REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEALS NOS. 64 AND 68 OF 2019 (CONSOLIDATED)

ANTI-COUNTERFEIT AGENCY.....1ST APPELLANT

CROWN PAINTS.....2ND APPELLANT

VERSUS

PETER MBARIA KARIUKI.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

THE INSPECTOR GENERAL

OF THE NATIONAL POLICE SERVICE.....3RD RESPONDENT

(Being an appeal from the judgment of Hon. H. Wandere, Senior Principal Magistrate (SPM), delivered on the 11th June, 2019, in Kakamega CMCCC No. 264 of 2016)

JUDGMENT

1. The appeal arises from the decision of the Chief Magistrate's Court, in Kakamega CMCCC No. 264 of 2016, in which the appellants, together with the 2nd and 3rd respondents, had been sued, by the 1st respondent, for general and special damages for unlawful arrest, malicious prosecution and defamation of character. The facts of the case were that the 1st respondent had been arrested on alleged account of holding counterfeit crown paints, and charged, on four counts, of the offence of having in his possession, in the course of trade, counterfeit goods, contrary to section 32(a), as read with section 35(1,) of the Anti-Counterfeit, Act No. 13 of 2018, in Kakamega CMCCRC No. 2529 of 2013. The 1st respondent was found not to have a case to answer, and was acquitted, leading to the filing of Kakamega CMCCC No. 264 of 2016, in which suit he was awarded a global sum of Kshs. 3,000,000.00 for general damages, Kshs. 120,000.00, special damages and costs of the suit.

2. Being dissatisfied with the judgment, the appellants lodged this appeal, through memoranda of appeal, dated 12th June, 2019 and 20th June of 2019, which listed several grounds of appeal, which included the following: -

(a) that the learned trial magistrate erred in law and fact and misdirected himself in finding that the 1st Respondent had proved his case for unlawful arrest, malicious and defamation;

(b) that the Learned trial magistrate erred in law and fact and misdirected himself in failing to find that the arrest of the 1st Respondent was carried out in accordance with the law and further that the Appellant was not involved in the arrest;

(c) that the learned trial magistrate erred in law and in fact and misdirected himself in the determination of liability of the Appellant on allegations of malicious prosecution, defamation and unlawful arrest;

(d) that the learned trial magistrate erred in law and fact and misdirected himself in failing to find that the arrest of the 1st Respondent was carried out in accordance with the law and further that the Appellant was not involved in the arrest;

(e) that the learned trial magistrate erred in law and fact by awarding the 1st respondent the sum of Kshs. 3,000,000.00 in general damages which amount is unreasonable; and excessive and manifestly unjust; and

(f) that the learned trial magistrate erred in law and in fact and misdirected himself in the determination of liability of the Appellant

on allegations of malicious prosecution, defamation and unlawful arrest.

3. I remind myself of the duty of the first appellate court, as I hereby sit as one, that it is to re-analyze and re-consider the evidence tendered before the trial court with a view to arriving at its own independent conclusions. (See *Selle & Another vs. Associated Motor Boat C. Ltd & Others* [1968] EA 123)

4. The 1st respondent testified on 12th September 2017. He narrated how persons claiming to be officials from the appellants, accompanied by police officers and other persons, showed up at his business premises, and accused him of manufacturing paints in the name of the 2nd appellant. They searched the premises and removed forty-two (42) tins of paint, without his consent. He was arrested and taken, together with the paints, to the Kakamega Police Station. He was later released on bond, and was arraigned in court the following day. He asserted that the report given to the police was false. During cross-examination, he stated that he had sued the police because his prosecution was mounted by them, after reports were made to the police by the appellants. He stated that of the forty-two tins, only twenty-nine were returned to him. He testified that the criminal matter took two years. He said that the 1st appellant alleged that the paints he was selling were counterfeit. He said that the criminal case collapsed for lack of evidence, for proper investigations had not been conducted. He stated that he had gotten the paints from a dealer and it was the dealer that the persons behind his prosecution ought to have pursued. He said that he had receipts from the dealer. He said that at the police station he placed in the cells, but he was released the same day.

