



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL APPEAL NO. 148 OF 2018**

ATIQ ANJARWALLA.....1<sup>ST</sup> APPELLANT

ASIR ANJARWALLA..... 2<sup>ND</sup> APPELLANT

VERSUS

CHARO WA YAA.....1<sup>ST</sup> RESPONDENT

WANGOMA CHEZO.....2<sup>ND</sup> RESPONDENT

THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT

(Being an Appeal against the Judgment of the Senior Resident Magistrate at Mombasa Hon. E. Mutunga) dated 25<sup>th</sup> July, 2018 in SRMCC NO. 2204 OF 2010)

CORAM: Hon. Justice R. Nyakundi

Anjarwalla & Khanna Advocates for the Appellant

Wachenje Mariga for the 1<sup>st</sup> and 2<sup>nd</sup> respondents

The Attorney General for the 3<sup>rd</sup> respondent

**JUDGMENT**

This appeal by the appellant arises out of dissatisfaction of the Judgment and decree of the trial court dated 25.7.2018 in which it was ordered as follows:

- (a). Liability jointly and severally for actuating unlawful arrest of the 2<sup>nd</sup> respondent.
- (b). Liability, against the 1<sup>st</sup> defendant for solely and unlawfully detaining the 2<sup>nd</sup> respondent without carrying out proper investigations on the allegations made against him.
- (c). On quantum for malicious prosecution for Kshs.1,200,000/=.
- (d). Further question for false imprisonment and detention for a sum of Kshs.300,000/=.
- (e). Costs and interest.

Being aggrieved with the whole Judgment, appellants have preferred an appeal based on long list of grounds as embodied in the Memorandum of Appeal dated 13.8.2018. The relief sought is to have the Judgment quashed and the appeal allowed with costs.

**Background**

The claim in the plaint filed in court on 28.8.2010 concerns an incident in which the respondents in which the respondents said the appellants wrongful arrest, false imprisonment and malicious prosecution. It was averred in the plaint that on or about the month of April 2002, the respondents were arrested by the Kenya Police and were charged before the Chief Magistrate Court Mombasa in Criminal Case No. 996 of 2002.

That the report instigated by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants then was malicious and the defendants made it with full knowledge of its fatuity. The defendants filed their respective defence. The trial commenced with **Wangoma Chezo** testifying as the sole witness, whereas the appellants moved the court to opt out viva voce evidence but their witness statements be admitted being subjected to cross-examination under the evidence rules.

Both counsels, filed written submissions on the issues framed for the courts determination. Basically, the evidence by the 2<sup>nd</sup> respondent who was also the one who succeeded at the trial court was on the chronology of events. On the arrest, false imprisonment and malicious prosecution.

During the pendency of the trial, the 2<sup>nd</sup> respondent told the court that he was in remand custody at Shimo la Tewa for a period of six months. He was later to undergo a trial while out on bond which lasted seven years but at the end of all acquitted of the allegations.

## **On Appeal**

### **The appellants case**

The case for the appellants was forcibly presented in the written submissions on various fronts. The first of this need dealt with the delay in the delivery of Judgment of the trial court which counsel submitted was on breach of the mandatory provisions of Order 20 Rule 1.

The Learned counsel relying on the authorities of **Ngozo General Stores Ltd v Jacob Gichunge {2005} eKLR**, **Matthew Kangira v Marete Kutha {2016} eKLR**, **Elizabeth Braganza v Tysons Habenga Ltd, Civil Appeal No. 285 of 1997** urged this court to have the Judgment to be set aside as being irregular.

Learned counsel further argued and submitted that not only was the delay of Judgment an aggravated feature of the trial but the impugned Judgment was neither dated nor signed by the Magistrate who pronounced it. He then urged this court to render the Judgment untenable. On this legal proagation counsel cited the cases of **Likhanga Shikami & Another v Lilhiana Ingasahal Regina {2015} eKLR**, **Mureithi Nyaga v James Wambugu {2018} eKLR** with these, counsel contended that the Judgment offends Order 21 Rule 3 of the Civil Procedure Rules. The appellants counsel further took issue with the contents of the Judgment which failed the threshold of Order 20 Rule 4 of the Civil Procedure Rules. On the basis of the Judgment, counsel submitted that there were no issues framed for determination and the reasons given for the decision Learned counsel to buttress the submissions on this point cited the following cases, **South Nyanza Sugar Co. Ltd v Okwendo Okwendo {2011} eKLR** and **Ochieng v Amalgamated Saw Mills {2009} eKLR**.

