Mwanzia v Inspector General of Police & 4 others (Constitutional Petition 3A of 2022) [2023] KEHC 24022 (KLR) (25 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24022 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CONSTITUTIONAL PETITION 3A OF 2022

TM MATHEKA, J

OCTOBER 25, 2023

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 2, 10, 25 (C), 27, 29(A) (D), 47, 49, 50, 157(11) AND 244(C) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF MAKINDU CHIEF MAGISTRATE'S COURT CRIMINAL CASE NO. 45 OF 2016 - REPUBLIC -VS- PAUL THADDEUS MWANZIA & 5 OTHERS

AND

IN THE MATTER OF MAKINDU CHIEF MAGISTRATE'S COURT CRIMINAL CASE NO. 44 OF 2016-REPUBLIC -VS- PAUL THADDEUS MWANZIA & 2 OTHERS

BETWEEN

PAUL THADDAEUS MWANZIA ..... PETITIONER

AND

INSPECTOR GENERAL OF POLICE ..... 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS ..... 2ND RESPONDENT

NO. 80975 CORPORAL EDWARD MWAURA ..... 3RD RESPONDENT

AUGUSTINE KIOKO SUKA ..... 4TH RESPONDENT

MAKINDU CHIEF MAGISTRATE'S COURT ..... 5TH RESPONDENT

JUDGMENT

1. Paul Thaddaeus Mwanzia, the Petitioner brought this petition against the Respondents hereinafter referred to as follows the Inspector General of Police 1st Respondent, The Director Public Prosecutions 2nd Respondent, the Investigating Officer (I.O) 3rd Respondent, Mr. Kioko (complainant), 4th Respondent, Makindu Law Courts 5th Respondent.

2. The petitioner's case is that on or about 14/03/2016, at the instigation and/or instance of the 4th Respondent Mr. Kioko, the 3rd Respondent the I.O working for the 1st Respondent the Inspector General of Police and in blatant collusion and/or connivance with the 2nd Respondent the DPP, arrested him (Petitioner) without any basis in law or in fact. He was arraigned and charged before the 5th Respondent the Makindu Law Courts with the offence of malicious damage to property Contrary to Section 339(1) of the Penal Code. That in a blatant and fragrant display of malice and bad faith, he was charged with two criminal charges to wit Criminal Case No. 300 of 2016 and 308 of 2016 respectively which were later consolidated to become Makindu Criminal Cases No. 44 of 2016 and 45 of 2016 (herein after; CRC No 44 & 45 of 2016 and collectively, 'the Makindu Cases')

3. Further, it's the petitioner's case that the 2nd Respondent, actuated and/or motivated by malice, spite and bad faith and in clear breach of its constitutional duty to act independently, succumbed to the pressure of the 3rd Respondent and the 4th Respondent and approved the bogus and baseless charges. That he pleaded not guilty to the charges and in a clear demonstration that the whole prosecution was a sham and mere charade, the Makindu Court found that he had a case to answer and placed him on his defence. That quite surprisingly, he declined to defend himself or call any witness yet the Makindu Court proceeded to acquit him under Section 215 of the *Criminal Procedure Code* in CRC No. 45 of 2016.He was however convicted in CRC No. 44 of 2016 yet both cases were founded upon the same facts, transaction and investigated under one Occurrence Book (O.B NO. 17/9/6/16).

4. Further, it's the Petitioner's case that his conviction in CRC No. 44 of 2016 was quashed and sentence thereof set aside on appeal in Criminal Appeal No. E13 of 2020 in which the court held that he was wrongly convicted by the trial court. That to further demonstrate that the prosecution was being mounted for extraneous reasons, he was convicted and wrongly detained at remand custody at Emali Police Station for 28 days before being transferred to Makueni G.K Prisons.

The Petition

5. The petition is dated 07/07/2022 and seeks the following reliefs;

    a. A declaration that failure by the 1st, 2nd and 3rd Respondents to conduct investigations and charge the 4th Respondent in the complaint raised by the Petitioner about his case vide Occurrence Book (O.B.) No. 27/6/1/16 was a violation of the Petitioner's rights to protection of the law and fair administrative action guaranteed under the *Constitution* of Kenya 2010.

    b. A declaration that arresting, charging and consequent prosecution of the Petitioner by the Respondents was unlawful and in violation of the Petitioner's rights guaranteed under the *Constitution* of Kenya, 2010.

    c. An order for compensation for malicious prosecution and false imprisonment.

    d. An order for general and punitive damages.

e. An order for general and exemplary damages suffered consequential to the declarations of violations of the Petitioner's fundamental rights and freedoms.

f. This Honourable Court do issue such Orders and gives such Directions as it may deem just and appropriate in the circumstances of this matter.

g. Costs of the Petition be awarded to the Petitioner

6. The petition is supported by the petitioner's affidavit sworn on 06/07/2022. He deposed that on 06/01/2016, he made a complaint against Mr. Kioko at Emali Police Station vide Occurrence Book (OB.) No. 27/6/1/16. His report was that Mr.Kioko had cut down the sisal planted on a public access road. That on 09/01/2016 Mr. Kioko made a complaint against him with an accusation of malicious damage to his crops on his alleged parcel of land vide OB No. 17/9/1/16 and as a consequence, he was arrested, arraigned and prosecuted for two criminal offences in Makindu Court. Copies of the charge sheets are exhibited as PTM-1.

