REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

CIVIL APPEAL NO 8 OF 2018

(Being an appeal from the Judgment of Hon. B. Omwansa Principal Magistrate delivered on 22 March 2018 in Sotik PMCC No. 71 of 2013)

KONOIN TEA GROWERS SACCO LTD.....APPELLANT

VERSUS

JOSEAH KIPRONO LANGAT.....RESPONDENT

JUDGMENT

Background

1. The Respondent/Plaintiff was a manager in the organization of the Appellant/1st Defendant's company sometimes in January 2005, the Appellant suspected some financial impropriety in the company and after internal investigations, referred the matter to the District Cooperative Office which in turn referred the company to the District Criminal Investigation Office. The Respondent was then arrested alongside the Accountant and charged in **Criminal Case 93 of 2005** in the PM's Court in Sotik with 9 counts as follows:

a) Conspiracy to defraud contrary to Section 317 of the Penal Code; alternative charge being failing to prevent commission of a felony contrary to section 392 of the Penal Code.

b) 8 counts of Stealing by servant contrary to Section 281 of the Penal Code on various occasions between 16 January 2004 and 25 March 2004 i.e. Count 2- Kshs.100,000; Count 3 – Kshs.100,000; Count 4 – Kshs.200,000; Count 5 – Kshs.100,000; Count 6 – Kshs.100,000; Count 7 – Kshs.50,000; Count 8 – Kshs.50,000; and Count 9 – Kshs.100,000.

2. The accused persons were acquitted of the charges under Section 215 of the Criminal Procedure Code as the prosecution had failed to prove its case beyond reasonable doubt despite calling 8 witnesses. They were later arraigned under **Criminal Case No. 808 of 2011** at the SPM Court in Bomet which case was dismissed for lack of witnesses on the part of the prosecution and appearance by the complainant in accordance with Section 202 of the Criminal Procedure Code.

3. The Respondent then instituted a civil suit against the Appellants claiming general and special damages for wrongful arrest, malicious prosecution and defamation. The trial court found in his favour and he was awarded general damages in the sum of Kshs.1,300,000 and Kshs.50,000 as special damages.

4. Being dissatisfied with the decision of the trial court, the Appellant lodged this Appeal. They raised six (6) grounds therein as follows:-

(i) That there was no evidence or proof of the elements of wrongful confinement and malicious prosecution on the part of the Plaintiff (the Respondent herein).

(ii) That there was total disregard of the Appellant's evidence and submissions which led to the wrong decision by the learned Magistrate.

(iii) That there was an error in law and fact where 100% liability was apportioned to the Appellant/Defendant for damages.

(iv) That the decision of finding the Defendant liable and the subsequent award was wrongful and not supported by facts, precedent or law.

(v) That the Magistrate failed to analyse and evaluate the evidence from both sides in holding the Appellants liable against the

weight of evidence on record to the contrary.

(vi) That the entire award was manifestly harsh and excessive in the circumstances of the case.

5. The Appeal was canvassed by way of written submissions.

Summary of submissions

6. In their submissions, the Appellants stated that the investigations conducted by the police were shoddy in respect of the first case, Criminal Case No. 93 of 2005, yet there were serious issues of concern such as the disappearance of money from the organization. They also submitted that they merely reported the matter to the authorities and had no control over the decision to prosecute hence there was no malice from their end. To this end they relied on the case of *Susan* **Mutheu Muia vs. Joseph Makau Mutua (2018) eKLR and John Ndeto Kyalo vs. Kenya Tea Development Authority & Another (2005) eKLR**. Thirdly, they submitted that the Respondent failed to prove the elements of malicious prosecution and that the learned magistrate erred in awarding the Respondent the sum of Kshs.1.3M which was inordinately high and was not based on any evidence in court. They cited the case of **John Ndeto (supra), Kipkebe Ltd vs. Javan Muchira Orechi, HC Civil Appeal No. 9 of 2014 and Katerrega vs. Attorney General (1973) E.A. 289**.