According to counsel pursuant to the above principles there are sufficient grounds to quash the Judgment of the trial court. On whether liability was established for malicious prosecution counsel placed reliance on the case of **Mbowa v East Mengo District Administration {1972} EA 352**.

Learned counsel took the view that the four tests enshrined by the court in this case were absent in so far as the impugned Judgment is concerned. Further, the appellant counsel submitted that there was no piercing the corporate veil to warrant the respondents to file the suit against the directors in their personal capacity as directors. (See the principles in **Salmon v Salmon {1887} AC 22**.)

On whether, the prosecution was instituted without a reasonable cause, counsel submitted that on the part of the appellant they had a reasonable and genuine complaint against the 2<sup>nd</sup> respondent. It was justifiable for the police to investigate and as such prosecute the 2<sup>nd</sup> respondent in accordance with the Law.

Learned counsel urged the court to be guided by the principles in **Kenya Power & Lightning Co. Ltd v Florence Musau Nthenya {2017} eKLR**, **Kasco Mutuku & Kenya Post Office Savings & Bank {2019} eKLR**

It was counsels contention that the 2<sup>nd</sup> respondent did not discharge the onus of proof on the various limbs of tools pleaded for the court to award the damages of Kshs.1,500,000/=. In his estimation the appeal ought to be allowed with costs.

### **The respondents submissions on appeal**

The Learned counsel for the respondents cumulatively submitted on the substratum of the suit in respect to maturity and quantum of damages. The Learned counsel account was that the respondent led evidence which discharged the burden of proof on a balance of probabilities. He reiterated to strengthen his submissions by referring various statements on record to proof the claim against the appellants counsel relying on the dicta in **Chrispine Otieno Caleb v Attorney General Civil Suit 782 of 2007** to counter the appellant submissions proposition that prosecution was punctuated with malice. Counsel asserts in his submissions that there was not justification for the appellants to lodge the complaint which led to the arrest, detention and prosecution of the 2<sup>nd</sup> respondent.

Learned counsel proffers, that the respondent was further vindicated by his acquittal of the charges against him by the court. Accordingly, counsel urged this court to dismiss the appeal altogether.

## **Determination**

On the issue of jurisdiction it is clear from the principles in the case of **Abok James Odera T/A A. J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates {2013} eKLR**

**“pursuant to the aforesaid position, the 1<sup>st</sup> appellate court is rendered to reconsider, the evidence, evaluate it and draw its own conclusions, though it should always bear in mind that it has neither seen or heard the witnesses now should make dire allowance in that respect.....”**

The legal position on the standard of proof as defined under Section 107 (1), 108, and 109 of the Evidence Act. Cap 80 of the Laws of Kenya. In cases like the one being tried by the trial court, it was incumbent upon the plaintiff, the 2<sup>nd</sup> respondent to persuade the court concerned with the determination of the issues that there was a reasonable basis for the verdict.

**Professor Cross** adopting the language in **Bridges v North London Rail Co. 1874 LR 7. H. L** put the preliminary question thus:

**“Whether there is evidence which if uncontradicted, would justify men of ordinary reason and fairness in affirming the proposition which the proportionate is based to maintain and added, having regard to the degree of proof demanded by the Law with respect to the particular case.”**

**Lord Denning** considering the matter separately in **Wright v Wright {1948} 77 CLR 191, 210** observed in the context of incidents of proof as follows:

**“Deals only with the incidence of proof, not with the standard of proof, it shows on whom the burden lies to satisfy the court, and not the degree of proof which he must attain. There can be no liability against the appellants.”**

Did the 2<sup>nd</sup> respondent who obtained in his favour discharge the burden of proof on the merits. Generally speaking, as it would be seen in the following arguments, the 2<sup>nd</sup> respondent in all probability failed the test.

In the Memorandum of Appeal much of the contestation by the appellants deals with incidents of non-proof of the 2<sup>nd</sup> respondent case to warrant liability to ensue and as a consequence assessment of damages.

This appeal court in compliance with the **Abok case (supra)** would be navigating through the record to establish in the first place whether the burden bearer discharged it within the legal context of Section 107, 108 and 109 of the Evidence Act. If he does discharge the trial court would have at its disposal a prima facie case on the issues pleaded in the plaint. The concept of prima facie in that respect deals with the initial burden which lies on the complaining party, which must establish a prima facie case of inconstancy with a particular provision.