7. He deposed that he pleaded not guilty on both charges and the matters proceeded for full trial. That in Cr No. 45 of 2016, he was put on his defence but declined to defend himself or call any witness yet he was acquitted under Section 215 of the *CPC*. A copy of the judgment is exhibited as PTM-2.

8. That on 30/03/2016, the two criminal matters were fixed on the same day in different courts and a warrant of arrest was issued in one court while he was attending the other. That he explained himself and the warrant was lifted. A copy of the warrant is exhibited as PTM-3.

9. That he was denied the prosecution's documentary evidence including charge sheets until 10/02/2017, almost a year later, when he applied for the same but the Makindu Court never compelled the DPP to supply them. Copies of the letters are exhibited as PTM-4.

10. He deposed that he applied for the court proceedings and paid for the same but they were not supplied until he sought assistance from the office of the Ombudsman. That upon being supplied, they were replete with errors and omissions which the court refused to rectify despite his protest letters. Copies of the emails and protest letters are exhibited as PTM-5. That the 2nd and 3rd Respondents completely failed to supply him with OB extracts despite being ordered by the Makindu court. Copies of application and Court Order are exhibited as PTM-6.

11. That in CR No. 44 of 2016, he was put on his defence and convicted on 26/08/ 2020. That after being sentenced, he was held at Emali Police Station with the remandees for a period of 27 days from 02/09/ 2020 to 29/09/2020 before being taken to Makueni Prison. A copy of the judgment is exhibited as PTM-7.

12. He deposed that the initial charge sheet in CR No. 44 of 2016 did not include the Land Reference number and upon its amendment, he did not plead to the new charge but continued to be tried with the initial charge. That he was convicted on the amended charge and on Appeal, the High Court agreed with him that his conviction was based on a charge that he had not pleaded to. A copy of the High Court judgment is exhibited as PTM-8.

13. Further, he deposed that the Police were biased and discriminated against him because he was the first to lodge a complaint but when Mr. Kioko reported his complaint, the I.O swiftly swung in to action and arrested him without carrying any investigations. That he followed the right legal channels by reporting a complaint and an OB. was recorded but no action was taken including investigating and arresting Mr. Kioko. That he wrote a complaint to the DPP who failed to recommend investigations

of the complaint but instead recommended that the cases where he (petitioner) appeared as an accused do proceed to their logical conclusion. The complaint letter and response are exhibited as PTM-9.

14. He deposed that the charge against him was aimed at intimidating and coercing him to stop pursuing his complaint against Mr. Kioko who worked in cahoots with the I.O. That while acquitting him in CR No. 45 of 2016, the Makindu Court observed that the evidence brought by the prosecution was contradictory and hearsay and that some prosecution witnesses contradicted themselves and each other as to which crops were damaged, where they were damaged and who damaged them.

15. He deposed that he had been advised by his Advocates on record and verily believed the advice to be true that the DPP went against its own policy known as "the National Prosecution Policy Revised in 2015" which requires public prosecutors to ask themselves; would an impartial Tribunal convict on the basis of evidence available.?. That the DPP was aware that Mr. Kioko did not own the parcel of land on which the alleged plants were grown, a fact that the High Court harshly criticized. A copy of official search is exhibited as PTM-10.

16. It was also his deposition that the surveyors report produced in the trial court clearly indicated that the crops were grown on access road and not on Mr. Kioko's land. The report is exhibited as PTM-11.

17. That without reasonable and probable cause, the DPP continued to prosecute the charges against him and caused the Makindu Court to commit him for trial for a period of more than 5 years.

18. He deposed that the I.O and Mr., Kioko collaborated to unlawfully and wrongfully arrest, detain, charge and prosecute him for an unreasonable period of time during which he suffered immense physical and mental torture, pain and anguish. That the Respondents acted jointly and severally in fabricating the criminal charges against him and proceeded to prosecute him without any reasonable basis in law and fact and as a result, the wrongful conviction was quashed by the High court and the sentence thereof set aside.