5. Joseph Karanja Muchoki testified that he was an employee of the 2nd appellant. He stated that he was the one who reported the matter to the 1st appellant. The complaint was about infringement of a trade mark, after the 2nd appellant had identified the products complained of as coming from the 1st respondent's businesses. After he made the report, the 1st appellant raided the 1st respondent's business premises, and found the 1st respondent with bases for mixing various paints, yet he was not a recognized dealer for the 2nd appellant, and he did not have machines for mixing the paints. He stated that the 1st respondent did not explain how he came by the bases, and to him, the bases were counterfeits. During cross-examination, he said that all the samples collected were subjected to testing, and some were found to be genuine and others counterfeit. The genuine ones were returned to the 1st respondent. He stated that he did not take part in the investigations, and that he was not present when the paints were removed from the 1st respondent's premises. He stated that he played no role at all in the criminal case. He confirmed that the 1st respondent was acquitted for lack of evidence, and that no appeal was preferred against the acquittal.

6. Evans Odongo Owuor was a chemist, employed by the 2nd appellant, who tested the samples in question. They were given to him by the police, and he tested them in the laboratories of the 2nd appellant. He found some to be genuine products from the 2nd appellant, and some not so.

7. The final witness was Thomas Joseph Ramogi Odek, a gazetted inspector of counterfeits from the 2nd appellant. He stated that he received a complaint from an officer of the 1st appellant about counterfeit paints being sold by a certain business at Kakamega. He made a report at the Kakamega Police Station, and he, together with police officers, went to the business in question and carried out an inspection. They found suspected counterfeit paint which they seized. The paints were subjected to chemical analysis, and it was established that some were counterfeit and some were genuine. The 1st respondent was thereafter arrested, detained at the police station before he was eventually charged. During cross-examination, he stated that he was not qualified with regard to analysis of paints, and that he was involved in the case merely because he participated in the seizure, and had testified in court in the criminal case. He said he instigated the arrest of the 1st respondent by making a report at the police station.

8. In the judgment delivered on 11th June 2019, the trial court found that the appellants and the 2nd and 3rd respondents were not able to prove their case against the 1st respondent, that he had handled counterfeit goods. It was the appellants who initiated the matter by making a report to the police. The police did not carry out independent investigations, and only acted on the basis of the report by the appellants, leading up to the mounting of a prosecution that ended in failure. The court found that it was the appellants who had caused the ill-fated investigations and prosecution, from which malice could be inferred. The court found that no proper investigations were done, hence the collapse of the prosecution, and concluded that there were no reasons for instituting the criminal proceedings, hence the prosecution was malicious, and the 1st respondent was entitled to compensation in damages.

9. Directions were taken on 13th November 2020, that the appeal be canvassed by way of written submissions, to be highlighted. The written submissions in the record before me were filed by the two appellants and the first respondent.

10. In its written submissions, the 1st appellant argued that the trial court made an error in awarding damages for unlawful arrest, malicious prosecution and defamation of character, when it had not made any finding on defamation and unlawful arrest, as it had made a finding only on malicious prosecution. It was submitted that the 1st respondent had not specifically pleaded any cause of action against the 1st appellant, with respect to malicious prosecution, defamation of character, unlawful arrest or illegality, and when the 1st respondent attempted to introduce evidence on unpleaded matters, the 1st appellant objected, and its objection was sustained. On special damages, the 1st appellant submitted that the 1st respondent never proved special damages of Kshs. 100, 000.00, and that a receipt of Kshs. 20, 000.00 was introduced into evidence at the close of pleadings. A host of decisions were cited to support the submission that special damages must not only be proved, they must be specifically pleaded. It was further submitted that the malicious prosecution was not proved. It was also submitted that the testimony of DW3 was not considered. The other submissions were that the arrest of the 1st respondent was legal and justified, although it had not been pleaded that the same was unlawful. It cited the decision in *Stephen Kaburu & 5 others vs. Attorney General & 7 other*s Meru HCCA No. 51 of 2016, to make the point that proof of unlawful arrest was absence of lawful justification. It was submitted that the 1st respondent had not proved that there was no lawful justification for his arrest. It was also argued that the finding that the arrest of the 1st respondent was instigated by the employees of the appellants and was actuated by malice, was not corroborated. It was also submitted that defamation had not been proved that the pleadings at the trial court were insufficient to maintain a claim for malicious prosecution, unlawful arrest and defamation of character, the court erred in finding that the appellants did not handle the complaint professionally leading to shoddy investigations which resulted in an acquittal. A number of copies of decisions of superior courts were attached to support the submissions.

