REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 720 OF 2019

DAVID ABWOGA (CHAIRMAN)

JULIUS KOROS (VICE CHAIRMAN)

MICHAEL MUKAYAGI (SECRETARY & CHIEF EXECUTIVE

OFFICER OF THE SOCIETY KNOWN AS NAIROBI CLUB

REGISTERED UNDER THE SOCIETIES ACT CAP. 106 LAWS OF KENYA...APPELLANT

VERSUS

SAMUEL OTIENO ABOGI..1ST RESPONDENT

THE ATTORNEY GENERAL..2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION...3RD RESPONDENT

(Being an Appeal from the Judgment and of the Honourable P.N. Gesora, (CM)

in the Chief Magistrate's Civil Case No. 5764 of 2016

delivered on 13th November 2019)

JUDGMENT

The 1st respondent was charged before the Kibera Chief Magistrate's Court with the offence of stealing contrary to Section 275 of the Penal Code in Criminal Case Number 5115 of 2010. The trial court acquitted the 1st respondent on 28th August, 2015. By a plaint dated 24th August, 2016 he sought damages for malicious prosecution. In a judgment delivered on 13th November 2019, Hon. P.N. Gesora, (CM), granted the 1st respondent's prayers and awarded him a total sum of Kshs.3,850,000 plus costs and interest. This appeal is against that judgment. The grounds of appeal are THAT:-

1. The learned magistrate erred in law and fact by failing to consider and evaluate all the evidence that was tendered before him.

2. The learned magistrate erred in law and fact by failing to consider the ingredients of the claim for malicious prosecution and whether all the ingredients had been proved.

3. The learned magistrate erred in law and in fact by failing to consider that once a prima facie case had been established against the plaintiff in the criminal proceedings against him then there was reasonable and probable cause for the prosecution.

4. The learned magistrate erred in law by failing to consider binding precedent from the High Court and the Court of Appeal for the proposition that where an accused person is put on his defence then there is reasonable and probable cause for the prosecution.

5. The learned magistrate erred in law by elevating the standard of proof in civil cases from proof on a balance of probabilities to proof beyond reasonable doubt.

6. The learned magistrate erred in law by awarding excessive damages without any legal or factual justification for awarding such damages,

7. The learned magistrate erred in law by holding that the respondent was entitled to aggravated/exemplary damages when there was no legal or factual basis for awarding such damages.

In support of the appeal, counsel for the appellant submit that the trial court did not set out the ingredients for a claim for malicious prosecution. The trial court relied on an extract from the case of **GITAU –V- ATTORNEY GENERAL (1990) KLR 13** which only deals with one element of malicious prosecution namely that the prosecution must be instituted or set in motion by the defendant. The trial court did not deal with the other three ingredients as to whether the prosecution terminated in favour of the respondent, whether there was reasonable or probable cause in prosecuting the respondent and whether the prosecution was actuated by malice.

It is further submitted that there was a list of agreed issues and the trial court did not deal with each and every issue as framed. Counsel relies on the case of **SOUTH NYANZA SUGAR CO LTD –V- OMWANGO OMWANGO (2011) eKLR** where the court held:-

"….Ordinarily and in law a judgment should deal with issues raised and should not be scanty. A judgment must comply with the mandatory provisions of order 21 rule 4 of the Civil Procedure Rules which provides that a judgment in a defended suit shall contain a concise statement of the case, points for determination, the decision thereon and reasons for such decision… The trial magistrate by not setting out points for determination and reasons for his decision contrary to the aforesaid provisions of the law abdicated his judicial responsibility. As a judicial officer he was under a duty to state in writing the reasons which made him arrive at a particular decision on liability and the apportionment thereof….. Any judgment that does not contain the aforesaid essential ingredients is not a judgment and an appellate court will frown at such a judgment and indeed impugn it"

It is also submitted that the appellant did not cause or set in motion the prosecution of the 1st respondent. The appellant did not present the plaintiff before a judicial officer but this was done by the police. Counsel rely on the case of **SOCFINAF KENYA LTD –V- PETER GUCHU KURIA & ANOTHER (2001) eKLR** where it was held:-

a. when there is a case of suspected theft the first step is to report the matter to police, who in their own way find out how to carry out investigations.

b. it is up to the police to take further steps like taking a suspect to court if they have sufficient evidence against such suspect to warrant such action.

c. A complainant should not be blamed for making such report to the police.

d. As to the prosecution of the 1st respondent, the complainant could not force police to do so when there was no evidence to take them to court. Police carry out investigations before taking suspects to court and there are various incidents when police have declined to prosecute a suspect when investigations have disclosed no offence to warrant this.