The Responses

19. The DPP through Prosecution Counsel Nyakibia Mburu, filed grounds of opposition dated 14/03/2023. The grounds are;

    a. That the application is baseless and unfounded in law.

    b. That the 2nd Respondent adheres to a strict code of conduct in carrying out its constitutional mandate.

    c. That the 2nd Respondent is not under the direction or control of any person or authority in exercising its constitutional mandate.

    d. That the 2nd Respondent made its decision to charge in good faith free of any malice of conflict of interest.

20. There are no responses from the other respondents but I have noted that submissions by the Attorney General, on behalf of Makindu Court (5th Respondent), are on record.

21. Parties elected to canvass the petition through written submissions and appropriate directions were given.

22. The 5th respondent (Makindu Court), through Senior State Counsel P.A Chibole, filed grounds of opposition dated 22/02/2023. The grounds are;

a. That the petitioner has not demonstrated before the honorable court how the 5th respondent has violated his constitutional rights.

b. That it is well settled law that the petitioner ought to demonstrate how the respondents' conduct constitutes an violation and/or contravention of their fundamental rights and freedoms. This was established in the case *Anarita Karimi Njeru – v- R* (1976-1980) KLR 1272 where the court stated that the petitioner must state and identify the rights with precision and how the same have been or will be infringed in respect to them.

c. That under Article 160(5) of the *Constitution* of Kenya 2010 and section 6 of the *Judicature Act*, a Judicial Officer is protected under the law from both civil and criminal liability in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.

d. That it is trite learning that acquittal per se, on a criminal charge is not a sufficient basis to ground a suit for malicious prosecution. See the case of *Nzoia Sugar Company Limited – v- Fungutuli* [1988]eKLR

e. That in the present petition, the petitioner did not even show that the complaint was false and that it was full of spite or malice.

f. That the Petition also offends the provisions of section 106 and 107 of the *Evidence Act* on the burden of proof as mere generalized assertions and allegations have been made without any such supporting evidence for instance on the suffering occasioned to the petitioner and in particular by the 5th respondent.

g. That it is also trite that in any claim for general and /or special damages, the party claiming must formally prove their claim which the petitioner has failed to do.

h. That the police under the *National Police Service Act* have a mandate which include but not limited to;

    i. Provision of assistance to the public when in need.

    ii. Maintenance of law and order

    iii. Preservation of peace

    iv. Protection of life and property

    v. Investigation of crimes

    vi. Collection of criminal intelligence

    vii. Prevention and detection of crime

    viii. Apprehension of offenders

    ix. Enforcement of all laws and regulations with which it is charged and performance of any other duties that may be prescribed by the inspector general under this Act or any other written law from time to time

i. That the police have therefore acted in accordance with the power conferred upon them by law.

j. That the power to prosecute is vested upon the office of the Director of Public Prosecutions under Article 157 of the *Constitution* of Kenya and the said office is an independent

constitutional office that is only subject to control of the court based on the principles of illegality, irrationality and procedural impropriety.

k. That the conduct of the respondents does not constitute any violation of the petitioner's rights.

l. That judicial intervention by the High Court should be limited to acts that are manifestly in breach of the law or where the court is satisfied that the decision maker reached a wrong decision influenced by other considerations other than the law, evidence and the duty to serve the interest of justice.

m. That the petition is frivolous, vexatious, incompetent and improperly before court and an abuse of the court process.

The Petitioner's Submissions

23. The petitioner, through his Counsel D. Muinde, identified the following as the issues for determination;

i. Whether the arrest and prosecution of the petitioner was illegal and unlawful or actuated by malice and whether it was done in violation of the petitioner's constitutional rights;

ii. What compensation, if any, is the petitioner entitled to

iii. Who is entitled to costs?

24. On the legality of the petitioner's arrest and prosecution, he submitted that this matter is basically about malicious prosecution. He relied on Article 29 of the *Constitution* for the submission that every person has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause. That the principles governing a claim founded on malicious prosecution were laid down by Cotran, J in the case of *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.

25. He also referred to *Clerk & Lindsell on Torts*, 18th Edition at page 823 where the essentials of the tort of malicious prosecution are given as follows:

> "in an action of malicious prosecution the claimant must show first that he was prosecuted by the defendant, that is to say, that the law was set in motion against him on a criminal charge, secondly that the prosecution was determined in his favour, and thirdly that it was without reasonable or probable cause; fourthly that it was malicious. The onus of proving every one of this is on the claimant.
>
> Evidence of malice of whatever degree cannot be invoked to dispense with or diminish the need to establish separately each of the first three elements of the torts."

26. The petitioner reiterated that his arrest and prosecution was without basis in law and fact and that the DPP maliciously breached its constitutional mandate of independence and approved bogus and

baseless charges. That the trial court acquitted him in CR 45 of 2016 and the DPP did not appeal. He also reiterated that his conviction in CR 44 of 2016 was eventually quashed by the High Court which held that he had been wrongly convicted.

