



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 5 OF 2018

SAMUEL WATUKA MUINDI.....APPELLANT

VERSUS

JAYESH VIJAY PATEL.....RESPONDENT

(Appeal from the judgment and decree of the Senior Principal Magistrate court at Mavoko, the honourable L. Kassan SPM in civil suit no. 582 of 2016)

BETWEEN

JAYESH VIJAY PATEL.....PLAINTIFF

VERSUS

SAMUEL WATUKA MUINDI.....1ST DEFENDANT

RAPHAEL RIOBA.....2ND DEFENDANT

DIRECTOR OF PUBLIC PROSECUTIONS.....3RD DEFENDANT

JUDGEMENT

1. The Respondent herein, **Jayesh Vijay Patel**, who was the Plaintiff in the lower court, by a plaint dated 16th June, 2016 sued the Appellant herein, **Samuel Watuka Muindi**, together with **Raphael Rioba** and the **Director of Public Prosecutions**, as Defendants seeking for general damages for false, unlawful and malicious arrest and prosecution, costs and interests.

2. According to the Respondent, on or about 6th June, 2011, the Respondent's company applied for and was subsequently allocated by the Commissioner of Lands Land Reference Number 24573 ("the suit property") vide the letter of allotment dated 8th September, 2011 upon satisfying the conditions therein and subsequently the said Commissioner processed and issued the Plaintiff's company, **Shamji Kalyan Pindoria Limited**, with the title deed to the suit property. According to the plaint, the said company duly took possession of the suit property in September, 2011 and commenced the construction of a perimeter wall around the property. In 2013, the Appellant's agent, one **James Mbaluka**, commenced an aggressive and zealous acts and campaign to harass the Respondent and the Plaintiff's company so as to compel the Respondent to surrender the suit property purporting that the suit property was the Appellant's.

3. According to the plaint, on the 13th March, 2013 the Respondent was arraigned in Mavoko Law Courts and charged with the offence of forgery contrary to section 345 of the **Penal Code** based on the allegation that the Respondent with intent to defraud forged a Land Title Deed Number LR 24573 IR 131908 purporting to be issued by the Ministry of Lands, Housing and Urban Development. The Respondent pleaded not guilty to the said charged and was released on a cash bail of Kshs 20,000/=.

4. It was the Respondent's case that the charge was false and that the Appellant's action of instituting the said proceedings against the Respondent and the 2nd and 3rd Defendants' action of charging him in Criminal Case No. 324 of 2014 with the offence of forgery was done maliciously and without any reasonable cause. The particulars of the said malice were pleaded.