It is the appellant's submission that there was a probable cause as to why the prosecution was instituted. Counsel referred to the case of **TOBIAS MOINDE KANGERE –V- POSTAL CORPORATION OF KENYA & 2 OTHERS (20190 eKLR** where the court cited the case of **KIGANE & ANOTHER, (1969) E.A 643** where the court held:-

"the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of objective test. That is to say, to constitute reasonable and probable cause the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material consisted of facts discovered by the prosecutor or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty."

According to counsel for the appellant, the facts of the case raised a probable cause. The 1st respondent admitted that he was at his place of work and he was in the vehicle that was stopped at the gate and suspected stolen items were found. The trial court erred by failing to consider the critical element of whether there was reasonable and probable cause in prosecuting the 1st respondent.

Counsel for the appellant further contend that the fact that the 1st respondent was put on his defence after the trial court found that the prosecution had established a *prima facie* case has an impact on a claim for malicious prosecution. Counsel relies on the case of **RAMANLAL BHATT –V- R (1957) E.A 332** where the court defined a prima facie case as one where a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence. It is submitted that the prosecution had a strong case that could have led to a conviction had the 1st respondent not offered any defence. Counsel cited the case of **MANSON MOREKA MONYENYE –V- ATTORNEY GENERAL & ANOTHER (2018) eKLR** where it was held:-

"The issue is not whether there was sufficient evidence at the trial but whether at the time the complaint was laid, there was reasonable and probable cause. In this case, I find and hold that there was sufficient basis for laying the complaint. My finding is augmented by the fact that the appellant was put on his defence after the trial magistrate found that there was a *prima facie* against him. I therefore hold that there was reasonable and probable cause established to charge and prosecute

the appellant."

It was also submitted for the appellant that the prosecution was not actuated by malice. The person who was alleged to have handed over the suspected stolen items never showed up to claim the items. He switched off his phone. There was no evidence tendered by the 1st respondent to the effect that his prosecution was actuated by malice. Counsel relies on the case of **ROBERT OKERI OMBEKI –V- CENTRAL BANK OF KEYA (2015) eKLR** where it was held:

> **"Comparative judicial experience in other jurisdictions also shows an emerging legal principle that an acquittal or discharge in a criminal prosecution should not necessarily lead to a cause of action in malicious prosecution law suits. A malicious prosecution plaintiff cannot establish lack of probable cause based on having obtained in an earlier action an acquittal based on insufficiency of the evidence. Successfully defending a prosecution or a law suit does not establish that the suit was brought without probable cause. It is the state of mind of the one commencing the arrest or imprisonment, and not the actual facts of the case or the guilt or innocence of the accused which is at issue. Probable cause is determined at the time of subscribing a criminal complaint and it is immaterial that the accused thereafter may be found not guilty."**

On the issue of damages, it is submitted that the award is excessive. The 1st respondent was awarded damages for "injuries" that were not pleaded or particularized. Counsel relies on the case of **GEORGE NGIGE NJOROGE –V- A.G. (2018) eKLR** and that of **NATIONAL BANK OF KENYA LIMITED –V- ALFRED OWINO BALLA (2017) eKLR** where the High Court in both cases awarded not more than Kshs.one (1) million. It is contended that there was no basis for the award of Kshs. One Million as exemplary damages.