27. He submitted that the trial court violated his right to a fair trial as guaranteed by article 25(c) of the *Constitution* when it failed to ensure compliance of its order, of 13/12/2019 to the prosecution, to furnish him with materials for his defence. He submitted that he was being tried for two similar offences but in two different case files. That the court had allowed for consolidation of the two cases but instead of the consolidation, the DPP undertook amendment of the charge sheet and the two matters continued to be heard separately and at times, the matters would be fixed for the same date. That at one time, a warrant of arrest was issued against him for failure to attend court yet he was in the other court. That he was arrested only for the warrants to be lifted.

28. He contended that the Prosecution maintained the two cases in different courts in the same day in order to disorient him and destabilize his defence thus interfering with his rights to a fair trial.

29. He submitted that the facts of the cases were a clear demonstration that the charges were orchestrated by malice as no reasonable and honest person could have believed that his prosecution for malicious damage to property was likely to succeed, taking in to account that the crops purportedly destroyed were found to have been grown in a road reserve.

30. He submitted that his rights to protection of the law and fair administrative action as guaranteed by Article 47 of the *Constitution* were breached as he did not receive any fair and impartial administrative action from the respondents. He contended that in a civilized society like ours, it is not right to close our eyes and ears when police officers arrest and charge innocent Kenyans and have them taken through unnecessary criminal trials like in the instant Petition.

31. He submitted that his complaint was recorded in an OB but attracted no action despite his written complaint to the DPP yet the same DPP recommended prosecution and logical conclusion of the cases where he (Petitioner) had been charged and which were reported after his complaint. He cited the case of *Anthony Murimi Waigwe – v- Attorney General & 4 others* [2020] eKLR where the expressed his view regarding the roles of the ODPP as follows;

> " Interest of the administration of justice dictates that only those whom the DPP believes have a prosecutable case against them be arraigned in Court and those who DPP believes have no prosecutable case against them be let free. This is why Article 159(2) of the *Constitution* is crying loudly every day, every hour that "justice shall be done to all, irrespective of status". Justice demands that it should not be one way and for some of us but for all of us irrespective of who one is or one has. The Petitioner in support of interest of administration of justice Dictates referred to the National Prosecution policy, revised in 2015 at page 5 where it provides that: "Public Prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction. In other words, Public Prosecutors should ask themselves; would an impartial tribunal convict on the basis of the evidence available?

32. He also relied on the case of *Republic – v- Director of Public Prosecution & another Ex Parte Chamanlal Vrajlal Kamani & 2 others* [2015] eKLR where the Court held;

> " A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say

with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable."

33. He acknowledged that the trial court was only subject to the *Constitution* and the law in exercise of its judicial authority but contended that Commissions and Independent Offices must operate within the law. He cited *RE the matter of the Interim Independent Electoral commission* [2011] eKLR at para 60 where the Supreme Court stated as follows:

> "While bearing in mind that the various Commissions and Independent offices are required to function free of subjection to "direction or control by the person or authority", we hold that this expression is to be accorded its ordinary and natural meaning; and it means that the commissions and independent offices, in carrying out their functions, are not to take orders or instructions from organs or person outside their ambit. The Commissions or independent offices must, however, operate within the term of the *Constitution* and the law; the "independence clause" does not accord them carte blanche to act or conduct themselves on whim; their independence is, by design, configured to the execution of their mandate, and performance of their functions as prescribed in the *Constitution* and the law."

34. He submitted that contrary to the submissions done by the Hon. AG on behalf of the 5th Respondent (Makindu Court), the Petition alleges violations by the court as an institution and there is no single allegation against the Magistrate who was presiding.

35. Further, it was his submission that the Petition has particularized and detailed the involvement of the issues and facts before court and has also particularized the violated Articles of the thus passing the standard set out in *Anarita Karimi's case*.

36. He submitted that after perusing the 5th Respondent's submissions and Grounds of Opposition, it would appear that although the Attorney General represents the 5th Respondent, its submissions purport to comment on the other Respondents whom he does not represent. He urged this court to ignore the Attorney General's Submissions that relate to other parties other than its client.

37. Further, it was his submission that at the time of drafting his submissions, there was no response or joinder of issues by the other respondents and the implication is that they do not oppose the Petition. That the violations against him by the said Respondents remain wholly and largely unchallenged.

38. As regards the compensation he is entitled to, he relied on Article 23(3)(e) of the *Constitution* for the submission that in any proceedings brought under Article 22, a court may grant appropriate relief including an order for compensation which can take a form of an award of damages.