7. Finally, the Appellant submitted that the fact that the Accused/Respondent had been acquitted in the two previous matters, the same was not a ground for instituting a suit for malicious prosecution. On this they cited the case of **Socfinaf Kenya Limited Vs. Peter Guchu Kuria Nairobi High Court Civil Appeal No. 595 of 2000, Nzoia Sugar Company vs. Fungutuli (1988) KLR 399 and James Karuga Kiiru vs. Joseph Mwamburi and 3 Others Nairobi C.A. No. 171 of 2000**.

8. The Respondent submitted that it was the responsibility of the Appellants to ensure that proper evidence was tendered in the lower courts and witnesses brought to prove their complaint against him; that since the proceedings resulted in an acquittal, then that was proof enough for the Respondent to prove malice in a civil suit on a balance of probabilities. According to the Respondent, the Attorney General (the 2nd Defendant) was not a party to the Appeal which could only mean that they were satisfied with the decision of the court. He also urged the court not to interfere with the trial court's award for damages since the same was based on the court's discretion and was within its pecuniary jurisdiction. To this end, he relied on the cases of **Simon Muchemi Atako vs. Gordon Osore (2013) eKLR** and **Butt vs. Khan (1977) KAR1**. Finally, the Respondent submitted that the Appeal was in the nature of a re-trial and that the court should be reluctant to interfere with the findings of fact as was decided in **Peters vs. Sunday Post Ltd [1958] EA 474.**

9. This being a first appeal, I am cognizant of the duties of an appellate court to re-evaluate the evidence and make my own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses. (See **Selle vs. Motor Boat Co [1968] EA; Mugo Muiru Investments Limited vs. Elizabeth Wanjiru Bagaine & 2 Others Nairobi Court of Appeal Civil Appeal No. 262 of 2004**.)

Issues for determination

10. From my evaluation of the Record, the grounds of appeal and the respective submissions, I consider the following to be issues for determination:-

i. Whether the criminal proceedings instituted against the Respondent amounted to malicious prosecution as determined by the trial court.

ii. Whether the learned magistrate erred in finding the Appellants 100% liable in respect of the claim for malicious prosecution.

iii. Whether the award of damages was lawful and appropriate in terms of quantum.

i) Whether the criminal proceedings instituted against the Respondent amounted to malicious prosecution as determined by the trial court.

11. The principles to be considered in determining whether or not a prosecution was accentuated by malice were well articulated by the Court of Appeal of Eastern Africa in **Mbowa vs. East Mengo District Administration [1972] EA 352** as follows:-

a. "The action for damages for malicious prosecution is part of the common law of England….The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than for the public benefit. It originated in the medieval writ of conspiracy which was aimed against combinations to abuse legal procedure, that is, it was aimed at the prevention or restraint of improper legal 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.

b. Its essential ingredients are:

i.) 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;

ii.) 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;

iii.) 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

iv.) 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……

c. 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..."

12. The third requirement was reiterated in **Clerk and Lindsell on Torts, 18th Edition at page 823** that:-

"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."

13. In the case of **Murunga vs. Attorney General (1979) KLR, 138;** Cotran, J restated the criteria thus:-

" a. The appellant instituted the prosecution.

b. The prosecution terminated in his favour.

c.The prosecution was initiated without reasonable and probable cause; and

d. The prosecution was actuated by malice or carried on maliciously."

See also **Kagane and Others vs. Attorney General and Another (1969) EALR 643**.

14. The first element to determine is whether a prosecution occurred and whether the same was instituted by the Appellants. In the present case, the Respondent was arrested and charged with several counts of offences as already stated. Both proceedings resulted in acquittals, one for lack of prosecution witnesses and in the other the prosecution failed to establish a prima face case against the Respondent. It is therefore not in dispute that a prosecution did occur. However, the first ingredient requires that the Respondent proves that it was the Appellants who set the law/prosecution in motion.