The appeal is opposed. Counsel for the 1st respondent submit that the ingredients for the claim of malicious prosecution were satisfied and the trial court did take into account all those ingredients. It is also submitted that it is the appellant who instituted the prosecution of the 1st respondent. The appellant through its security officer called the police on 16th November, 2010 to report the alleged theft by the 1st respondent and his co-accused. PW5, Corporal Simon Rotich testified that he was called by the appellant's Security Manager on 16th November, 2010 at about 7.20a.m. The appellant was therefore actively involved in instituting the criminal proceedings. Counsel relies on the case of **JOSEPH WAMOTO KARATI –V- DORMAN LIMITED & ANOTHER (2018) eKLR** where Justice R.E. Aburili referred to the case of **GITAU –V- ATTORNEY GENERAL (1990) KLR 13** where the court held:-

> **"To succeed on a claim for malicious prosecution the plaintiff must first establish that the defendant or his agent set the law in motion against him on a criminal charge. "Setting the law in motion" in this context has not the meaning frequently attributed to it of having a police officer take action, such as effecting an arrest. It means being actively instrumental in causing a person with some judicial authority to take action that involves the plaintiff in a criminal prosecution. An example would be where a person prefers a criminal charge against another before a magistrate."**

According to counsel for the 1st respondent, the police could not have arrested the 1st respondent and charge him with the offence on their own without the concerted effort of the appellant. The appellant insisted that it was the 1st respondent who was on duty at the reception and is the one who handed the suspected items to the taxi driver yet a co-accused (Francis Amenya) testified that he was the one on duty at the reception. The trial court found that the goods did not belong to the appellant. No appeal was filed against that finding. The prosecution terminated in favour of the 1st respondent.

It is further submitted that the appellant, the 2nd and 3rd respondents jointly and severally acted without reasonable and probable cause. Counsel relies on the case of **STEPHEN GACHAU GITHAIGA & ANOTHER –V- ATTORNEY GENERAL (2015) eKLR** where Justice Mativo referred to the case of **THOMAS MBOYA OLUOCH & ANOTHER –V- LUCY MUTHONI STEPHEN & ANOTHER, Nairobi HCCC 1729 OF 2001** where Justice J.B.Ojwang (as he then was) stated:-

> **"Unless and until the common law tort of malicious prosecution is abolished by Parliament, policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense...I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State's prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes"**

Counsel for the 1st respondent contend that the alleged stolen items were meant to be delivered to one Rabia Mwanajuma. PW3 testified that he talked on phone with Rabia and that confirmed that the recipient existed and it was not a creation of the 1st respondent. PW3 also testified that he called and talked to Mr. Abdullahi who confirmed that he had taken the items to the appellant's premises. The appellant did choose not to pursue those people and interrogate them. This, according to the appellant, confirms that the prosecution was done without reasonable or probable cause. The 1st respondent was not at the scene when the goods were intercepted.

On the issue as to whether the placing of the 1st respondent on his defence by the trial court affects a claim for malicious prosecution, it is submitted that it does not. The end result is that the prosecution terminated in favour of the 1st respondent. Counsel rely on the case of **STEPHEN GACHAU GITHAIGA & ANOTHER –V- ATTORNEY GENERAL (supra)** where it was held:-

> **"The second element of the tort demands evidence that the prosecution terminated in the plaintiff's favour. This requirement precludes a collateral attack on a conviction properly rendered by a criminal court, and thus avoids conflict between civil and criminal justice. The favourable termination requirement may be satisfied no matter the route by which the proceedings conclude in the plaintiff's favour, whether it be an acquittal, a discharge at a preliminary hearing, a**

withdrawal, or a stay.

It is now trite law that acquittal whether after hearing both prosecution and defence witnesses or on a finding that there is no case to answer amounts to a termination in favour of the accused."

It is also submitted that the appellant and the 2nd respondent did not conduct the investigations in a prudent or cautious manner or in good faith. This leads to the inference of malice in the manner the investigations were carried out. Counsel relied on the case of Stephen Gachau Githaiga (supra) where Mativo J observed at paragraph 29 as follows:-

"On whether the making of the said report was malicious, the law is clear that the mere fact that a person has been acquitted of the criminal charge does not necessarily connote malice on the part of the prosecutor. As was held in *James Karuga Kiiru vs. Joseph Mwamburi and 3 Others*,[29] to prosecute a person is not *prima facie* tortuous, but to do so dishonestly or unreasonably is the burden of proving that the prosecutor did not act honestly or reasonably being on the person prosecuted. Malice, however, can either be express or can be gathered from the circumstances surrounding the prosecution. A prosecution can either be mounted based on offence committed in the presence of law enforcement officers or by way of a complaint lodged by a person to the said officers or agencies. 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. The mere fact that the version of one of the parties is not considered does not make the subsequent prosecution malicious. However, where the police deliberately decide not to take into account the version of the suspect and acts on a story that eventually turn out to be improbable and which no ordinary prudent and cautious man would have relied upon that failure may constitute lack of reasonable and probable cause for the purposes of malicious prosecution."