    He submitted that from the facts, it is clear that he was arrested for no reason, arraigned in court when there was no evidence against him and waited for six years for the cases to be concluded. That he was acquitted on one case and convicted on the other and sentenced to 12 months which he served but the conviction was later quashed and sentence set aside. That his reputation has been damaged hence general damages and punitive damages should be awarded. He relied o*n Erastus Maina Karanja – v-Machakos County Government* [2021] eKLR where the court expressed itself as follows:

> "The Petitioner herein alleges that his right was violated on the account of his arrest, detention and prosecution being unlawful. Wrongful arrest involves deprivation of a person's liberty; it consists of arresting and holding a person without legal justification. Thus, liability thereof is strict, and a party needs not show that the person causing the arrest was at fault or that he was aware that the arrest was wrongful. It is one that falls under action

injurium, and so proof of damage is not necessary to support the action. Even if no pecuniary damage has been suffered, the court will award a contemptuous figure for the infringement of the right to liberty.

As a general rule, an arrest of a suspect should not be made unless and until his or her case has been investigated with sufficient evidence requiring an answer on the complaint. The starting point for the investigating officer is not to depart from the enforcement of a right to a fair hearing and due process.

39. He relied on Anthony Murimi Waigwe (Supra) where the Petitioner was awarded punitive damages of Kshs. 500,000.00 for malicious prosecution. He also cited *Peter M. Kariuki – v- Attorney General* [2014] eKLR where the appellant was awarded Kshs. 15,000,000.00 by the Court of Appeal as damages for violation of his constitutional rights.

40. In conclusion, he submitted that based on the gross violations meted against him and considering that he was maliciously prosecuted in two separate cases and in further consideration of the inflation of the Kenya shilling, an award of Kshs. 32,000,000.00 as damages for violations of his constitutional rights and Kshs. 1,000,000.00 as punitive damages should be awarded.

Submissions by the 2nd Respondent

41. The 2th respondent through Prosecution Counsel Nyakibia Mburu submitted that the petition is baseless and unfounded in law. That in carrying out its mandate, the DPP is governed by a strict code of conduct and the petitioner has failed to show how it was breached. Relying on section 6(1)(b) of the *ODPP Act*, she submitted that the petitioner's prayer, for a declaration that his rights were infringed for failing to charge Mr. Kioko, is unobtainable as the DPP is not under anyone's direction in deciding whether to charge or not.

42. She submitted that the DPP exercises his powers through delegation to public prosecutors hence the prosecutor who made the decision in this matter was exercising such powers. That the decision to charge was arrived at in strict compliance with the code of conduct and in line with the independence of the office.

43. It was also her submission that the petitioner is not entitled to compensation, damages or costs as he has failed to establish infringement of his fundamental rights and freedoms. She relied on *R – v- DPP & Anor Ex-parte Chamanlal Vraslal Kamani & Others* (2016) eKLR for the submission that the decision of the DPP should not be interfered with unless proof is shown of arbitrary use of the decision to prosecute.

Submissions by the 5th Respondent

44. The 5th respondent, through Senior State Counsel P.A Chibole, has identified the following as the issues for determination;

    a. Whether the 5th respondent's conduct constitutes a violation and contravention of the *Constitution* of Kenya 2010

    b. Whether the petitioner has proved his case to the required standard and therefore the honorable court should issue the orders sought in the petition.

    c. Whether the petitioner is entitled to costs.

45. On whether the petitioner's rights were infringed by the respondents, she has relied on *Anarita Karimi Njeru* (*supra*) and *Mumo Matemu – v- Trusted Society of Human Rights Alliance & 5 Others* (2013)

eKLR for the submission that it is not enough to list Articles of the *Constitution* that were allegedly violated without giving specific facts.

46. Relying on Article 160 of the *Constitution*, she submitted that the Chief Magistrates Court has power to hear and determine disputes primarily of criminal and civil nature. That the immunity bestowed upon members of the Judiciary is intended to protect and safeguard Judicial Officers from being personally culpable for acts they performed in good faith. She relied *Maina Gitonga – v-Catherine Nyawira Maina & Anor* (2015) eKLR where the court stated;

> 'It is undoubted that under the established doctrine of judicial immunity, a judicial officer is absolutely immune from a criminal or civil suit arising from acts taken within or even in excess of his jurisdiction. Judicial immunity is necessary for various policies. The public interest is substantially weakened if a judge or a magistrate allows fear of a criminal or civil suit to affect his decisions. In addition, if judicial matters are drawn into question by frivolous and vexatious actions, 'there never will be an end of causes: but controversies will be infinite.'

47. She submitted that in as much as the High Court has supervisory jurisdiction over all other subordinate courts, persons, body and authorities exercising judicial or quasi-judicial functions, the same should only be invoked to acts that are manifestly in breach of the law or when the court is satisfied that the decision maker reached a wrong decision influenced by other considerations other than the law, evidence and duty to serve the interests of justice.