On the part of the defendant party, when the prima facie case is made, the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistencies” (see the case)

The issue in the instant appeal is whether the 2<sup>nd</sup> respondent evidence was so strong that it demanded a rebuttal evidence from the appellants. That therefore shifted burden would squarely rest with the appellants to shoulder it against the 2<sup>nd</sup> respondent motion on prima facie case on the claim.

What was the case expected of the appellants to answer. From the record, pleadings, evidence and submissions by counsel it was respect of the tort of false imprisonment and malicious prosecution. That being the case what was the trial court to look for on liability against the appellants:

**(a). On arrest and investigations.**

The National Police Service Act, the Criminal Procedure Code and recent promulgation of, our Republic Constitution Article 49 provides for recognition of human rights that are guaranteed in favour of an arrested person.

By virtue of Article 49, the constitution guarantees the arrested person basic minimum rights to legal counsel, to remain silent, not to confess to an offence, obtained by the use of torture, threat or use of force, the right to be released on bail for a non-cognizable offence and to be informed the reasons of his or her arrest.

How does the question of these legal rights accrue within the balancing all and the necessary of the police acting in the best interest of the common good.

In my opinion during pretrial detention, the investigating officer can only hold the suspect if the crime charged with is that punishable with imprisonment of at least more than six months.

Secondly, the custody of the suspect awaiting trial should be an absolute necessity to prevent escape from the jurisdiction of the court, his own security, interference with the administration of justice or it justifiable to do so under the corpus of the interest of justice. At the very earliest in the 19<sup>th</sup> century, the **English Court in Hicks v Faulkhar {1978} 8 QBD 167** observed on what is the reasonable and probable cause for arrest by a police officer:

**“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 assessing them to be true, would reasonably lead any ordinarily, 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 there must be. First, an honest belief of the accuser, in the guilt of the accused, secondly such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion. Thirdly, such secondly – mentioned belief must be based upon reasonable grounds, by this I mean, such grounds as would lead any fairly cautious man in the defendant's situation so to believe, fourthly, the circumstances so believed, and relied on by the accuser must be such as amount to reasonable ground to believe in the guilt of the accused.”

This principle has been aptly stated in the persuasive case of **Mugwanya Patrick v Attorney General HCC NO. 154 OF 2009** where **Musota J** had that:

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

Meanwhile, the respondent's contention both on appeal and at the trial, is the quest for the court to appreciate that he was detained falsely for a crime he did not commit.

In *locus classicus* case of **Fleming v Det Cpl Nyers & the Attorney General {1989} 25 JLR Caren J. A.** stated as follows:

**“In my respectful view, an action for false imprisonment lies where a person is held in custody for an unreasonable period after his arrest and without either being taken before a justice of the peace and a Resident Magistrate. The legal justification may be pursuant to the valid warrant of arrest or where by statutory powers, a police officer, is given the power of arrest in circumstances where he honestly, and on reasonable and probable cause, believes a crime has been committed.”**

From the foregoing precedents and principles, the question which begs for an answer is whether the trial Magistrate was right in finding in favour of the respondent on wrongful arrest and detention.

The reason of constitutionality or otherwise of the arrest against the respondent lay on the primary proceedings in Criminal Case No. 996 of 2002. I reckon that during the civil proceedings the Attorney General never saw it fit to adduce evidence in rebuttal to the case by the claimant. The allegations made against the 2<sup>nd</sup> respondent arise out of a complaint made to the police by **ASIF ANJARWALLA**, a director of Manland properties. The criminal case was investigated by **PW6 – PC Sudi Kilahi** for the 1<sup>st</sup> respondent to succeed on liability on the claim for false imprisonment.

He was expected to demonstrate that his freedom of movement was restricted without sufficient cause and not for the advancement of administration of justice. That the restriction of his freedom of movement at the police station before appearance to be tried for the offence was an abuse of powers of arrest.

The description of the facts is illustrated from the record of the criminal proceedings and notes of the trial Magistrate. The printed version must form part of the record during the trial of the case filed by the respondent. Here the primary defence of the appellants was that the actions of the respondent were appropriate for the complaint on malicious damage to property contrary to Section 339 of the Penal Code.

In the instant case, the 2<sup>nd</sup> respondent based his claim on false imprisonment and detention commonly referred to as pre-trial-detention. I accept from the Judgment of the trial Magistrate that the 2<sup>nd</sup> respondent was confined for a period of three days. That was the period which underpinned the award of damages of Kshs.300,000/=.

Such a question of fact involving a matter and functions of another constitutional organ under Article 244 of the Constitution required evidence to stand that the action by the police was an improper assertion of legal authority.