5. It was further pleaded that had the 3rd and 4th Defendants conducted their investigations properly and impartially; and not omitted and or deliberately distorted the evidence, the criminal proceedings would not have been instituted against the Respondent. According to the Respondent the said trial lasted for over one year and in a ruling of 29th June, 2015, the Respondent was acquitted under section 210 of the **Criminal Procedure Code** after the 4th Defendant failed to prove a prima facie case against the Respondent.
6. The Respondent lamented that the said proceedings which went on for over a year were embarrassing to the Respondent were embarrassing to him as the same were published in the media as a result of which he was defamed. It was further pleaded that the Respondent and his family, as a result suffered mental anguish.
7. The Respondent therefore claimed damages for malicious prosecution and mental and psychological anguish during the pendency of the said proceedings against him.
8. In support of his case the Respondent relied on his witness statement which he adopted as part of his evidence in chief and in which he reproduced the contents of the plaint. Apart from explaining how his company, **Shamji Kalyan Pindoria Limited**, acquired the suit parcel of land, he stated that he was a businessman residing in Nairobi dealing extensively in Real Estate development within Nairobi and its environs. He stated that on 12th March, 2014, the 2nd Defendant maliciously and without any reasonable cause presented a charge sheet before the Senior Resident Magistrate's Court in his absence and a warrant of arrest was issued against him. According to him, that procedure was unnecessary as he had always communicated with the 2nd Defendant regarding the details surrounding the said criminal matter and the 2nd Defendant as the investigating officer knew his place of abode and could easily reach him. The said warrant was only lifted after he appeared in court and was released on bail. According to him, as at 13th March 2014, the 2nd Defendant had not completed investigations and moreover, all witnesses questioned by that date had no adverse report or finding against him. It was therefore his position that the decision by the 2nd Defendant to hurriedly prosecute him in a case which had no evidence was maliciously.
9. It was averred that the 2nd and 3rd Defendants, despite being aware of how the Respondent's company acquired the suit land proceeded to charge the Respondent and deliberately decided not to take into account the statements made by the Respondent and the Survey Department Officials regarding the acquisition of the suit property by the Respondent's company. Based on the testimony of the witnesses in the criminal case, the Respondent averred that the prosecution was malicious and were instigated by the Defendants while the 2nd Defendant was well aware of the facts but distorted the evidence and failed to carry out proper investigations. According to the Respondent, though the 1st Defendant admitted that he mandated his agent, **Mr Mbaluka**, to lodge a complaint, there was no evidence to show that any complaint was lodged against the Respondent.
10. It was averred that the Respondent was eventually acquitted on the 29th June, 2015.
11. In his oral evidence before the trial court, the Respondent testified that when he was charged in court on 13th March, 2014, the 2nd Defendant was not aware if investigations had been done. Although he was charged with forgery the prosecution's witness statements supported his case. The evidence presented talked of double allocation and there was no complaint against him. It was his evidence that the purpose of his prosecution was to harass him and entice him to give out his claim to the suit property. It was his evidence that the Appellant was malicious because he offered himself as a witness when he knew of the existence of ELC 586 of 2013 but stated that he had no complaint against the Respondent.
12. Referred to the Memo from the National Land Commissions and the Gazette Notice by the same Commission, he, in cross-examination, admitted that the same talked of the revocation of his title deed. He however, stated that the same was reinstated by the Court. He insisted that the Appellant knew how he acquired the suit land. He reiterated that the Appellant stated that he did not have any complaint against the Respondent and that he never made any report. He however blamed the Appellant for coming forward to testify despite his knowledge that there was no forgery and despite being aware of the pendency of the matter before the ELC. It was his evidence that the failure by the Appellant to disclose the existence of that case constituted malice though he also conceded that the existence of a civil matter does not prevent a criminal case. Since the police have the powers to prosecute to sustain a criminal case. He admitted that the Appellant had the right to tell the court the true position of the matter. Though he insisted that the Appellant called the media he admitted that the media is supposed to report the correct information. He however insisted that the Appellant controlled the media and caused the media to report the wrong information. He however conceded that an acquittal does not always point to malicious prosecution.
13. At the close of the Respondent's case the Defendants did not call any evidence.
14. In his judgement the learned trial magistrate found that the fact that there was in existence civil proceedings at the time the criminal charges were instituted was a clear breach of the law and a blatant abuse of the courts. He found that the civil dispute was transformed conveniently to quick criminal fix (sic) meant to intimidate a party to a suit in the High Court. It was his view that this amounted to malice and the Defendants are to blame. In his view all the Defendants were to blame because the Appellant was a party to the suit while the 2nd Defendant being the Investigations Officer knew or ought to have known the existence of the case. The learned trial magistrate therefore found that the arrest and prosecution of the Respondent was heavily tainted with malice, ill-will and was unlawful.
15. As regards damages, the learned trial magistrate awarded the Respondent Kshs 2,000,000.00 in general damages and Kshs 1,000,000.00 punitive exemplary damages against the Defendants jointly and severally. He also awarded the Respondent costs and interests.
16. It was submitted on behalf of the Appellant that the learned magistrate erred in law in failing to date the judgment hence the said judgment is a nullity, ineffectual and lacks the full backing of the law. In this regard the Appellant relied on the case of **Musa Hassan Bulhan vs. Kenya Airways Limited & Another [2005] eKLR.**
17. This court was therefore urged to set aside the judgment of the lower court since it is a nullity and also unknown in law.