48. As to whether the petitioner has proved his case to the required standard, she relied on sections 107 and 109 of the *Evidence Act* for submission that the burden is on the petitioner to prove the allegations. She contended that the petitioner did not even show that the complaint by the 4th respondent was false and full of spite and malice. She relied on *Peter Ngari Kagume & Others – v- Attorney General*; Constitutional Petition No. 128 of 2006 where the court stated that;

> " Turning to the alleged violation....it is incumbent upon the petitioner to avail tangible evidence of violation of their rights and freedoms. I have gone through the petitioner's affidavits which have horrifying allegations. The respondent has denied all those allegations...the petitioners allegations ought to have been supported by further tangible evidence such as medical records, witnesses' or rather oral evidence capable of being subjected to cross examination to test its veracity. The petitioners did not provide such evidence except the averments of what transpired to them...the court is deaf to speculations and must be guided by evidence of probative value.

49. She submitted that the police acted upon the complaints made by the petitioner and 4th respondent and after investigations, charges were preferred against the petitioner. That the petitioner was accorded a fair hearing and convicted accordingly. That the petitioner exercised his right of appeal and was successful. Further, she submitted that the withdrawal of the petitioner's case for lack of sufficient evidence does not mean that his arrest and prosecution were malicious in any away.

50. She submitted that the prayers sought in the petition are only meant to interfere with the institutional independence of various institutions like the office of the DPP and Kenya Police.

51. As to whether the petitioner is entitled to costs, she submitted in the negative and contended that matters in the domain of public interest litigation tend to be exempted from award of costs.

Analysis and Determination

52. I have carefully considered the petition, the responses by the respondents, the submissions, and the record. I find that the following issues arise for determination;

    a. Whether the failure to arrest and prosecute the 4th respondent violated the petitioner's rights to protection of the law and fair administrative action.

    b. Whether the petitioner was maliciously prosecuted and falsely imprisoned.

    c. What compensation, if any, is the petitioner entitled to.

    d. Which orders should the Court issue

Whether The Failure To Arrest And Prosecute The 4Th Respondent Violated The Petitioner's Rights To Protection Of The Law And Fair Administrative Action

53. At paragraph 2 of the affidavit in support of the petition, the petitioner deposed that on 06/01/2016, he made a complaint against Mr. Kioko at Emali police station vide OB No. 27/6/1/16 where he reported that Mr. Kioko had cut down the sisal planted on a public access road. In the correspondences exhibited as PTM-5, there is a letter dated 14/02/2019 written by the petitioner and addressed to Makindu Law Court. At paragraph 4 therein, he requests that the OCS, Emali Police station be compelled to produce in court; OB 37/13/1/16, OB 17/9/1/16, OB 17/9/6/16 and the OB recorded by PC Francis Ndeti Nzuve at Emali Police Station on 13/3/2016.

54. Further, there is an order by Makindu SRM Court issued on 23/12/2019 in response to a letter written by the petitioner on 11/12/2019. Paragraph 1 states that "THAT the 1st accused (Paul Thaddeus Mwanzia) be supplied with extracts of OB 17/9/1/2016, 17/9/6/2016 and OB 37/13/1/2016". There is another letter dated 17/02/2020 written by the petitioner and addressed to Makindu Law Courts. At paragraph 4 therein, he requests that OB 17/9/1/16, 17/9/6/16 and 37/13/1/16 be produced in court.

55. It is not clear why the Petitioner was asking for the supply of these other OB records as none of them correspond with the one containing his report OB reference No. 27/6/1/16 and as such, there is no evidence upon which this court can conclude that a report was made by the petitioner at Emali police station. The Court even responded to his letter and pointed out that the request for these records was vague .

Whether The Petitioner Was Maliciously Prosecuted And Falsely Imprisoned.

56. In the submissions by counsel for the Petitioner at paragraph 14 counsel states " the petition is anchored on violation of articles 2,10,25,(c) ,27,29(a) , (d),47,49,50, 157(11), 244(c) of the *Constitution*., the foundation being that the petitioner was arrested and charged with an offence, but was later acquitted . It is basically a matter of malicious prosecution" (emphasis mine)

57. The *Black's Law Dictionary*, Thomson West Publishing, 8th Edition, 2004, defines malicious prosecution as follows;

> " The institution of a criminal or civil proceeding for an improper purpose and without probable cause. The tort requires an adversary to prove four elements-
>
> i) The initiation or continuation of a law suit;
>
> ii) Lack of probable cause;

iii) Malice; and,

iv) Favourable termination of the law suit" (emphasis mine)

58. The above test was explained by the East African Court of Appeal in *Mbowa – v- East Mengo Administration* [1972] E.A. 352 at 354 (Per Lutta JA); as 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"

59. Further, the principles have been restated by the Court of Appeal of Kenya in *Patrick Nyakonu Ombati – v- Credit Bank Limited* [2016] eKLR, *Robert Ombeka – v- Central Bank of Kenya* [2015] eKLR and *James Karuga Kiiru – v- Joseph Mwamburi & others* [2001] eKLR.