15. In **Gitau vs. Attorney General (1990) KLR 13,** Trainor J stated what it means to set the law in motion and who has the capacity to do so thus:-

"To succeed in 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 arrest. It means 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 a magistrate. Secondly he who sets the law in motion must have done so without reasonable and probable cause…The responsibility for setting the law in motion rests entirely on the Officer-in-Charge of the police station. If the said officer believed what the witnesses told him then he was justified in acting as he did, and the court is not satisfied that the plaintiff has established that he did not believe them or alternatively, that he proceeded recklessly and indifferently as to whether there were genuine grounds for prosecuting the plaintiff or not."

16. It follows that lodging a complaint with the police is not reason enough to conclude that a complainant is the one who sets the law in motion and therefore responsible for instituting the criminal proceedings. This principle was enunciated in **Edel Nyaga vs. Silas Mucheke CA No. 59 of 1987** ***(unreported)*** where the court held that:-

" The appellant had made a complaint to the police and nothing more and what followed had nothing to do with him. The decision to arrest the respondent was made by the police who must have found some merit in the report."

17. In other words, this principle is to the effect that it is only police officers who have the power to set the criminal process in motion, a complaint itself is not enough and therefore an action cannot arise against a complainant.

18. The case of **James Karuga Kiiru vs. Joseph Mwamburi & Others [2001] eKLR** further illustrates this point thus:-

"…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…On the other hand it would be obviously absurd to make a defendant liable because matters of which he was not aware put a different complexion upon facts, which in themselves appeared a good case for prosecution. But neglect to make

a reasonable use of the sources of information available before instituting proceedings would be evidence of want of reasonable and probable cause and also malice. It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but whether there is a reasonable and probable case for a prosecution. Circumstances may exist in which it is right before charging a man with misconduct to ask for an explanation but no general rule can be laid down."

19. The Appellants in this case lacked the *locus* to prosecute. That mandate is only vested in the Office of the Director of Public Prosecutions (ODPP) under Article 157 of the Constitution of Kenya (formerly handled by the Attorney General). The only exception is where an individual moves the court to be granted powers to institute private prosecution which is not the case here. In the case of **Douglas Odhiambo Apel & another v Telkom Kenya Limited & 2 others [2006] eKLR,** Kihara Kariuki J. stated**,**

"The Plaintiffs were arrested and charged by the Police. And the prosecution was undertaken by the Attorney-General as the public prosecutor. Telkom Kenya was merely a complainant. The decision to charge and prosecute the Plaintiffs was taken by the Police and the Attorney-General. Telkom Kenya as a complainant would not have been involved in that process. Once Telkom Kenya had made a complaint to the Police, it was left to the Police to investigate the complaint and decide whether or not to charge the Plaintiffs. That is why in a claim for damages for unlawful arrest, false imprisonment and malicious prosecution, the proper defendant is always the Attorney-General."

20. Similarly in **Koech vs. African Highlands & Produce Company Limited & Another [2006] 2 EALR 148** the court stated:-

"The police carried out their own investigation and were satisfied that there were sufficient grounds upon which a charge of theft by servant could be preferred against the plaintiff. The first defendant carried out its own investigation regarding the disappearance of its property, just like any prudent person or company would in the circumstances but those investigations had nothing to do with the investigations by the second defendant through the police and the resultant decision to charge the plaintiff with the said offence."

21. In yet another case of **Jedel Nyaga vs. Silas Mucheke CA No. 59 of 1987** the court stated that:-

"The appellant had made a complaint to the police and nothing more and what followed had nothing to do with him. The decision to arrest the respondent was made by the police who must have found some merit in the report…. Consequently, the Court found that**;** ***'the appellant who had made the report to the police was not responsible for the arrest of the respondent and the mere fact that he was a probable prosecution witness did not render him responsible for the arrest of the subsequent prosecution of the respondent by the police."***

22. From the foregoing, the decision to prosecute solely vests in the Police and the prosecuting office and no other. Where a complainant conducts their own investigation and the Respondent becomes aware of the same, it cannot be reason enough for the latter to conclude that the Appellants were the ones who lodged the prosecution against him merely because they lodged a complaint. A claim for malicious prosecution will always be against the Prosecution (ODPP) or the Police. The Appellant merely lodged a complaint but they are not the ones who were responsible for instituting the said prosecution. A claim for malicious prosecution against the complainants, in this case the Appellant, therefore cannot stand. To the extent that the Respondent brought a suit against the Attorney General, then the first ingredient is met.