18. The appellant maintained that there was no malice in instituting the criminal case against the respondent since he simply exercised his constitutional duty in reporting a crime to the relevant authorities as required. He therefore did his duty as any reasonable man in his position could have done. It was therefore submitted that the learned magistrate therefore erred in law and fact in finding that the appellant acted maliciously in filing a complaint against the respondent and reliance was placed in this court's in **Chripine Otieno Caleb –Vs- Attorney General [2014] eKLR** as guided by the findings of the judges of the East African Court of Appeal in **Mbowa –Vs- East Mengo District Administration [1972] EA 352**. Based on the foregoing, it was submitted that it is very clear that **all** the ingredients of malicious prosecution must be met. However, in this case, the honorable magistrate erred in law and fact in finding that that the appellant was guided by malice in instituting this case and therefore had no reasonable and probable cause. The lack of malice on the part of the appellant lowers the threshold required to make all the ingredients of the malicious prosecution unite. In support of this submission, the Appellant relied on the decision of **Mativo, J** in **Stephen Gachau Githaiga & Another –vs- Attorney General [2015] eKLR**.

19. It was contended malice is lacking in our present case as the respondent did not prove the malice on the part of the appellant to the required balance of probability. Furthermore, after the appellant made the complaint, it was the responsibility of the prosecution to investigate the matter and make a decision whether to prosecute or not. Even if the complaint was malicious, that malice cannot automatically be transferred to the prosecutor unless it was proved that there was collusion between the complainant and the prosecutor in bringing out the prosecution. It was finally submitted that in a public prosecution, the prosecutor is squarely responsible for the prosecutions but not the complainant.

20. Regarding the existence of the civil proceedings, it was submitted that the Appellant was simply performing a public duty in reporting a crime and that he had no intention of fixing the respondent. Furthermore, the statutes allow for concurrent criminal and civil proceedings and reference was made to section 193A of ***Criminal Procedure Code***.

21. From the above provision, it was submitted that it is clear that the honourable magistrate erred in law and fact in finding that the appellant filled a criminal case to fix the respondent while there was a civil dispute emanating pending in high court.

22. Regarding the roles of the defendants, it was submitted that since the appellant's role in the criminal justice system and particularly in this case of malicious prosecution is not the same as the role of the 2nd and 3rd respondent, the honorable magistrate therefore erred in law and fact in failing to distinguish the role of the appellant with the rest of the defendants in his findings. The appellant's role was limited to reporting a criminal act, trespass and no more. It was upon the 2nd and the 3rd respondent to make an informed decision independently whether to prosecute the respondent or not. Furthermore, the appellant has no control on the mode of operation of the 2nd and 3rd respondent.

23. With regard to the media coverage during the hearing of the criminal case, it was submitted that the appellant was not responsible for media coverage during the hearing of the criminal case since he had no control of the working of media house and therefore is not to blame and he further relied on the media freedom as is guaranteed in Article 34 of the Constitution. He therefore submitted that the honorable magistrate erred in law and fact in holding that the appellant was responsible for media coverage of the criminal case. In any case, the proceedings were held in open court which is a public place and the respondent failed to object the presence of media houses. He therefore cannot be allowed to point fingers at the appellant while he had the opportunity to move the trial court not to allow the media at the proceedings.

24. As for the award of damages, it was submitted that the trial magistrate erred in law and fact in entering judgment against the appellant and awarding 2 Million as general damages and Kshs 1. million as punitive and exemplary damages which is quite excessive in the given circumstances. It was contended that the trial magistrate took into account irrelevant facts in arriving at the inordinately high award of damages which the court should set aside. Reliance was placed on the case of **Loice Wanjiku Kagunda -vs- Julius GachauMwangi C A No. 142 of 2003 (UR)**.

25. Going by the above cited authority, it was submitted that the trial magistrate exercise of discretion was not in tandem with the principles stated hereinabove and therefore was not exercised judicially as already enumerated in the six questions posed to this honourable court.