11. The 2nd appellant submitted that it did not mount any prosecution, rather it was the national police who conducted the same, and that it had no authority over the national prosecutorial authorities. It argued that all it did was to lodge a complaint with the government agencies about the 1st respondent, it did not set in motion the prosecution. It was further submitted that there was expert evidence, which was disregarded by the trial court, to effect that the items the 1st respondent was found in possession of were counterfeit. It was finally submitted that all the elements of malicious prosecution, unlawful arrest and defamation were not established, and that the court ought not have awarded a lump sum for all three torts of malicious prosecution, unlawful arrest and defamation. Several authorities were cited, and copies attached to the written submissions.

12. The 1st respondent in his submissions highlighted the determination of the trial court in the criminal matter, which triggered the civil matter, the subject of the instant appeal, and used that determination as the framework for his submission that there was a legal and factual basis for the findings that the trial court came to with regard to the torts the subject of the instant proceedings. The 1st respondent also cited case law to support his position, and attached copies of the authorities.

13. What constitutes malicious prosecution? The East African Court of Appeal, in *Mbowa vs. East Mengo District Administration* (1972) EA 352, discussed the elements of malicious prosecution, where it said: -

> *"The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings…It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion of the truth. It's essential ingredients are: (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 ..."*

14. The court, in *Kagane vs. Attorney General* (1969) EA 643, a decision which resonates with section 3(2) of the Evidence Act, Cap 80, Laws of Kenya, set the test for what constitutes reasonable and probable cause for the purposes of malicious prosecution by stating:

> *"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 an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed... If and insofar as that material is based on information, the information must be reasonably credible, such that an ordinary reasonable prudent and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for the prosecution ..."*

15. The matter before the trial court was prompted by the outcome in the criminal proceedings in Kakamega CMCCRC No. 2529 of 2013, where the 1st respondent was the subject of prosecution. Those criminal proceedings provided the raw material for the civil proceedings in Kakamega CMCCC No. 264 of 2016, whose outcome gave rise to the instant appeal. Curiously, the appellants did not make any reference whatsoever to the criminal proceedings, yet the said proceedings were backbone of the civil matter. They went about the appeal as if the civil proceedings were completely independent of the criminal proceedings, and as if everything turned on the proceedings in the civil matter. Indeed, the appellants appeared to take the positon that whether there had been malicious prosecution depended largely on the proceedings that were conducted in the civil matter, and that what happened at the criminal trial was somewhat irrelevant, for they paid no attention to it at all. Helpfully, the 1st respondent anchored his submissions on the said criminal proceedings, appreciating that that was the point from which a determination as to whether there was malicious prosecution should begin.

16. I have taken time to go through the proceedings of the court in the criminal matter. The prosecution called four witnesses and closed its case. The 1st respondent was acquitted by the court on the finding made at the close of the prosecution, on the basis that the prosecution had not made out a *prima facie* case for him to be put on his defence. The trial magistrate made the following conclusions, which were the basis for its final determination:

> *"… In this case, from the evidence of PW1, 3 and 4 it is not in dispute that the sample paints were investigated and analyzed in the company's laboratories to the exclusion of the investigating officer Mr. Maloba, any official from the anti-counterfeit agency or the accused person. This is a less than desirable situation which in my mind creates serious doubts as to the credibility of the entire process as there was no independent party to verify the same.*
>
> *The situation is further made worse by the testimony of PW4 who in cross-examination stated that the accused had furnished the company as well as the Anti-Counterfeit Agency with sufficient proof of where he had obtained the paints thus implicating a third party and possibly exonerating himself. According to PW4 the company and the Anti-counterfeit Agency turned a blind eye to this information supplied by the accused person and went ahead to prosecute him. PW4 insinuated that there was in existence a conspiracy to shield the thirty party and have the accused take the blame."*

17. The 1st respondent's case in the civil matter was founded on the outcome that I have recited above. The criminal case, according to the ruling on a no case to answer, was founded on the allegation that the 1st respondent was in possession of counterfeit goods, which he was exposing for trade. The criminal court found for a fact, from the testimonies of the witnesses presented by the prosecution, who included officials from the appellants, that the sample paints that were tested for the purpose of the prosecution were investigated and analyzed at laboratories belonging to the 2nd appellant in the absence of all the other parties interested in the matter, that is to say the 1st respondent, the

1st appellant and the police. The testing and analysis were done exclusively by the 2nd appellant, in the absence of independent or neutral parties, and it was the outcome of that one-sided testing that the 2nd appellant was placing before the court as evidence of the 1st respondent's culpability.