23. The second element requires that the prosecution must have been terminated in favour of the Respondent. The basis of this is to avoid the obvious conflict between criminal and civil proceedings. It is not in dispute that the Respondent was acquitted in the two criminal cases lodged against him. As evidenced by the trial court proceedings, the Respondent produced different charge sheets being Charge Sheet in CR No. 93/205 and CR 808/2011 marked as P-Exhibit 4 and P-Exhibit 5 respectively in support of his actual arraignment before court. He then stated in his submissions that he had been acquitted in both criminal cases. This is verifiable from the Judgement which is on page 27 and the trial court proceedings in the Record of Appeal at page 25 for the two matters respectively. Thus, the second ingredient is met.

24. The third ingredient is that the prosecution must have been lodged without reasonable and probable cause. In defining the terms reasonable and probable cause **Halsbury's Laws of England, 4th Edition - Reissue, Vol. 45 (2)** states as follows:-

"…reasonable and probable cause for a prosecution has been said to be an honest belief in the guilt of the accused person based on a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of an accuser, to the conclusion that the person charged was probably guilty of the crime...."

25. This means that it matters not, neither is it necessary for the prosecutor to believe in the guilt of the person accused; he only has to be satisfied that there is a proper case to lay before the court and accompanied by evidence. In the case of **Thacker vs. Crown Prosecution Service (1997) Times, 29 [1979, EWCA Civ 3000]** Kennedy L.J. observed, ***"Guilt or innocence is for the Tribunal and not for him."*** In another case, **Coudrat vs. Commissioners of Her Majesty's Revenue and Customs (2005) EWCA Civ 616** Smith L.J. stated, ***"An officer is entitled to lay a charge if he is satisfied that there is a case fit to be tried. He does not have to believe in the probability of conviction."***

26. Similarly**,** in **John Ndeto Kyalo vs. Kenya Tea Development Authority & Anor (supra)** Maraga J, as he then was, cited **Hicks Vs. Faulkner (1878), 8 Q.B.D 167 at page 171, in** defining what constitutes 'reasonable and probable cause' in the following terms:

"Reasonable and probable cause is an honest belief in the guilty 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."

See also **Chrispine Otieno Caleb vs. Attorney General [2014] eKLR;**

27. In **Stephen Gachau Githaiga & Another vs. Attorney General [2015] eKLR** Mativo J. held that:-

"As a matter of policy, if reasonable and probable cause existed at the time the prosecutor commenced or continued the criminal proceeding in question, the proceeding must be taken to have been properly instituted, regardless of the fact that it ultimately terminated in favour of the accused."

28. In the present case, the facts demonstrate that the complaint lodged by the Board was that money had been lost and unaccounted for in the organization. During cross-examination in the trial court, the Respondent in his evidence at page 102 of the Record of Appeal stated that before an officer was subjected to compulsory leave, a thorough audit of the books of accounts ought to have been done. He further stated that though he was aware of the auditor who testified in the court, he felt that that the organization ought to have conducted further investigations as recommended by that same auditor. It was his testimony that he would not have been charged had the relevant parties conducted adequate and proper investigations.

29. In addition to the above, one of the Directors Mr. Richard Kiprono Koskei (DW2) in his testimony at page 111 of the Record of Appeal stated that they had not produced any report before the court that money was actually lost in the organization but still maintained that the prosecution was not malicious and was based on adequate investigations.

30. I take the view that where there is a suspicion as to loss or misappropriation of funds in an organization, the proper thing to do is to call for thorough investigation by the relevant parties. In this case, the Directors of Appellant opted to involve the police because they suspected criminal activity in the organization. This in my view was a reasonable decision and the right course of action and by doing so they properly lodged a complaint. The decision to prosecute however, should have been weighed against the evidence available after a proper investigation by the police.