26. In the result the appellant urged the court to set aside the judgement of the trial court.

27. In opposing the appeal, the Respondent took issue with the competency of the record of appeal on the ground that, contrary to the requirements of Order 42 rule 13(4)(f) of the Civil Procedure Rules, the decree appealed from was not incorporated in the record. In support of this submission the Respondent relied on **Bwana Mohammed Bwana vs. Silvano Buko Bonaya & 2 Others [2015] eKLR**.

28. Regarding the validity of the judgement, it was submitted that that ground was incorporated in the amended Memorandum of Appeal for which leave was not sought. Secondly, the lower court record demonstrates the coram for 2nd November, 2017 which is dated and that the judgement was dated and signed in open court. It was however submitted that if the court finds that the judgement was a nullity, the option is to remit the matter back to the trial court for a retrial or for dating and reliance was placed on **Sumbeiyu Primary School & 3 Others vs. Kipsit Ayabei & Another [2015] eKLR**.

29. It was submitted that the Appellant and his agent, **Mr Mbaluka**, PW1, influenced both the institution of the criminal case and the media reporting knowing well the existence of the civil proceedings.

30. According to the Respondent as at the time the Respondent was charged, the statements of the witnesses had not been recorded hence there was no reason or probable cause to charge the Respondent.

31. Based on **Kemfro Africa Ltd T/A Meru Express & Another vs. A M Lubia and Another [1982-88] 1 KAR 727** and **Obongo & Another vs. Municipal Council of Kisumu [1971] EA 91**, it was submitted that the award was reasonable and sound in law and there is no basis for the court to disturb the same.

Determination

32. I have considered the issues raised in this appeal. It is important to emphasise that there were three Defendants before the trial court, this appeal is only in respect of the finding of liability as against the 1st Defendant who is the appellant before me. Accordingly, the outcome of this appeal is only restricted to that particular party and not the other Defendants.

33. Before dealing with the merits of the appeal there are two preliminary issues that this Court has been called upon to determine in *limine*. The first is whether there is a competent appeal before me in light of the failure to comply with Order 42 Rule 13(4) of the **Civil Procedure Rules**. That provision states as follows:

(4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:

(a) the memorandum of appeal;

(b) the pleadings;

(c) the notes of the trial magistrate made at the hearing;

(d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;

(e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;

(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

Provided that—

(i) a translation into English shall be provided of any document not in that language;

(ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).

34. What is mandatorily required by the Court under Order 42 Rule 13(4)(f) is the judgment, order or decree appealed from. In other words, the Court may proceed to determine an appeal where there is judgement. In the circumstances of this case, whereas I appreciate that parties to an appeal ought to extract the decree or order appealed from and incorporate it in the record of appeal, where a decree has actually been extracted as in this case, it would be elevating procedural rules to a fetish. It was therefore appreciated by **Ringer, J** (as he then was) in the case of **Microsoft Corporation vs. Mitsumi Computer Garage Ltd & Another Nairobi (Milimani) HCCC No. 810 of 2001 [2001] KLR 470; [2001] 2 EA 460** that:

“Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not fetter or choke it and where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not to be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue”.

35. In **Dominion Farm Limited vs. African Nature Stream & Another Kisumu HCCC No. 21 of 2006** it was appreciated that whereas the rules of procedure are not made in vain and are not to be ignored, often times the Courts will encounter inadvertent transgressions or unintentional or ill-advised omissions through defective, disorderly and incompetent use of procedure but which if strictly observed may give rise to substantial injustice and in such circumstances, the exercise of the discretion of the Court comes into play to salvage the situation for the ends of justice.

36. The Court further recognises that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case heard on merits. The broad approach under the current constitutional dispensation is that unless there is fraud or intention to overreach, an error or default that can be put right by payment of costs ought not to be a ground for nullifying legal proceedings unless the conduct of the party in default can be said to be high handed, oppressive, insulting or contumelious. The court, as is often said, exists for the purpose of deciding the rights of the parties and not imposing discipline. See **Philip Chemwolo & Another vs. Augustine Kubende [1986] KLR 492; (1982-88) KAR 103.**

