to be judged on the objective question whether the material known to the prosecutor would satisfy a prudent and cautious man that the accused was probably guilty. Before the trial court, the 1st Respondent testified as PW1. It was his evidence that he was employed as a tour guide for Abercrombie & Kent Tours and Travels Limited and responsible for taking clients to various national parks managed by the Appellant and for the purpose was issued with a smart card No XXXX by the Appellant

20. That his employer ordinarily paid monies to enable loading of the smart card to facilitate the said Respondent's easy to access to the national parks. He asserted that the prosecution did not prove that the questioned receipts in the criminal trial and subject of the various counts preferred against him were recovered from him or that they belonged to him. Further, the accountant at Abercrombie & Kent Tours and Travels Limited was never called as a witness in the criminal court. That on account of the foregoing he was maliciously prosecuted and banned from the Appellant's parks. He stated that had the 2nd Respondent thoroughly investigated the matter his innocence would have been established long before charges were preferred against him.

21. On the part of the Appellant and 2nd Respondents, it was their case through their shared witnesses Ignatius Ipapo (DW1) and Tom Kipkosgei (DW2) that the smart card in question was used by the Appellant to collect revenue from clients; that it was based on a three way system, namely, point of issue, point of sale and point of access. That the 1st Respondent was the holder of smart card "XXXX" and it appeared that the software in respect of the smart card system had been stolen or smuggled from the Appellant's Headquarters and used to load suspected smart cards outside the Appellant's Headquarters. Upon retrieval of the 1st Respondent's smart card, it was confirmed that it was genuinely issued.

22. However, upon comparing return receipts submitted by the 1st Respondent to his employer with those in the possession of the Appellant, it was noted that the actual loading of the 1st Respondent's smart card was done outside of the Appellant's headquarters leading to a reasonable suspicion that the Appellant thereby lost due revenue. It was further the Appellant's evidence through DW1 that the 1st Respondent was charged based on his smart card and related loading receipts obtained by the investigators.

23. Reviewing the evidence in the lower court, including the charge sheet and the decision of the criminal court produced as P. Exh.1 and P. Exh.2, the gist of the prosecution case was that on various dates, the 1st Respondent without lawful authority prepared the Appellant's Load Value Receipts purporting them to be genuine receipts made and issued by the Appellant. And that, the 1st Respondent thereby loaded his smart card "XXXX" outside the Appellant's offices for use in accessing national parks, when requisite payments in the suspect receipts were not posted or reflected as revenue collected by the Appellant, thereby occasioning the Appellant financial loss.

24. Arising from the above, it is evident that the 1st Respondent at the time of his arrest was employed as a tour guide working for Abercrombie & Kent Tours and Travels Limited. Further, he was issued with one of the later suspected smart card "XXXX", that was flagged as having been used to perpetrate fraudulent access to various parks managed by the Appellant. In as much as the specific Load Value Receipts in question were not found in the 1st Respondent's possession, the smart card that was one of the key components used in perpetrating the fraudulent activities ongoing at the Appellant's parks was found in the possession of the 1st Respondent. In the circumstances, there were reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, that would reasonably have led any ordinary prudent and cautious man, placed in the position of an accuser, to the conclusion that the person charged was probably guilty of the crime.

25. Regarding the role of the Appellant as a complainant, having lodged the complaint to the police, which complaint was based on a reasonable and probable cause, the Appellant left investigations to the police. The decision to charge the 1st Respondent was made by the police. In a similar situation, the Court of Appeal in *Wambua v Mbuthi & 2 others* (Civil Appeal 231 of 2016) [2022] KECA 84 (KLR)where the Court of Appeal stated that;-

> " 19........... In our view, the 1st and 2nd respondents having been found harboring the donkeys was sufficient to establish probable cause. As to what would transpire thereafter is a matter that would be left to the police and the prosecution to determine whether or not to mount a prosecution. Clearly, the course of action to be taken after she lodged a complaint was beyond her control.
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> 20. In the case of Jedel Nyaga v Silas Mucheke, CA No 59 of 1987 this Court stated thus;
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> "The appellant had made a complaint to the police and nothing more and what followed had nothing to do with him. The decision to arrest the respondent was made by the police who must have found some merit in the report". Consequently, the Court found that; "the appellant who had made the report to the police was not responsible for the arrest of the respondent and the mere fact that he was a probable prosecution witness did not render him responsible for the arrest of the subsequent prosecution of the respondent by the police."
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> 21. Similar finding were made in Koech v African Highlands & Produce Company Limited & Another [2006] eKLR 148 thus;
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> " The police carried out their own investigation and were satisfied that there were sufficient grounds upon which a charge of theft by servant could be preferred against the plaintiff. The first defendant carried out its own investigation regarding the disappearance of its property, just like any prudent person or company would in the

circumstances but those investigations had nothing to do with the investigations by the second defendant through the police and the resultant decision to charge the plaintiff with the said offence."