In this case, i is evident that two criminal cases were initiated by the DPP against the petitioner pursuant to complaints by Mr. Kioko. The petitioner was charged, before the Makindu Senior Principal Magistrate Court, with the offence of malicious damage to property contrary to section 339(1) of the Penal Code in both cases.

60. In CRC No 45 of 2016, the petitioner was acquitted by the trial Court under section 215 of the Penal Code and in CR 44 of 2016, he was convicted and fined Kshs 50,000/= and in default to serve 12 months imprisonment. He appealed to this court (Dulu J) whereupon his conviction was quashed and sentence set aside. The two cases were therefore terminated in his favour. The upshot is that the first and fourth elements of the test the initiation or continuation of a suit, and favourable termination of the law suit" have been satisfied.

61. The other test is that of whether or not there was a probable cause in the petitioner's prosecution? The petitioner has argued that any reasonable person would not have believed that the prosecution was likely to succeed. The legal text Salmond on the Law of Torts defines reasonable and probable cause to mean: -

> " .... a genuine belief, based on reasonable grounds, that the proceedings are justified."

62. Further, the English case of *Hicks – v- Faulkner* (1878) 8 QBD 167 defined reasonable and probable cause as follows:

> " Reasonable and probable cause is an honest belief in the guilt of the accused based upon 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 the accused, to the conclusion that the person charged was probably guilty of the crime imputed. .... The prosecutor must himself honestly believe in the case which he is making..."

63. In this case, I do not have the benefit of the record of the trial in the subordinate court but I have looked at the exhibited judgments. Firstly, it is important to interrogate the ingredients of the offence of malicious damage to property in order to understand what a reasonable person would be looking for in determining whether proceedings are justified. Section 339(1) of the Penal Code provides as follows;

> 339. Malicious injuries to property

(1) Any person who willfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanor, and is liable, if no other punishment is provided, to imprisonment for five years.

64. I am in agreement with the interpretation of the section by Justice Ngaah in *Simon Kiama Ndiangui – v- Republic* [2017] eKLR where he stated that;

> "In order to convict the court must be satisfied that, first, some property was destroyed; second, that a person destroyed the property; third, that the destruction was willful and therefore there must be proof of intent; and fourth, the court must also be satisfied that the destruction was unlawful. I cannot find any suggestion in this provision that ownership of the destroyed property must be established for liability to attach. My take on this issue is that ownership of the property is a relevant but not the defining factor; it may be taken into account amongst other evidence that tends to establish that the offence was committed. It follows that failure to prove ownership is not fatal to the prosecution case and to this extent I agree with the learned counsel for the state."

65. In CRC NO. 44 of 2016, the judgment shows that the prosecution called four witnesses. PW1 was the complainant, Mr. Kioko, and he testified that on 08/01/2016, he was informed via phone call that some people were cutting mango trees on his farm. On 09/01/2016 he proceeded to the farm and confirmed that 33 mango trees, a paw paw tree and sweet potatoes had been damaged. PW2 testified that on the instructions of PW1 he hid in PW1's farm together with others and at around midnight, he saw the petitioner among the people who were cutting mango trees using pangas and axes. On cross examination by the petitioner, he stated that the petitioner arrived on board a probox motor vehicle, approached the farm, went in and started cutting trees. PW3 was the agricultural officer who assessed the damage on PW1's farm at Kshs 5,287,500/= and produced the report as P. Exb 2. PW4 was the investigating officer who testified that on 09/01/2016, the complainant reported that 33 mango trees and a paw-paw tree had been damaged on his farm.

66. A casual look at the summarized evidence above shows that some property in form of fruit trees was destroyed and that the petitioner was mentioned by an eyewitness as one of the people who caused the damage. Evidently such evidence would make a DPP counsel to genuinely believe that prosecution would be justified. As indicated elsewhere above, the petitioner was convicted in the case but the conviction was overturned on appeal.

67. At this juncture, it is important to indicate that according to the appellate court, the elements of damage, identification of the petitioner and willful destruction were proved by the prosecution. The point of departure was that the said destruction was not unlawful as the plants were on a public road and not on the complainant's farm. The appellate court also found that the learned trial magistrate had erroneously convicted the petitioner on a charge which had been replaced. The upshot is that even from the appellate court's judgment, it is discernible that there was a probable cause to prosecute the petitioner. The question then would be, where is the malice? From te foregoing facts malice cannot be imputed.