37. What then is the option available in those circumstances? As was stated in the Court of Appeal in **Kenya Commercial Finance Company Limited vs. Richard Akwesera Onditi Civil Application No. Nai. 329 of 2009** *the Court now has wider powers and will not automatically strike out proceedings but will before doing so, look at available alternatives. Order 4 rule 1(6), gives the court discretion when it comes to striking out a pleading based on such omission. In exercising this discretion, the most important consideration, in my view, is that of justice and unless the omission has occasioned the defendant prejudice, the court, as always, should lean towards sustaining a suit.*

38. In this case since there is a decree on record, there is no hindrance to this court determining the appeal on its merit. Accordingly, I decline to dismiss the appeal on that ground. It is however my view that records of appeal which are prepared slovenly ought to attract censure in

terms of costs.

39. The second issue was whether there is a valid judgement on record. Order 21 rule 3(1) of the *Civil Procedure Rules* provides that:

A judgment pronounced by the judge who wrote it shall be dated and signed by him in open court at the time of pronouncing it.

40. In this case, it is true that the certified copy of the judgement herein was neither signed nor dated. There is however a minute in the handwritten proceedings that the judgement was delivered on 2nd November, 2017. This is confirmed by the proceedings of 7th July, 2016 in which the learned trial magistrate confirmed that he delivered the judgement on 2nd November, 2017 but forgot to sign it. In light of that admission, is the judgement rendered a nullity? In **C K Matemba vs. Mary Matemba [1968] EA 646**, Georges, CJ held that the mere failure to sign the judgement should not be held as significant and it should be treated as if it had in fact been signed on the day pronounced. The same position was adopted by Nyarangi, JA in **Meshallum Wanguhu vs. Kamau Kania 1 KAR 780 [1987] KLR 51; [1986-1989] EA 593** where he expressed the view, based on **Matemba vs. Matemba** (supra) that:

“The failure to date and sign the ruling was a serious omission capable of being exploited mischievously and unlawful since the language in Order 20, rule 3 has a mandatory tone and must have been intended to convey the message of the importance of strict compliance with the particular order. However failure to sign a judgement, which has been pronounced, is not so significant as to invalidate the judgement.”

41. The defect in the judgement herein is akin to the circumstances in **Tachasis Wholesalers Ltd. vs. Kenya Seed Co. Ltd Civil Application No. Nai. 299 of 2000** where a judgement of the High Court was delivered by the Deputy Registrar as opposed to the Judge who prepared it. The Court of Appeal directed that the file be placed before the Superior Court Judge for the reading of the Judgement as required by law and a copy of the proceedings to be included in a supplementary record and made part of the record of appeal. The same Court in **Dorcas Indombi Wasike vs. Banson Wamalwa Khisa & Another Civil Application No. Nai. 131 of 2002** found that:

“There is no provision in the Civil Procedure Rules for delivery of a Judgement of the Superior court by a judicial officer other than a Judge of the Superior Court...A judgement carries with it many consequences and a Judge should be careful how the same should be delivered. A judge should not ask the Deputy Registrar to deliver it. A judgement so delivered is an irregularity which irregularity can be cured by the Judge when she dates it having been delivered.”

42. It is therefore clear that omission to sign an or procedurally deliver a judgement is an omission that is curable. In this case the omission has been cured by the learned trial magistrate who confirmed that he actually delivered the judgement appealed from but forgot to sign it. While such omission ought not to be encouraged, parties ought not to suffer due to omissions on the part of judicial officers where save for procedural defects a judgement is otherwise valid. Based on the decision in **Kenya Commercial Finance Company Limited vs. Richard Akwesera Onditi** (supra). I decline the invitation to find that the said judgement is a nullity.

43. Having dealt with the said preliminary issues, I now proceed to deal with the merits of the appeal. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

44. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

45. On the power to interfere with factual findings of the trial court, it was therefore held by the then East African Court of Appeal in **Ramjibhai vs. Rattan Singh S/O Nagina Singh [1953] 1 EACA 71** that:

“This Court will not disturb a finding of a trial Judge merely because of an irregularity in the format of the judgement if it thinks that the evidence on the record supports the decision.”