It is further submitted for the 1st respondent that the trial court did not equate the standard of proof in the proceedings to that of a Criminal case. The trial court did not enter judgment against the appellant for its failure to prove its case beyond reasonable doubt.

On the issue of damages, it is submitted that the trial court had discretion on what quantum of damages to award. The amount awarded by the trial court, according to counsel for the respondent, is reasonable. The special damages of Kshs.350,000 were not objected to during the hearing.

Analysis and Determination

This is a first appeal. The court has to evaluate the evidence adduced before the trial court and draw its own conclusion. One witness testified for the plaintiff's' case while two were for the defence case. The 1st respondent who was the claimant informed the court that he had worked for the appellant for eleven (11) years. On 15/11/2010 he was on duty when he received a sealed parcel from a reciprocating member and it was to be sent to Nakuru. He did not know the contents. There was an envelope with Kshs.10,000. He left the items with his colleague to send to Nakuru. The following day he found the parcel at the gate. He recorded a statement at Capital Hill Police Station and was taken to Kilimani Police Station where he was put in the cells. He was later charged with the offence of stealing chicken and sausages but was acquitted in 2015. He was earning about Kshs.50,000 monthly. He was dismissed in February, 2011. He was a loyal servant who had no disciplinary record.

It was the 1st respondent's evidence that the reciprocating member by the name Abdalla told the police that he is the one who had left the parcel. He spent Kshs.350,000 defending the suit. The parcel contained frozen foodstuff. He was not issued with a recommendation letter. Abdalla who left the parcel was from Kitale Club. He was employed as a sauna attendant but when the incident occurred he was working as a receptionist.

DW1 JOHN KIOKO MWALUA relied on his witness statement dated 31st October 2017. He was the chief receptionist and was the 1st respondent's supervisor. He told the court that guests sometimes leave parcels at the club with instructions to deliver to someone or destination. The parcel was collected by a taxi driver who was known at the club and there was nothing peculiar for the taxi driver to collect the parcel. The parcel contained frozen beef products and butter. One required a gate pass for him to exit with such goods.

DW2 PC Simon Rotich was attached at the KJIA Police Station. On 16th November, 2021 the police were informed that there was a problem at the Nairobi Cub. Security guards had found two cartons of foodstuff. The cartons were labelled "Duncan," "Nairobi Club". They were shown a register which indicated that the cartons were taken there by one Abdullahi. There was an envelop with Kshs.10,000. The parcels were delivered on 15th November 2010. He talked to the taxi driver who told him that it was the 1st respondent who had called to inform him that he collects the parcel.

It is DW2's further evidence that a stock check in the kitchen revealed deficit of 10 chicken, 5kg of top side steak, 3 ½ kg of rump steak, one packet of tea leaves, one packet of spaghetti, 2 packets of Weetabix, 2 kg. pishori rice, one jar of corn oil, 4 pieces of butter and 2kg of Atta were all missing. The parcel was in the name of Justice Ibrahim Mohammed. It did not indicate who the beneficiary was. He was not able to reach Abdullahi. Justice Ibrahim was a dormant member at the club. Nobody claimed the goods and the money.

The appellant in their submissions contends that the appeal raise five issues. Those issues can be condensed into two namely:

i. Whether on a balance of probabilities the 1st respondent proved that he was maliciously prosecuted.

ii. **Whether the damages awarded are excessive and were legally justified**.

In a claim for malicious prosecution, the proceedings before the criminal court also plays an important part in assisting the Civil Court to determine whether the prosecution was malicious. The civil court can refer to the most crucial evidence adduced before the criminal court as well as the reasons for acquittal. In Criminal Case number 5115 of 2010 Peter Munyoki Ngundi testified that he worked as a store keeper at Nairobi Club. The goods are recorded in a pincard. On 15th November 2010 he worked upto 9.00p.m. and left the keys with Francis Omenya who was the second accused. He reported on 16th November 2021 and heard people saying some goods had been stolen. Police officers went to the store and he was told to take stock as some goods had been intercepted. The stock taking revealed that 10 pieces of chicken were missing, 5kg of topside beef, 3 ½ kg of ramp steak and some other items like Atta were missing.