68. In CRC 45 of 2016, the judgment does not summarize the witness accounts but the trial magistrate stated as follows;

> "The prosecution called four (4) witnesses and closed their case. The prosecution case is that on 12/01/2016 at around 11.00am, the accused persons were on PW1's land cutting

down maize, sweet potatoes and covering trenches. At the close of the prosecution case, the prosecution had established a prima facie case against the accused persons....I find that there is evidence that there was damage to maize cow peas and sweet potatoes as PW5 confirmed and assessed the crop damages and produced a crops damage assessment report dated 13th January 2016 (P Ex 2) to that effect... According to PW3 who is also an eyewitness, it was at 9.00am when he was alone when he saw five people among them the three accused along the road slashing mango trees and grass in the shamba..."

69. After the full trial, the trial magistrate found that the prosecution had not proved its case beyond reasonable doubt as the evidence was contradictory however, just like in CRC No. 44 of 2016, the above judgment extract shows that property in form of fruit trees was destroyed and the petitioner was mentioned by an eyewitness as one of the people who caused the damage. Consequently, I reiterate my view that such evidence would make a DPP counsel to genuinely believe that prosecution would be justified. It has been held in numerous decisions that an acquittal in itself does not indicate that prosecution was malicious. In *Nzoia Sugar Company Ltd – v- Fungututi* [1988] KLR 399, the Court of Appeal held;

> " 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. 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."

70. The petitioner argued that his prosecution was meant to intimidate him in order to abandon his complaint against Mr. Kioko who worked in cahoots with the I.O. Unfortunately; there is nothing to show that he actually made a complaint against Mr. Kioko. It was also the petitioner's argument that the DPP was aware that subject parcel of land was not owned by the complainant because a surveyor's report was produced in the trial court. I have looked at the said report (PTM-11) which is dated 07/12/2015 and addressed to the Land Registrar –Makueni County. It is evident that the report was introduced by the defence during trial. Consequently, there is nothing on which to base a conclusion that indeed the DPP was aware. It could be a case of incomplete investigations by the I.O which, in my view, does not translate into malicious prosecution.

71. As to whether the petitioner was falsely imprisoned, I have not heard him saying that he was not presented to a court of law within 24 hours after arrest. His argument is that he was convicted and wrongly detained at remand custody at Emali Police Station for 28 days before being transferred to Makueni G.K Prisons. In the Ugandan case of Mugwanya Patrick v Attorney General High Court Civil Suit No. 154 of 2009 Justice Stephen Musota (as he then was) stated that;

> " The civil tort of false imprisonment consists of unlawful detention of the plaintiff for any length of time whereby he is deprived of his personal liberty. It must be total restraint.... where an arrest is made on a valid warrant it is not false imprisonment; but where the warrant or imprisonment is proved to have been effected in bad faith then it is false imprisonment."

72. In this case, if indeed the detention complained of what happened, then it was after conviction hence no proof of false imprisonment. He was already a convict awaiting to be transported to the Prison. Due process had been followed and the authorities were justified in restraining him.

What Compensation, If Any, Is The Petitioner Entitled To?

73. The court is obligated to assess damages that it would have awarded if the matter was successful. The petitioner had proposed an award of Kshs. 32,000,000.00 as damages for violations of his constitutional rights and Kshs. 1,000,000.00 as punitive damages. It is trite that courts have discretion to award general damages which are meant to give a fair compensation to the aggrieved for the offending actions of the defendant.

74. The petitioner clearly stated that this was a case of malicious prosecution. Damages for Malicious prosecution need not necessarily be pursued through the route of violation of Constitutional rights. It could be pursued as a normal tortious claim.. Musyoka J had this to say in . *Dickson Chebuye Ambeyi v National Police Service & another; Peter Sifuna Wesonga & another (Interested Parties)* [2020] eKLR

> 11. 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.

75. I agree. Reading through the petition I find that there is insufficient evidence to support the claim for malice or ill will. This required that the petitioner testify and give evidence to support his claim. How does the court assess general damages without proof of the damage?

76. Hence in my view the claim of violation of the rights of the petitioner is not proved and the same is dismissed with costs. I am required however to determine damages if I had found the petitioner successful. He submitted for Ksh 32,000,000. However, he did not lay any basis for that claim. He did not lay any basis for the claim for general damages to enable the court make that assessment. In *Joseph Wamoto Karani - v- C. Dorman Limited & another* [2018] eKLR where a global award of Kshs 2,000,000/= was made. Perhaps a global sum of Ksh Kshs 2,000,000 would have been adequate compensation.

77. Otherwise the petition is dismissed with costs.

DATED SIGNED AND DELIVERED VIA EMAIL THIS 25TH DAY OF OCTOBER 2023

MUMBUA T MATHEKA

JUDGE