46. However, in **Peters vs. Sunday Post Limited [1958] EA 424**, it was held that:

“Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance,

when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given...Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question...It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

47. It was therefore held by the Court of Appeal in Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278 that:

"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

48. In this case since the claim arose from the tort of malicious prosecution, the following are the issues that fall for determination in this suit:

1. Whether the criminal proceedings were instituted by the Appellant.
2. Whether the said prosecution was actuated by malice.
3. Whether there was reasonable cause and/or justification to make the complaint to the police.
4. Whether the criminal proceedings terminated in the plaintiff's favour.
5. Whether the defendant is liable to compensate the plaintiffs and if so what should be the award of damages.
6. Who should bear the costs of the suit?

49. The law guiding the tort of malicious prosecution is well settled in this country. In Mbowa vs. East Mengo District Administration [1972] EA 352, the East African Court of Appeal expressed itself as follows:

"The action for damages for malicious prosecution is part of the common law of England...The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than for the public benefit. It 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. Its 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...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. The damage that is claimed is in respect of reputation but other damages might be claimed, for example, damage to property...The damage to the plaintiff results at the stage in the criminal proceedings when the plaintiff is acquitted or, if there is an appeal, when his conviction is quashed or set aside. In other words, the damage results at a stage when the criminal proceedings came to an end in his favour, whether finally or not. The plaintiff could not possibly succeed without proving that the criminal proceedings terminated in his favour, for proving any or all of the first three essentials of malicious prosecution without the fourth which forms part of the cause of action, would not take him very far. He must prove that the court has found him not guilty of the offence charged...The law in an action for malicious prosecution has been clearly defined and in so far as the ordinary criminal prosecution is concerned the action does not lie until the plaintiff has been acquitted of the charge. In this case the respondent could have brought his action for malicious prosecution until the prosecution ended in his favour. He could not have maintained his action whilst the prosecution was pending nor could he have maintained an action after he had been convicted. His right to bring the action only accrued when he secured his acquittal of the charge on appeal, and he then had the right to bring this action for damages...Time must begin to run as

from the date when the plaintiff could first successfully maintain an action. The cause of action is not complete until such a time, and in this case this was only after he was acquitted on appeal.”

50. In Egbema vs. West Nile Administration [1972] EA 60, the same Court held:

“False imprisonment and malicious prosecution are separate causes of action; a plaintiff may succeed on one and fail on the other. If he established one cause of action, then he is entitled to an award of damages on that issue...For the purposes proof that the criminal proceedings have been determined in the appellant’s favour it is enough that the criminal proceedings have been terminated without being brought to a formal end. The fact that no fresh prosecution has been brought, although five years have elapsed since the appellant was discharged, must be considered equivalent to an acquittal, so as to entitle an appellant to bring a suit for malicious prosecution...There was no finding that the prosecution instituted by Uganda Police was malicious, or brought without reasonable or probable cause. The Uganda Police, unlike Administration Police, are not servants or agents of the respondent...The decision whether or not to prosecute was made by the Uganda Police, who are not servants of the respondents after investigation. There is no evidence of malice on the part of the respondent. The appellant was an obvious suspect as he was responsible for the security of the office from which the cash box disappeared. It cannot be said that there was no reasonable and probable cause for the respondent instigating a prosecution against the appellant. The actual decision to do so was taken by the Uganda Police. As the Judge has made no finding as to whether the instigation of the prosecution was due to malice on the part of the respondent, this Court cannot make its own finding. The circumstances of this case reasonably pointed to the appellant as a suspect and there was not sufficient evidence that in handing the appellant over to the Uganda Police for his case to be investigated and, if necessary, prosecuted, the respondent was actuated by malice”.

51. In Gitau vs. Attorney General [1990] KLR 13, Trainor, J had this to say:

“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 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. The Court does not consider that the plaintiff has established *animus malus*, improper and indirect motives, against the witness.”

52. In James Karuga Kiiru –vs- Joseph Mwamburi and 3 Others, Nrb C.A No. 171 of 2000, the court held:

“To prosecute a person is not prima facie tortuous, but to do so dishonestly or unreasonably is. And the burden of proving that the prosecutor did not act honestly or reasonably lies on the person prosecuted.”