PW3 David Mugani Kimani, was a security officer at Nairobi Club. He was informed that the guards had intercepted some suspicious items at the gate. He found the items parked in two cartons and appeared to have come from the freezer. The cartons had beef, capon, butter, corn oil, spaghetti among others. He told PW2 to do stock checking. **PW4 Kimathi David Ataya** was a guard at the gate. They intercepted the suspicious items at the gate. **PW5 Corporal Simon Rotich** also testified in the civil case and his evidence is somewhat similar in both cases. **PW5 Corporal Sheme Ondieki Mogaka** is a crime scene officer. He took photographs of the items.

The 1st respondent informed the criminal court that he was the acting chief receptionist and was in charge since the head receptionist was on leave. On 15th November 2010 he worked as usual. At around 5.30p.m. a gentleman by the name Abdullahi walked in. He did not know him. He was a member of Kitale Club. He wanted him to receive cartons that were to be sent to Nakuru. He was shown his membership card. The gentleman also gave him Khs.10,000 in an envelope. The boxes were to be delivered to Mololine for transportation to Nakuru. The recepient was Rabia Mwanajuma and he did not know her. There was a taxi driver who had gone to collect batteries. He told him to deliver the cartons to Mololine the following morning. The goods were registered at the reception. He left with the taxi which had collected the batteries. On 16th November 2010 he received a call at around 8.00a.m. from his place of work. He went there and was told some boxes had been intercepted.

The 1st respondent's co-accused namely Francis Amenya Lisingu, Elizabeth Mbula and Nelson Amendi Mbajah denied committing the offence. The 4th accused was the taxi driver whose vehicle had the goods. The guards asked him to get a gate pass.

The criminal court in its judgment stated as follows:-

> **"The items that were intercepted at the gate had no unique markings for the Nairobi Club, neither was the packaging bearing any unique marks. However, commodities of the same kind were in the club's store. From the evidence of PW3, PW5 and the first accused person, the investigating officer had information from the accused persons during the investigations that the items were allegedly taken to the club by one Mr. Abdullahi who had been sent by Justice Ibrahim. Justice Ibrahim and Abdullahi were not among the witnesses who testified during the trial and therefore there is no independent confirmation whether or not those items had been delivered to the club on 15/11/2010 by Abdullahi on instructions of Justice Ibrahim as contended by the defence. These two were crucial witnesses. In view of the evidence adduced by the accused persons, the evidence of the two would have assisted the court in establishing where the truth really lies, considering that the intercepted items were common commodities that could have been sourced even from a supermarket. Because of the gap in the evidence adduced and the inconsistencies in the documents produced, I find that the charge against the accused persons has not been proved beyond reasonable doubt as required. I therefore find each of the four accused persons not guilty of the charge and accordingly acquit each of the accused persons of the same under Section 215 of the Criminal Procedure Code."**

On the other hand, the civil court in its judgment observed as follows:-

> **"I have carefully evaluated the evidence adduced herein and submissions by parties. It is clear that the claim herein is premised on the tort of malicious prosecution.**

It was held in the case of GITAU VERSUS ATTORNEY GENERAL 1999 the court held:-

> **"To succeed on a claim for malicious prosecution the Plaintiff must first establish that the defendant or his agent set the law in motion against him in criminal charge. Setting the law in motion. In this context has not the meaning frequently attributed to it of having a police officer taken auction such as effecting arrest. A meaning being actively instrumental in causing a person with some judicial authority to take action that involves the plaintiff in a criminal charge against another before the magistrate."**
>
> **It is clear that on the material day the Plaintiff was on duty in the 1s Defendant establishment and that he received a parcel and Kshs. 10,000. This was conceded by the Defendants witness. DW2 produce photographs of the same and conceded the same amount of 10,000/= is with the Officer Commanding Station Kilimani. That he was to deliver the parcel and cash at Mololine Services on onward transmission to Nakuru.**
>
> **It is important to note that the Plaintiff left duty slightly early on that day and handed over to his colleague. It was on the following day that he was accused of stealing goods belonging to the 1s Defendant. The Plaintiff was not at the scene. The 1st Defendant's security manager moved swiftly and called in the police. He did not take time to understand what had happened. Its like he was waiting for an event to happen. Relying on the evidence of the taxi driver so as to nail the Plaintiff was far-fetched meaning to embarrass him."**