18. Secondly, the criminal court noted that the 1st respondent had given certain information, according to one of the prosecution witnesses, to both appellants, about where he had obtained the paints in question. That information implicated a third party, and would have perhaps exonerated the 1st respondent. However, according to the prosecution witness, that information was not acted upon by both appellants, and they went ahead with their prosecution of the 1st respondent. The trial criminal court, itself, in the ruling, talked of the appellants proceeding to prosecute the 1st respondent despite giving them information that implicated a third party and exonerated him. The trial criminal court went on to say that the witness for the prosecution, who was an official of one of the appellants, even insinuated that there was a conspiracy to shield the third party mentioned by the 1st respondent, and to make the 1st respondent "the fall guy."

19. With the kind of conclusions that the trial court in Kakamega CMCCRC No. 2529 of 2013 reached there really was very little for the trial court in the civil court to do. The appellants had been found in the criminal proceedings to have been in a conspiracy to nail the 1st respondent, and protect a third party. They were found to have had been given information that would have assisted in getting the actual culprits, if at all, but they did not pursue that information. They did not investigate the third party based on that intelligence. To make matters worse, the report they relied as evidence that the paints were counterfeit was based on tests that were carried out in the laboratories of one of them, probably by its own staff, to the exclusion of everybody elsewhere. The trial criminal court found that to be undesirable, as an exercise that created serious doubts, and which undermined the credibility of the entire process. Malice is constructed on such stuff as what the trial criminal court found. Surely, faced with such findings, what else was the civil court expected to find, different from that. Its job was well cut out. Looked at purely from the findings of the trial criminal court, there can be no other conclusion other than that the prosecution was malicious. It was manipulated or geared to achieve a certain objective, against the 1st respondent, and that the prime movers were the two appellants.

20. The appellants argued strongly that they had no role in the prosecution, for that is the work of the relevant State agencies. The 2nd appellant submitted that it merely made a complaint to the police, which was acted upon leading to the prosecution of the 1st respondent. Firstly, I reiterate what I have stated above, that the trial criminal court found that the appellants prosecuted the 1st respondent. It is a finding that has not been appealed against. Surely, the appellants cannot argue that they did not prosecute the 1st respondent when the trial criminal Court said so in its ruling. Secondly, prosecution for the purpose of malicious prosecution is used broadly. It means much more than a prosecution mounted by a gazette prosecutor. One cannot, therefore, argue that since I am not mandated in law to mount a prosecution, since I am not a prosecutor under statute, and, therefore ,I cannot be held liable for malicious prosecution, unless I conducted a private prosecution. It is not just prosecutors who can be liable for malicious prosecution. It captures, among others, complainants who initiate a complaint and push it through, even when it is clear that it has no basis. It includes police investigators and detectives, who marshal the evidence and organize to have it placed before a court, and so on. The argument, therefore, that a prosecution is the preserve of the Director of Public Prosecutions, is simplistic. From the ruling of the trial criminal court, it is clear that the driving forces behind the prosecution of the 1st respondent were the appellants. They set the stage, and the police merely followed their lead. They did the initial investigations, and only roped the police in at the tail end. They were the heart of the prosecution, and if there was malice in the prosecution, they cannot escape the consequences.

21. The submission that the arrest was lawful completely flies against the face of ruling of the trial court, which found that the 1st respondent had provided sufficient proof as to where he had gotten the paints from, but rather than pursue that lead, the court found that the appellants turned a blind eye to that and proceeded to prosecute him. That finding amounted to saying that the arrest and prosecution was not justified. No appeal was brought against that ruling, and the civil proceedings in the civil matter could not be used to contradict what was before the criminal court. The trial court in the civil court was, therefore, justified to find that the investigations were shoddy, leading to an acquittal, primarily because the appellants failed to follow the lead alluded to by the trial criminal court. Hence the conclusion that the complaint was not handled professionally. The investigations were rushed, and no wonder the case collapsed at the close of the prosecution. Rushing to arrest a person on flimsy evidence collected in shoddy investigations points to abuse of process, and such renders any arrest unlawful, if it is designed to serve ulterior motives of the complainant.