53. Rudd, J in Kagane vs. Attorney General (1969) EA 643, set the test for reasonable and probable cause. Citing Hicks vs. Faulkner [1878] 8 QBD 167 at 171, Herniman vs. Smith [1938] AC 305 and Gliniski vs. McIver [1962] AC 726 the learned judge stated thus:

“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...Excluding cases where the basis for the prosecution is alleged to be wholly fabricated by the prosecutor, in which the sole issue is whether the case for the prosecution was fabricated or not, 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. 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...If it is shown to the satisfaction of the judge that a reasonable prudent and cautious man would not have been satisfied that there was a proper case to put before the court, then absence of reasonable and probable cause has been established. If on the other hand the judge considers that prima facie there was enough to justify a belief in an ordinary reasonable prudent and cautious man that the accused was probably guilty then although this would amount to what I call primary reasonable and probable cause the judge may have to consider the further question as to whether the prosecutor himself did not believe in the probable guilt of the accused, and this is obviously a matter which is to be judged by a subjective test. This subjective test should only be applied where there is some evidence that the prosecutor himself did not honestly believe in the truth of the prosecution...Inasmuch as this subjective test only comes into operation when there were circumstances in the knowledge of the prosecutor capable of amounting to reasonable and probable cause, the subjective test does not arise where the reason alleged as showing absence of reasonable and probable cause is merely the flimsiness of the prosecution case or the inherent unreliability of the information on which the case was based, because this is a matter for the judge alone when applying the objective test of the reasonable prudent and cautious man. Consequently the subjective test should only be applied where there is some evidence directly tending to show that the prosecutor did not believe in the truth of his case. Such evidence could be afforded by words or letters or conduct on the part of the prosecutor which tended to show that he did not believe in his case, as for example a failure or reluctance to bring it to trial, a statement that he did not believe in it and, I think possibly, an unexplained failure to call an essential witness who provided a basic part of the information upon which the prosecution was based.”

54. As to what constitutes reasonable and probable cause, the law is clearly restated in Simba vs. Wambari [1987] KLR 601 as follows:

“The plaintiff must prove that the setting of the law in motion by the inspector was without reasonable and probable cause... if the inspector believed what the witnesses told him then he was justified in acting as he did and I am satisfied the plaintiff has not established that he did not believe them or alternatively that he proceeded recklessly and indifferently as to whether there were genuine grounds of prosecuting the plaintiff or not”

55. The foregoing, in my considered view set out the law and the conditions to be satisfied in order for a plaintiff to succeed in the tort of malicious prosecution.

56. On the first issue whether the criminal proceedings were instituted by the Appellant, both from the witness statement and in his evidence before the trial court, the Respondent maintained that though the Appellant admitted that he mandated his agent, **Mr Mbaluka**, to lodge a complaint, there was no evidence to show that any complaint was lodged against the Respondent. He in fact reiterated that the Appellant’s position was that he did not have any complaint against the Respondent and that he never made any report. In these circumstances, going by the Respondent’s own evidence, there is no basis upon which the court could find that the criminal proceedings were instituted by the Appellant. In fact, no such finding was made by the learned trial magistrate in his judgement.

57. With respect to the second issue 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, Nrb C.A No. 171 of 2000, 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. I therefore associate myself with the position adopted by **Mativo, J** in Stephen Gachau Githaiga & Another vs. Attorney General [2015] eKLR, that;

“...the initiation of criminal proceedings in the absence of reasonable and probable grounds does not itself suffice to ground a plaintiff’s case for malicious prosecution, regardless of whether the defendant is a private or public actor. Malicious prosecution, as the label implies, is an intentional tort that requires proof that the defendant’s conduct in setting the criminal process in motion was fuelled by malice. The malice requirement is the key to striking the balance that the tort was designed to maintain: between society’s interest in the effective administration of criminal justice and the need to compensate individuals who have been wrongly prosecuted for a primary purpose other than that of carrying the law into effect.”