The appellant was awarded damages for malicious prosecution. His co-accused, Nelson Amendi Mbaja filed **Civil Case number 6736 of**

2015 before the Milimani Chief Magistrate's Court. He was not successful. **Hon. E. Wanjala, SRM**, observed as follows in her judgment delivered on 4th July, 2018:-

> **"On this issue I have evaluated the evidence and my finding on a balance of probabilities is that for the reasons that the Plaintiff was found with two boxes of food stuffs while leaving the 2nd Defendant's premises and he was required to produce a gate pass which he did not have then the 2nd Defendant were justified to suspect the food stuffs as stolen and were justified to lodge a complaint with the police thus there was a reasonable cause for the complaint to be lodged with the police and after investigations police found a reasonable cause to charge the Plaintiff and the Plaintiff confirms that after hearing the prosecution case the court found the Plaintiff had a case to answer and was put on his defence, further a mere act of a person being acquitted of the criminal charge does not necessarily connote malice on the part of the prosecutor."**

The subject of malicious prosecution has been litigated since time immemorial. Both counsel referred to various past decision on the subject. The court has to evaluate the evidence and objectively determine whether there was malice in the prosecution and also satisfy itself that the ingredients of malicious prosecution have been established on a balance of probabilities.

In the case of **NZOIA SUGAR COMPANY LIMITED –V- FUNGUTUTI (1988) KLR, 399 at 404,** Apaloo J.A. (as he then was) stated as follows:-

> **But in my opinion, the case of malicious prosecution must founder on the absence of proof of malice or ill-will. The only reason why the respondent claimed he was maliciously prosecuted, was because the prosecution terminated in his acquittal. As he put it in evidence.**
>
> **"I was acquitted under section 210 of the Criminal Procedure Code and in view of this, I am claiming damages from the defendant company because since my acquittal, I have not been employed because I have been treated as a thief as a result of this case".**
>
> **It is trite learning that acquittal, per se, on a criminal case charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecutor. The mental element of ill-will or improper motive cannot be found in an artificial person like the appellant. But there must be evidence of spite in one of its servants that can be attributed to the Company. The respondent gave no evidence from which it can be reasonably inferred that the Security Officer made this report to the police on account of hatred or spite that he had for him.**

The Halsbury's Laws of England (3rd edition) volume 25 at page 348 (paragraph 681) defines malicious prosecution in the following terms:-

> **A malicious prosecution is an abuse of the process of the court by wrongfully setting the law in motion on a criminal charge. To be actionable as a tort the process must have been without reasonable and probable cause and must have been instituted or carried on maliciously. The plaintiff must prove damage, except where the charge endangers his fame or person, in which cases damage is implied.**

At paragraph 704, Halsbury's (supra) states as follows:

> **Burden on the plaintiff in first instance. The burden of proof in an action for damages for malicious prosecution lies in the first instance on the plaintiff. It is not sufficient for him to prove that he was innocent of the crime for which he was prosecuted by the defendant by proving that the prosecution terminated in his favour. He must also show that the defendant acted maliciously and without reasonable and probable cause.**

In the case of **MURUNGA –V- ATTORNEY GENERAL (1979) KLR 138,** the principles necessary for proving malicious prosecution were stated 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.**

The Black's Law Dictionary (10th Edition) defines **"malice"** as: -

> **1. The intent, without justification or excuse, to commit a wrongful act.**
>
> **2. Reckless disregard of the law or a person's legal rights**
>
> **3. Ill will or wickedness of heart**

In the case of **KAGANE –V- ATTORNEY GENERAL (1969) E.A. 643**, **Rudd J** (as he then was) stated as follows at page 645 – 646:-

In order to succeed in the action for malicious prosecution the plaintiffs must prove four essential ingredients:

> **(1) That the prosecution was instituted by King.**
>
> **(2) That the prosecution terminated in the plaintiffs' favour.**
>
> **(3) The plaintiff must also prove that the prosecution was instituted without reasonable and probable cause. This is a matter which requires very careful consideration as regards two aspects; the first aspect being as to whether the evidential material on which the prosecution was based was such that a reasonable prudent and cautious man could have honestly believed that it was sufficiently credible and cogent to justify the institution of a prosecution; and the second aspect being the effect of the fact that the prosecution was instituted on the direction of a State Counsel in the Attorney-General's Chambers.**
>
> **(4) The plaintiffs have further to prove that the prosecution was instituted with malice on the part of the prosecutor King. <u>In this connection malice means that the prosecution was motivated by something more than a sincere desire to vindicate justice.</u> (Emphasis added)**

The Court went on to add the following: -

> **As regards malice and want of reasonable and probable cause, in the nature of things, a person who is actuated by malice may for that reason be likely to institute a prosecution without reasonable and probable cause. This possibility is provided for in law to some extent in a rather backhanded way by allowing want of reasonable and probable cause to be taken into consideration as being some evidence of malice, but the converse does not apply. There would be too much risk of injustice if the converse applied since a malicious person may yet have reasonable and probable cause for instituting a prosecution, and so malice is no evidence at all of absence of reasonable and probable cause and must be completely disregarded when considering the question as to whether there was reasonable and probable cause for the prosecution.**
>
> **"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"**

The issue for determination remains as to whether the totality of the evidence on record does establish that there was malicious prosecution. The Appellant submitted that the placing of the accused on their defence means that a prima facie case was established and therefore the prosecution was not malicious. In my view, that cannot be the case because the crucial element is that the claimant has to prove that the prosecution terminated in his favour. Termination in a criminal case before the subordinate court can be done in two ways:-

> (a) Acquittal of an accused where there is no case to answer under Section 210 of the Criminal Procedure Code; in this situation the trial court delivers a Ruling.
>
> (b) Acquittal after the accused has been put on his defence after hearing the defence case under Section 215 of the Criminal Procedure Code. In this case a Judgment is delivered.

In a criminal case, the mere placing of an accused on his defense does not mean that he is guilty of the offence. If that were to be the case, then all those accused who are placed on their defence would have to be convicted. All what the court requires at that stage is evidence from the accused and his witnesses, if any, which can controvert the prosecution evidence. It is part of the criminal process and it does not preclude an accused who is placed on his defence but ultimately acquitted from subsequently presenting a claim for malicious prosecution. The aspect of being placed on the defence does not preclude a subsequent conclusion in a civil claim that the prosecution was actuated by malice. As observed by **Rudd J** in the **Kagane Case**, one can be malicious but fail to prosecute due to the absence of a reasonable or probable cause. The moment a reasonable and probable cause emerges, malice can be submerged and the prosecution can be found as not been triggered by malice. The fact remains that even those who are put on their defence could have been maliciously prosecuted.

Another issue raised by the Appellant is that they did not prosecute the 1st Respondent. It is the state which carried on the prosecution. All what they did was to lodge a complaint. The police carried out investigations and prosecuted the suspect.

> **Hon. P. N, GESORA** observed as follows in his Judgment which is the subject of the appeal: -
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> **"It is not enough for the 1st Defendant to put up a defence that its mandate ended at the time a report was made to the police. Conversely the 2nd and 3rd Defendants cannot hide under the cover of receiving a complaint and acting on it. Each of the parties had a duty to pose and ask themselves the net effect of their actions. The trial court in the criminal case was clear that the recovered items were not uniquely identifiable with the 1st Defendant."**

I do agree with the above finding of the trial court on that issue. A civilian who lodges a complaint before the police cannot later on claim that the police had the option of either prosecuting or releasing the suspect. It is true that not all complaints end up with prosecution. The person who sets the prosecution process on motion, depending on the nature of the case, is a complainant. The complainant would always push for the prosecution of the accused. The court can later on determine the issue of malice in the prosecution and find out whether the complaint was genuinely made to the police at the first instance. On the other hand, the Attorney General cannot bask on the assertion that he only received a complaint and acted on it. The state is a necessary party in a claim for malicious prosecution since it is the one which carries out the prosecution.