22. The appellants attacked the pleadings in several respects. It was submitted that malicious prosecution, unlawful arrest and defamation of character were not pleaded. The plaint at paragraphs 12, 13, 14 and 15 pleaded all these things: (a) arrest, detention and arraignment that that had no regard to the rights and liberty of the 1st respondent, and that the same was malicious and ill motivated; (b) particulars of malice and bad faith itemized, which revolve around a questionable arrest, false and malicious complaints, self-instigated investigations, a prosecution mounted for ulterior motives and driven by malice, shoddy investigations, and collusion; (c) the appellants maliciously and deliberately portraying the 1st respondent as a criminal and caused him ridicule, shunning and disrepute to his character in the eyes of right thinking members of society; and (d) prays for damages for unlawful arrest, malicious prosecution, and defamation of character. It cannot, therefore be argued that these were not pleaded.

23. It was submitted that there was no finding on defamation and unlawful arrest. On defamation, it should be noted that the suit before the trial court was not principally for defamation. The principal tort is that of malicious prosecution, and defamation was secondary, in the sense of flowing naturally from the malicious prosecution. A malicious prosecution exposes party to indignity, humiliation, injured feelings and the like. Since determination in such cases is not independent of the alleged malicious prosecution, pleadings and evidence relating to it need not be subjected the usual rules governing libel and slander. The court addressed its mind to it, may be not so elegantly, or extensively, or elaborately but it did, and it was in that behalf that it cited the decisions in *Johnson Muendo Ngui Waita vs. Odillah Mueni Ngui* Machakos HCCC No. 43 of 2016 and *Dr. Willy Kaberuka vs. AG* Kampala HCCC No. 160 of 1993. It would not have cited these decisions, which deal with defamation in the context of malicious prosecution, if it had not found that the 1st respondent had been defamed through the ill-fated and malicious prosecution.

24. On unlawful arrest, there could be foundation in the claim that the trial court did not make a finding on the lawful arrest. The trial court did not make a definitive finding that the arrest of the 1st respondent was unlawful, although it did conclude that he was entitled to damages

for it. I note, though, that in the paragraph where the trial court addressed malicious prosecution, it lumped it together with the arrest. Said it was effected without a warrant, it was instigated by the appellants and was actuated by malice. The bottom-line from these statements is that an arrest that was instigated without foundation and actuated by malice was, not doubt, outside the bounds of the law, and, therefore, was unlawful. There is no merit therefore to the submissions that there was no finding on unlawful arrest.

25. On the malicious prosecution, I would reiterate what I have stated above, the trial criminal court came to a very clear finding that the testing of the paints, the foundation of the charge, was done in an undesirable environment, which raised serious doubts about the credibility and integrity of the process, in the sense of the conflict of interest presented by the said tests being conducted in the laboratories of the complainant in the absence of the accused and the investigating authorities. That reeks of malice. Then the court pointed at the fact that important intelligence which directed the appellants to a third party as the maker of the counterfeits, which information would perhaps have exonerated the 1st respondent, but the same was ignored. Indeed, a prosecution witness, who was an official of one of the appellants, even suggested a conspiracy, of the appellants to protect the third party, and blame the 1st respondent. Conspiracy to use the criminal justice system to nail another can only point to malice. It is about manipulating the system for ulterior and unlawful purposes. It is what malice is about.

26. It is my view that the prosecution of the 1st respondent was actuated by malice owing to the absence of probable and reasonable grounds to prosecute him. No proper investigations were conducted prior to his prosecution. The court, in *Kioko Mwakavi Makali vs. Attorney General & another* [2019] eKLR, stated, with regard to malice in criminal prosecutions:

> *"Neglect to make a reasonable use of the sources of information available before instituting proceedings may therefore be evidence of malice and hence abuse of discretion and power. In the absence of any evidence as to the facts and circumstances upon which the 1st Respondent arrived at the decision to charge the Appellant, the court can only conclude that there was no probable and reasonable cause for charging the plaintiff and that constitutes malice for the purposes of the tort of malicious prosecution…. Therefore, the police are expected to be professional in the conduct of their investigations and ought not to be driven by malice or other collateral considerations. However, the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words, the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect."*

27. On special damages. In note from the plaint that special damages were pleaded, being the moneys the 1st respondent paid to his advocate in the criminal matter and for the demand letter for the purpose of the civil suit, totaling Kshs. 120, 000.00. When the 1st respondent testified on 12th September 2017, he did not produce receipts to support the amount of Kshs. 100, 000.00 that he had allegedly paid to his advocate in the criminal matter, saying that the advocate died before he had issued him with receipts. He produced a receipt to support the payment of Kshs. 20, 000.00, that he had paid for the demand letter in the civil proceedings. It is trite law that special damages must not only be specifically pleaded, they must also be specifically proved. The 1st respondent satisfied the rule about specifically pleading special damages, but only partially satisfied the second aspect of it, specific proof of the special damage, as he only specifically proved the payment of Kshs. 20, 000.00, and not the Kshs. 100,000.00. He said that his advocate in the criminal matter died before he issued the receipts, but there was no proof of the alleged death.