In any case, the 2<sup>nd</sup> respondent was arrested as a suspect of malicious damage to property a felony not with the precepts of Article 49 of the Constitution with a justification to have him released forthwith as an offence punishable with a fine or a term imprisonment of six months.

It is not in doubt that the 2<sup>nd</sup> respondent was made aware of the reasons of his arrest and lawful confinement pending a charge before a Resident Magistrate.

In my view, the motion lacked standing for Judgment to be awarded damages on false imprisonment. The foregoing analysis particularly the testimony of the 2<sup>nd</sup> respondent failed to demonstrate the detention was unreasonable and unwarranted, a necessary element of a claim on false imprisonment.

It is a legal and constitutional obligation of any court to preserve and protect the rights of individual and uphold the integrity of the constitution. However, in doing so in proceedings of this nature the fundamental question is whether the police officer or any other person was acting on his own account or for his own private benefit, but for the public, enforcing the public right to have the public Law obeyed.

(See **Yahola v Whipple 189 Okla 583 {194}** )

Similarly in **R v Lewes Crown Court ex parte Hill {191} 93 Criminal Appeal R 60 at 65** the court in considering the role and powers of police officers and the administration of criminal justice in England had this to say:

**“The Police and Criminal Evidence Act governs a field in which there are two very obvious public interests. There is, first of all, a public interest in the effective investigation and prosecution of crime. Secondly, there is a public interest in protecting the personal property and rights of citizens against infringement and innovation. There is an obvious tension between these two public interest in protecting the person and property rights of citizens against infringement and innovation. There is an obvious tension between these two public interests because crime could be most effectively investigated and prosecuted if the personal and property rights of citizens could be freely overridden and the total protection of the personal and property rights of citizens would make investigation and prosecution of many crimes impossible or virtually so.”**

I am therefore satisfied that liability on false imprisonment was not well founded and its therefore for interference by this court.

From the lengthy submissions by the appellants counsel the second fundamental issue for considerations is whether the Learned trial Magistrate erred in fact and Law when he made a finding on liability on malicious prosecution in favour of the 2<sup>nd</sup> respondent against the defendants/jointly and severally.

To maintain a claim for malicious prosecution, a claimant must satisfy the threshold conditions set out in the Canadian cases of **Nelles v Ontario 1989 2 SCR 170 (SCC)**, **Proulx v Quebec (Attorney General) 2001 206 DLR (4<sup>th</sup>) 1 (SCC)**, **Miazga v Kvello Estate 2009 3 SCR 339 (SCC) (Miazga 2)**, **2008 282 DLR (4<sup>th</sup>) 1 (Sask CA)**

**“That the police not only had reasonable grounds to suspect that the accused person committed the offence but also that the prosecutor had reasonable and probable cause for prosecuting, the Lord Justice found it unnecessary to deal with the issue of malice. The reasoning behind so concluding was that since the judge held that “had the claimant proved a lack of reasonable and probable cause of prosecuting, he would have succeeded in establishing malice in the sense of improper motive.” (para 153) This is not, “as I read the Judgment and as counsel for the Chief Constable agreed, a finding of malice, but an observation that there would have been an improper motive if the appellant had proved a lack of reasonable and probable cause of prosecuting, which he did not. That was because the evidence showed that part of the thinking prosecuting, which he did not. That was because the evidence showed that part of the thinking of those responsible for the prosecution was to make an example of the appellant, as a police officer, and to show the public that the police were treating seriously innocent deaths caused in police road pursuits; a point that can be linked to the disquieting degree of publicity given to the arrest and charging of the appellant. However, that was as far as the point went; and the finding that there was reasonable and proper cause for the prosecution meant that the question of malice or improper cause became irrelevant to liability. It would be wrong in the circumstances to go any further into the issue.” The next is Moulton v Chief Constable of the West Midlands 2010 EWCA Civ 524 paras 26 -27 and 44 where Lady Justice Smith held that the trial Judge had been right to hold that there was reasonable and probable cause to commence the prosecution but had made no specific reference to evidence of malice at the time of the charge, as he had not needed to do so. The claim could not succeed in respect of that period if there was reasonable and probable cause to prosecute. But, as a fact, there was not a shred of evidence from which it could be inferred that, at that the stage, the officers were motivated by anything other than a legitimate desire to bring the appellant to justice. The Justice of Appeal held that there was never a time when the police did not have reasonable and probable cause to bring and continue the prosecution. In that case, it was not necessary to say anything about malice.”**

Likewise in our jurisdiction, a claim for malicious prosecution on both liability and award of damages must be brought within the scope of the principles in the celebrated case of **Mbowa vs East Mengo District Administration (supra)**

**“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 a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion of the truth. It’s essential ingredients are;**

- (1) The criminal proceedings must have been instituted by the defendant, that is, he was instrumental in 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 “untie” 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 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 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.”