22. So that, in as much as the appellant lodged a complaint with the police, she clearly had no control over its outcome. In other words, whether or not the police would prosecute the two respondents was a decision that rested entirely with the prosecution.

23. We would add that in the prosecution's case, there was also nothing in the evidence that disclosed that the police did not believe in the authenticity of the appellant's case. We therefore find that on the prosecution's part, reasonable and probable cause in prosecuting the case was properly established" (sic)

26. On the question of malice, the Court of Appeal in *Commissioner of Customs & Excise v Hasmukh Shamji Halai & 3 others* [2018] eKLR pronounced itself as follows;-

" 31. The final element for proof was malice. For it would not matter that there was an acquittal of the two respondents; that the commissioner was the instigator of the prosecution; and that there was no probable or reasonable cause for it, if it is established that there was no malice. All the elements must dovetail in order to establish a cause of action. As this Court stated in Nzoia Sugar Company Ltd v Fungututi [1988] KLR 399:

"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."

32. In the Githaiga case (supra) the court explained as follows:-

"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."

Referring to the element of malice, the former East African Court of Appeal in the Mbowa case (supra) stated:-

" 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 purpose other than its legally appointed and appropriate purpose." (sic) (Emphasis added).

27. Was there a demonstration of malicious collusion either out of spite or ill will, between the complainant and the prosecuting agency, to prosecute the accused person? In this case there was no evidence led before the trial court that the Appellant and the 2nd Respondent colluded out of spite or ill will to prosecute the 1st Respondent. All with an intent to use the legal process in question for some purpose other than its legally appointed and appropriate purpose. The trial court in finding malice proven stated inter alia that there was no "no reason as to why the prosecution choose to leave out two probable suspects and prosecute the Plaintiff without doing thorough investigations other than malice on their part" (sic).

28. This in the court's view was a serious misdirection. The fact that the police conduct shoddy investigations in a matter or decide to charge only some of several suspects cannot, without more, be proof of malice. The 1st Respondent ought to have demonstrated ill will or spite on the part of the defendants before the trial court. As observed earlier, there was a reasonable and probable honest belief in the guilt of the accused person that would reasonably have led any ordinary prudent and cautious man, placed in the position of an accuser, to conclude that the person charged was probably guilty of the crime. Hence the Appellant's complaint to police for investigation.

29. Further to the foregoing, the 1st Respondent was acquitted under Section 215 of the *Criminal Procedure Code*, upon being placed on his defence after the criminal court had determined that the prosecution had established a prima facie case and that the 1st Respondent had a case to answer. It was incumbent upon the 1st Respondent to discharge the burden of proving the various ingredients required in a successful suit for malicious prosecution. In my own evaluation of the trial evidence, the 1st Respondent's case in the lower court did not rise to the standard of proof on a balance of probabilities of the ingredients to necessary to establish a case of malicious prosecution against the Appellant and 2nd Respondent.

30. Or stated another way, under section 107 of the *Evidence Act*, the burden of proof lay with the 1st Respondent and because his evidence did not support the facts pleaded, he failed as the party with the burden of proof. The trial court misdirected itself in law and fact in concluding otherwise and its conclusions cannot stand. In the result, the court finds the appeal merited and will allow it by setting aside the judgment of the lower court and substituting therefor an order dismissing with costs the 1st Respondent's suit in the lower court. The costs of the appeal are equally awarded to the Appellant.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 25TH DAY OF MAY 2023.**

**C.MEOLI**

**JUDGE**

**In the presence of:**

For the Appellant: Mr. Kagicha

For the 1st Respondent: Ms. Wangari h/b for Mr. Gachie

For the 2nd Respondent: N/A

**C/A: Carol**