28. The other submission was that there was expert evidence that the goods the 1st respondent was selling were counterfeit, and it is argued that the trial court disregarded that evidence. With respect, this submission displays some measure of naivety. The evidence that the trial court needed to assess the matter before it was that which was presented before the criminal court. The so called expert evidence adduced before the criminal court, was discredited on the grounds that I have discussed above with respect to malicious prosecution. Firstly, the testing was done at the laboratories of the 2nd appellant, in the absence of the 1st respondent, the 1st appellant and the police. That was a classic case of conflict of interest, of a complainant being both the investigator, the judge and the jury. Testing of such material ought to have been done at the laboratories of a neutral entity, procured by the police officer who was investigating the matter. It should never have been done at the facilities of the complainant, the 2nd appellant, in the absence of the police investigators and the suspect, the 1st respondent. Secondly, as it was done exclusively by the 2nd appellant, it would follow that it was the officials of the 2nd appellant who were the experts that the appellants are talking about. The criminal court found that that evidence was tainted and discredited; the trial court in the civil matter could not have been expected to come to a different conclusion, for the claim for malicious prosecution should have been founded on the material that was before the criminal court, and not what transpired at the civil court.

29. It was also argued that the trial court ought to have had made separate awards for malicious prosecution, unlawful arrest and defamation. I find no merit in the said submission. No authorities were cited to support the contention. As stated above, the primary claim was for compensation for malicious prosecution, the other two were incidental to the malicious prosecution. Indeed, unlawful arrest and malicious prosecution are inseparable, for prosecution is not limited to what transpires at the criminal court, it begins with the complaint, and includes everything done by all the parties involved in the processing of the complaint, investigations, arrest, arraignment in court and the actual prosecution. Arrest is part of the whole chain that makes up the prosecution. I have also addressed the matter of defamation above, and said that, in the context of malicious prosecution, defamation would flow naturally from such prosecution. If the same is malicious, it would expose an innocent person to indignity, humiliation, ridicule, among others, with the consequence that his standing in society would suffer. The mere fact of being treated as a suspect in a criminal enterprise, being investigated by criminal agencies, being arrested, being contained in cells at a police station, being arraigned in court, attending court on numerous dates during the course of the prosecution, sitting at the dock, among others, cumulatively, exposes the person to an environment where a curious onlooker would view him as an evil doer or an undesirable element in society who is facing the law for the wrongs committed to society. Defamation of character arising from being prosecuted maliciously ought not be treated as a separate matter from the malicious prosecution itself. There would be no justification, in the circumstances, for awarding damages under different heads.

30. On the award itself, of Kshs. 3, 000, 000.00 general damages, it was submitted that the same was exaggerated. The appellants cited authorities to support the position that an appellate court should interfere with the award of general damages where it is demonstrated that the

award was inordinately high or low, or the court proceeded on a wrong principle or misapprehended the evidence. None of the two appellants made an attempt to demonstrate, with respect to assessment of damages, that the award was inordinately high, or the trial court proceeded on a wrong principle or misapprehended the evidence. No case law was cited on comparable awards for similar torts committed in similar circumstances. No effort was made to show that the trial court fell into error in assessing damages for the torts pleaded. A case was, therefore, was not made for me to interfere with the award of damages made by the trial court. On the award of special damages of Kshs. 120,000.00, it is my finding that the 1st respondent produced receipts to support the expense of Kshs. 20, 000.00, but not for Kshs. 100, 000.00. The trial court should have awarded damages to the extent, therefore, of only Kshs. 20, 000.00 special damages only.

31. In the end, I find that the appeal only succeeds to the extent of the award of special damages. I accordingly reduce the award of special damages to Kshs. 20,000.00. The appeal is disposed of in those terms. Each party shall bear their own costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 19TH DAY OF MARCH 2021

W MUSYOKA

JUDGE