31. Nothing from the trial file indicates that there was any material evidence from the police which pointed to the Respondent as being directly involved in the matter or that he could have been involved at all. I find it unfounded that the police opted to refer the matter to the Attorney General for prosecution. The subsequent decision by the Attorney General to prosecute the Respondent who was the office manager was also misdirected as they did not establish any evidence that pointed to his culpability. It seems probable that the Respondent was only prosecuted because he was the Manager responsible for the said department and failed to detect the loss of funds from the Accounts office. The particulars of the Charge as fashioned stated that he alongside another, had conspired to defraud the Appellants of various amounts as listed in the charge sheet at page 17 of the Record of Appeal. It however remains questionable from the facts as to whether the Respondent was the right suspect deserving of the subsequent prosecution. I find that the third ingredient that there was no reasonable and probable cause, is also met.

32. The fourth element is whether the prosecution was conducted maliciously. Black's Law Dictionary, 10th Edn. at page 1100 defines malice as***, "The intent without justification or excuse to commit a wrongful act, reckless disregard of the law or of a person's legal rights and ill-will or wickedness of heart."***

33. In the case of **National Oil Corporation vs. John Mwangi Kaguenyu & 2 Others, Civil Appeal No. 251 of 2017,** the court of Appeal stated, ***"...case law is replete on the issue of malicious prosecution. Of critical importance is that a litigant must establish malice. It is not sufficient to find one liable on the basis that he or she is the one who made the complaint."***

34. In this case, the Respondent argued both in his statement and submissions in the trial court that he was subjected to various court proceedings, that he was arrested unduly and that he was forced to go on compulsory leave without pay while it was common practice to suspend one on half pay pending the outcome of the proceedings or investigations. He further stated that the Appellants failed to pay his dues in arrears after his acquittal.

35. The issue of suspension and payment of arrears is a matter for the Employment and Labour Court. However, in my view, it may also be a demonstration of malice.

36. It is also important to see whether there was a justifiable reason for the prosecution. As stated by **Tindal C.J. in Willians v Taylor (1829) 6** stated that:-

"Malice alone is not sufficient because a person actuated by the plainest malice may nonetheless have a justificable reason for a prosecution."

37. In analysing the Respondent's testimony in the trial court, the learned magistrate stated that the Respondent, (then Plaintiff) had testified that the organization had taken him round in small circles in a bid to turn him giddy and that this could only have been actuated by malice and ill will to taint his name. The Respondent also stated that his refusal to fire the ICT officer and the Accountant was the reason why he was being victimized by the members of the Board and senior management.

38. I agree with the finding of the trial magistrate that the prosecution of the Respondent was actuated by malice. This is because apart from the Appellant making a report without proper internal investigations, the police and the prosecution insisted on charging the Respondent with a crime whose evidence was either inadequate or non-existent. I say so because the Respondent, after being acquitted the first round, was immediately arrested on fresh charges which once again were not proved.

39. The above notwithstanding, I disabuse the Respondent's claim that his acquittal was enough ground to prove the tort of malicious prosecution. It was the Respondent's submission that the fact that the Appellants subjected him to investigations and court processes which resulted in his acquittal were reason enough to connote malice. As stated by Aganyanya, J. (as he then was), in the case of **Socfinaf Kenya Ltd vs. Peter Guchu Kuria & Another, Civil Appeal No. 595 of 2000 (2002) eKLR**:-

> ***"That a suspect was acquitted of a criminal case is not sufficient ground for filing a civil suit to claim damages for malicious prosecution or false imprisonment. Evidence of spite, ill-will, lack of reasonable and probable cause must be established."***

40. It follows then that such a claim must be supported by evidence that there was collusion between the complainant and the prosecution. Malice is material on the part of the prosecutor as was determined also in the case of **Music Copyright Society Of Kenya vs. Tom Odhiambo Ogwel [2014] eKLR** but an acquittal doesn't necessarily mean that the person was maliciously prosecuted, unless this is substantiated based on the elements already discussed.