I find as a fact that the 2<sup>nd</sup> respondent retained the ultimate legal burden in reference to the claim under malicious prosecution. Although the 2<sup>nd</sup> respondent was eventually acquitted of the offence of malicious damage prima facie did not amount to a malicious prosecution. From the record, what evidence is there that the 2<sup>nd</sup> respondent was maliciously prosecuted? It seems to me that the directors of the company, who happen to be the appellants did lodge a complaint with the police to bring to book suspects who had destroyed the fence erected around the parcel of land.

I accept both the Canadian approach and the fundamental principles in **Mbowa case (supra)** that the decision to prosecute complained of ought to have met the legal parameters in **Pastoli vs Kabale District Local Government Council and Others {2008} 2 EA 300**. Though anchored in the realm of judicial review principally it is relevant in advancing what might constitute an illegal, irrational, improper exercise of discretion to initiate against the respondent. The court observed as follows:

**“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ... illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission... irrationality is when there is such gross unreasonable in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards .... Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.”**

In the present appeal upon review of the evidence, the vital link between the unlawful and wrongful initiation of the prosecution was not properly evaluated by the trial Magistrate.

The distinct grounds of reasonable and probable cause and malice are single elements of the tort for a claimant to prove on a balance of probabilities, by the 2<sup>nd</sup> respondent. That burden at the trial, as to what circumstances the appellants put into force the process of the Law to maliciously prosecute him for the offence of malicious damage to property fell below the standard of proof to attract award of damages.

Consequently, I agree with the appellants submissions that an action for malicious prosecution in a suit filed by the 2<sup>nd</sup> respondent was utterly without ground of truth.

In **De Medina v Grove the Judgment of Wilde CJ (with whom Maule J, Cresswell J, Williams J, Parke B and Rolfe B agreed)**:

**“The Law allows every person to employ its process for the purpose of trying his rights, without subjecting him to any liability, unless he acts maliciously and without probable cause.”**

Applying the line of principles illustrated in the above cases certainly the Learned trial Magistrate erred in Law and fact, in my view surprising so to the detriments of the rights of the appellant. That the complaint made to the police was a wrongful act done intentionally without just cause or excuse. In conclusion in my strong view, the main matter raised before me an appeal by the appellant counsel on the alleged violation of the respondent fundamental rights shows that what happened in that criminal case did not fit the frame of false imprisonment and malicious prosecution. In **The Kate {1864} Br & L 218, Dr. Lushington** drew an express analogy with common Law actions for malicious prosecution. He said:

**“The defendants are not in my opinion entitled to damages, because the circumstances of the case do not shew on the part of the plaintiffs any mala fides or crassa negligentia, without which, according to The Evangelismos unsuccessful plaintiffs are not to be mulcted in damages.”**

In **Savile v Robers 1 LD Raym 374 3 Salk 17**:

**“There is a great difference between the suing of an action maliciously, and the indicting of a man maliciously. When a man sues an action, he claims a right to himself, or complains of any injury done to him; and if a man fancies he has a right, he may sue an action....”**

**Akin** to the principles in the case of **Mbogo v Shah {1968} EA 93**: in the eyes of the Law, the appellants have satisfied the onus of proof that the trial court was wrong when it made a finding on liability and assessed damages on the basis that the respondent was falsely arrested, imprisoned and maliciously prosecuted. Apparently, the trial Magistrate’s thought that the phrase acquittal or discharge in a criminal proceedings instituted by the Director of Prosecution was according to the reason of the Law malicious and frivolous. If every discharge or an acquittal ends up into malicious prosecution certainly courts will be opening up a new species of action not founded on the Common Law principles to the tort of false imprisonment and malicious prosecution. The very touchstone of administration of justice, is the force of Law under Article 50 of the Constitution on a right to a fair hearing. It is only in exceptional cases that the consequences attached to a criminal trial under our constitution and statute Law a cause of action for malicious prosecution can arise before another court of justice for award of damages. Unfortunately, the respondent’s claim did not qualify for a remedy in tort for malicious prosecution under our present Law.

Accordingly, and for the reasons stated above, the appeal is allowed and the Judgment of the trial court set aside together with the decree and costs to the appellants.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 6<sup>TH</sup> DAY OF MARCH, 2020**

.....

**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

1. Ms. Onesmus for the appellant