58. In his evidence the Respondent’s case against the appellant as regards malice is premised on the fact that despite the fact that Appellant knew how he acquired the suit land and was aware of the pendency of the civil proceedings, he still came forward to testify in the criminal case without disclosing the pendency of the said proceedings. It was his evidence that the failure by the Appellant to disclose the existence of that case constituted malice though he also conceded that the existence of a civil matter does not prevent a criminal case. In fact, going through the judgement of the learned trial magistrate, that was the only basis for inferring malice against the Appellant. As rightly submitted by the Appellant, section 193A of *Criminal Procedure Code* Cap 75 of 2010 provides that:

Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.

59. Even before the amendment to the *Criminal Procedure Code* which introduced section 193A thereof, it was stated in Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69 that:

“Under section 77(5) of the Constitution it is a constitutional right that no person who has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of the offence. What is clear from this constitutional right is that it prevents the re-prosecution of a criminal case, which has been determined in one way or another. However, it does not mean that a civil suit and a criminal case cannot co-exist at any one particular time. This is because the section envisages the re-prosecution of a criminal case substantially dealt with either in fact or law, a case in which issues have been laid to rest. There is no mention in the section that the simultaneous existence of a civil and criminal case is constituting double jeopardy. The courts have, however stated that the power to issue an order of prohibition to stop a criminal prosecution does not endow a court to say that no criminal prosecution should be instituted or continued side by side with a civil suit based on the same or related facts, or to say that a person should never be prosecuted in criminal proceedings when he has a civil suit against him relating to matters in the criminal proceedings...The normal procedure in the co-existence of civil and criminal proceedings is to stay the civil proceedings pending the determination of the criminal case as the determination of civil rights and obligations are not the subject of a criminal prosecution....”

60. I, however, agree with the decision of the Court of Appeal in Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others Nairobi Civil Appeal No. 56 of 2012 [2013] eKLR that:

“While the law (section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith.”

61. It is therefore clear that the mere fact that a civil suit is pending before a court in respect of the same subject matter, the institution of criminal proceedings in respect thereof where the facts also constitute the commission of a criminal offence cannot by that fact be termed as malicious and a person who is boded to testify in the criminal proceedings even if a party to the civil proceedings cannot thereby be held liable. It is therefore my finding that the Respondent failed to prove that the Appellant’s action was malicious.

As regards the conduct of the media, I wish to quote the sentiments expressed in **Dream Camp Kenya Ltd vs. Mohammed Eltaff and 3 Others Civil Appeal No. 170 of 2012** that:

“Every litigation is inconvenient to every litigant in one-way or another. Also no one in his right senses enjoys being sued and ipso facto no one cherishes litigation of any nature unless it is absolutely necessary. With respect, we accept litigation is expensive and no litigant would enjoy the rigours of trial.”

62. That however does not necessarily render a trial malicious simply because the media has got wind of an ongoing trial and decide to go to town about it.

63. The next issue is whether the criminal proceedings terminated in the Respondent’s favour. There is no doubt that the criminal proceedings were terminated in favour of the Respondent. 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. The law is that for the purposes proof that the criminal proceedings have been determined in the appellant’s favour it is enough that the criminal proceedings have been terminated without being brought to a formal end. Accordingly, the finding in favour of the accused whether pursuant to section 210 or 215 of the ***Criminal Procedure Code*** is clearly a termination in favour of the Plaintiff.

64. Therefore, the Respondent having failed to prove that the criminal proceedings were instituted by the Appellant and that the Appellant was actuated by malice in so doing, the finding of liability by the learned trial magistrate against the Appellant herein cannot stand.

65. In the premises, this appeal succeeds, the judgement of the learned trial magistrate to the extent that he found the appellant liable to the Respondent for malicious prosecution is hereby set aside and is substituted by an order dismissing the case against the Appellant with costs. As regards the costs of this appeal, as the record was prepared in a casual manner, there will be no order as to costs.

66. It is so ordered.

Read, signed and delivered in open Court at Machakos this 9th day of March, 2020

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kaveke for Mr Mutiso for the Appellant

CA Geoffrey