41. A similar view point was made in **Nzoia Sugar Company Ltd vs Fungututi (1988) KLR 399,** where the Court of Appeal held thus:-

> ***"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."***

42. In this case malice can only be inferred from the Appellant's previous actions during and after the two criminal suits, being the fact that they sent the Respondent on compulsory leave, failed to carry out further investigations as recommended by their auditor; and sent the Respondent on unpaid leave, possibly to frustrate the Respondent or to teach him a lesson for failing to comply with the directives of his superiors.

43. With respect to the trial itself, the Record of the proceedings shows that the prosecution requested numerous adjournments under Bomet SPM's Court Criminal Case No. No. 808 of 2011, which led to a dismissal under section 202 of the Criminal Procedure Code. The fact that the prosecution insisted on having the matter drag on for years without witnesses makes it apparent that there was inadequate evidence to begin with. Instead, the Respondent was subjected to numerous court processes with the prosecution often coming off as unprepared and eventually having the case dismissed for lack of witnesses. A combination of all these factors demonstrate malice.

44. I therefore find that the case meets the threshold for malicious prosecution.

Whether the learned magistrate erred in finding the Appellants 100% liable in respect of the claim for malicious prosecution.

45. It is trite that liability in a claim for malicious prosecution, attaches to the prosecuting authority and not an individual or organization, unless such person or authority were legally vested with prosecutional power or mandate. In this case therefore liability attaches to the Attorney General who was the 2nd Defendant in the case. I observe that the Attorney General did not appeal the judgment along with the Appellant herein.

ii. Whether the award of damages was lawful and appropriate in terms of quantum.

46. I have already established that the Respondent succeeded in his claim on malicious prosecution. With respect to the question whether or not he was entitled to damages, I have no doubt that the trial court was justified when it made the award. I am persuaded by the case of **Dr. Willy Kaberuka –vs- Attorney General Kampala** where the court held that:-

> ***"The plaintiff suffered injury to his reputation.…. He must have suffered the indignity and humiliation. He is also entitled to recover damages for injuries to his feelings especially the possibility of serving a sentence……There are no hard and fast rules to prove that the plaintiff's feelings have been injured or that he has been humiliated as this is inferred as the natural and foreseeable consequence of the defendant's conduct. The plaintiff's status in Society is also a relevant consideration and for all these reasons the plaintiff is entitled to damages……A plaintiff who has succeeded in his claim is entitled to be awarded such sum of money as will so far as possible make good to him what he has suffered and will possibly suffer as a result of the wrong done to him for which the defendant is responsible.***

47. The general principle is that the assessment of damages is within the discretion of the trial court and the appellate court will only interfere where trial court, in assessing damages, either took into account an irrelevant factor or overlooked some material facts or where the award was either too high or too low as to amount to an erroneous estimate or where the assessment was not based on any evidence. See **Butt Vs. Khan (1981) eKLR 349**; **Mark Ouiruri Mose Vs. R (2013) eKLR**.

48. Having re-evaluated the case, I find no reason to disturb the award.

Conclusion:

49. In the final analysis, I grant the following orders:-

> *(i)* ***I uphold the finding of the trial court that the claim for malicious prosecution was proven on a balance of probability.***
>
> *(ii)* ***The award granted by the lower court being general damages (Kshs.1,300,000/=) and special damages (Kshs.50,000/=) and shall be paid by the Attorney General. This judgment be served upon the Attorney General.***

(iii) ***The costs of the suit and interest thereon, awarded by the lower court shall be paid by the Appellant.***

(iv) ***Each party shall bear their costs in this appeal.***

49. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED THIS 21ST DAY OF OCTOBER, 2021.

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R. LAGAT-KORIR

JUDGE

Judgment delivered electronically to the parties as per their consent at the following email addresses:-

M/s Obondo Koko & Co. Advocates for the Appellant - frankokobo@yahoo.com

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