Turning to the main issue as to whether a case for malicious prosecution was established, the evidence from both sides show that there were two cartons which contained food stuff that were intercepted at the gate of the Appellants. Some of these items include meat and chicken. The evidence of **PW 3 David Kimani** before the criminal court is that those items were frozen or appeared to have just come out of the freezer. The club had in its store similar products. There is conflicting evidence as to the labelling on the cartons. The investigation officer testified that the cartons were labelled "Duncan" "Nairobi Club" while the 1st Respondent testified that the cartons had "Dormans" logo and that there was no label to show that they were from Nairobi Club.

The bottomline is that goods were intercepted at the club's gate. Stocktaking was done at the store and on a balance of probabilities, 10 pieces of chicken, 5 kg of top side meat and $3^1/_2$ kg of rump steak meat were found missing. Part of what was intercepted was 10 pieces of chicken and an equivalent amount of meat. In my view, any reasonable owner of the premises would conclude that those items belong to him. The Appellant reasonably believed that those were items belonging to the club.

The 1st Respondent's evidence is that the items were left by one Abdullahi. It was not for the prosecution to call Abdullahi to prove that he is the one who brought the items. It was also not for the prosecution to call Rabia Mwanajuma to find out whether she was expecting those items. It was upto the defence in the criminal case and the 1st Respondent in the civil case to call Abdullahi to confirm that he was the one who left those items. A phone call to either of them by the investigation officer may not be held as confirmation that the items were taken to the club by Abdullahi. Where is the proof that the call was to one Abdullahi.

In my view, it is also imprudent for a reciprocating member to buy food items in a shop or supermarket, travel all the way to Nairobi Club and ask for assistance for the items to be taken to Nakuru by way of Mololine. The member knew that the food items were beef and chicken and were to stay overnight, and transported the following day. That process defeats logic. Why couldn't the member take the items to Mololine himself. Even if the items were taken to the club at 5.30 p.m., there is no evidence that at that time there was no Mololine vehicle that could have taken the items to Nakuru. The nature of the items would have made any reasonable person have them delivered at the earliest opportunity.

There is also the issue of an envelope having Kshs. 10,000. The driver (4th accused) testified that he was to get his cost from that amount and also use the same amount to pay for the transport costs of the parcel. The 1st Respondent during cross-examination by Mr. Amendi testified that the driver was to collect two boxes and an envelope containing Kshs. 10,000. There is no evidence as to how the sum of Kshs. 10,000 was to be utilized. Was there any balance to be sent to Mwanajuma. How much is the cost of a taxi from Nairobi Club to Mololine at the City center and how much does it cost to send two cartons from Nairobi to Nakuru. In my own estimation, the cost for both taxi and Mololine expenses to transport two cartons to Nakuru could not be Kshs. 10,000. Even if the money was found by the police, that does not prove that it was left by Abdullahi.

The claimant had to establish that there was malice in his prosecution and that there was no reasonable or probable cause. The employer had a reasonable cause to report to the police. Equally, the police correctly proceeded with the prosecution. The coincidence of food items missing from the store and similar items intercepted at the gate raises a reasonable or probable cause for prosecution. The trial court in the civil case considered the fact that the 1st Respondent was not at his place of work when the items were intercepted. That was not a good reason for finding the Appellant culpable. The 1st Respondent is the one who allegedly received the items and also told the driver to pick the items the following day. Why couldn't the driver go with the goods on 15/11/2010 when he went to collect the batteries? It is evident that the 1st Respondent was a crucial party in the entire process and was properly prosecuted.

The totality of the evidence does prove that the prosecution was not actuated by malice. There was reasonable or probable cause to believe that the items were taken from the club's store. The 1st Respondent did not prove on a balance of probabilities that he was maliciously prosecuted.

On the issue of damages awarded, I do consider the fact that the 1st Respondent had worked for the Appellant for many years and was earning about Kshs. 50,000 and the fact that his employment was terminated to be important factors to warrant the amount of damages awarded by the trial court. The award is not excessive.

The upshot is that the appeal is merited and is hereby allowed. The Judgment of the trial court is set aside. Taking into account the fact that the 1st Respondent lost his job, I do order that parties meet their own costs both for the appeal and the cost before the trial court.

DATED DELIVERED AND SIGNED AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2021

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S. CHITEMBWE

JUDGE