



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL APPEAL NO. 141 OF 2014**

**(Being an appeal from the original judgement and decree of Hon. Susan N. Mwangi, Ag. Senior Resident Magistrate, of 20<sup>th</sup> November 2014 in Vihiga SPMCCC No. 71 of 2012)**

**PATEL RAMESHBHAI GORDHANBHAI.....APPELLANT**

**VERSUS**

**STANLEY AJONGA KIVASA.....1<sup>ST</sup> RESPONDENT**

**VIOLET KAVAI IMBUGA.....2<sup>ND</sup> RESPONDENT**

**AND**

**ATTORNEY-GENERAL.....INTERESTED PARTY**

**JUDGMENT**

1. The suit at the trial court, in Vihiga SPMCCC No. 71 of 2012, was initiated by the appellants herein against the respondent and the interested party, for general damages for malicious prosecution, arising from Vihiga PMCCRC No. 1017 of 2010, where the respondents had been charged, in a criminal case where the appellant was the complainant, of stealing contrary to section 275 of the Penal Code, Cap 63, Laws of Kenya, which proceedings terminated upon the withdrawal of the charge by the state under section 87(a) of the Criminal Procedure Code, Cap 75, Laws of Kenya. The respondents pleaded that prosecution was malicious, and they had suffered loss and damages. They accused the appellant of falsely instigating the charges against them.

2. The appellant entered appearance and filed a defence, in which he denied that the respondents had suffered damage to their reputation by reason of the withdrawn proceedings. He pleaded that he had made a true and genuine report of acts of theft relating to his property, and averred that if the respondents were arrested by the police pursuant to that report, then their arrest was founded on reasonable belief after proper investigations had been conducted by the police in connection with the report. He asserted that the arraignment and prosecution of the respondents was lawful and procedural, and could not possibly give rise to any cause of action. He averred that the termination of the case was not at the instigation of the respondents, and he pledged to plead estoppel in that respect. He further averred that the nature of the termination did not afford the respondents the nature of remedy that they sought in the suit. He pledged to make use of the civil proceedings to prove his loss and to show the connection between the respondents and their loss.

3. At the oral hearing, the 1<sup>st</sup> respondent testified. He stated that he and the 2<sup>nd</sup> respondent were arrested on 8<sup>th</sup> November 2010, by police officers, on allegations that they had stolen mattresses from the appellant, who had made a report thereof to the police. They were locked up in police cells for three days, before being produced in court on 10<sup>th</sup> November 2010, and charged in Vihiga PMCCRC No. 1017 of 2010, of stealing, as aforesaid. A trial was conducted and they were acquitted under section 87(a) of the Criminal Procedure Code. He stated that no witnesses were presented by the prosecution to give evidence against them. He submitted that he suffered loss, and produced documents to support that submission. He also asserted that he had bought the mattresses that were alleged to have been stolen, and he produced receipts to support his case. He blamed the appellant for giving false information to the police, which led to their arrest and the state for not carrying out sufficient investigations.

4. The appellant testified on his part as the defendant. He stated that he noted that 28 pieces of mattresses were missing from his premises, and he made a report to the police, who subsequently informed him that they had found the stolen items. He said that he did not know the respondents, but the persons from whom the items were found showed the police receipts, saying that they had bought the items. He stated that the police never informed him that they had charged anyone in connection with the theft. He asserted that he did not give the police the names of any suspects, including the respondents. He stated that he was never bonded to appear in court, and he was not present when the respondents were arrested.

5. After taking the evidence, the trial court was convinced that there was malicious prosecution, found the appellant liable and condemned him to pay to the respondents Kshs. 200, 000.00 general damages.

6. The appellant was aggrieved by the decision, and lodged this appeal. His case, as articulated in his memorandum of appeal, dated 9<sup>th</sup> December 2014, is that the case before the trial court was invalid for want of service of a statutory notice of intention to sue, the claim against the 2<sup>nd</sup> respondent was incompetent for failure to file the requisite written authority to empower the 1<sup>st</sup> respondent initiate suit on her behalf, the trial court exceeded the limits of its civil jurisdiction when it remarked that the criminal court should have terminated the criminal case against the respondents under section 202 of the Criminal Procedure Code rather than section 87(a) of the same Act, the trial court misapprehended the implication of a withdrawal under section 87(a) of the Criminal Procedure Code, there was no evidence available to support the conclusion by the trial court that the theft had been carried out by the appellant's employees, the trial court did not consider the defence and failed to conclude that the appellant had acted in good faith, the trial court failed to determine the authenticity of the receipts produced by the respondents, the judgement was vague and uncertain, it was against the weight of the evidence, and the award of damages was legally unfounded and exaggerated.

7. It is the appellant's submission that under Order 3 Rule 2(d) of the Civil Procedure Rules, 2010, it is a requirement that when filing a complaint, the same must be accompanied by a letter of demand before action. He adds that there was no compliance on the part of the 2<sup>nd</sup> respondent, as the only demand notices filed were in respect of the 1<sup>st</sup> respondent and the interested party, and, as such, the same rendered the 2<sup>nd</sup> respondent's claim "incompetent." The respondents did not submit on the issue.

8. From the record, a notice of intention to sue was issued by the 1<sup>st</sup> respondent to the appellant and to the interested party, pursuant to section 13A (1) of the Government Proceedings Act, Cap 40, Laws of Kenya. It would appear that that notice only related to the 1<sup>st</sup> respondent, for it does not mention the 2<sup>nd</sup> respondent.

9. Recent legal developments appear to suggest that the said notice is no longer mandatory before one files their suit in court against the government. In any case, the said section applied to the interested party only being the legal representative of government. I say that in view of the decision in *Kenya Bus Service Ltd & another vs. Minister For Transport & 2 others* [2012] eKLR, where the court faulted section 13A (1) of the Government Proceedings Act, and described it as an affront to Article 48 of the Constitution. The court stated:

*"...that the requirement for notice particularly where it is strictly enforced as a mandatory requirement diminishes the ability of the citizen to seek relief against the government. It is my finding therefore that section 13A of the Government Proceedings Act as a mandatory requirement violates the provisions of the Article 48."*

10. Then there is also Order 3 Rule 2 of the Civil Procedure Rules, 2010, which provides for the documents that ought to be lodged in court at the time of filing suit. The provision is specific that it applies also to proceedings against government and the documents to be lodged include a demand notice. However, Order 3 Rule 2 of the Civil Procedure Rules, 2010, is subsidiary legislation, and it cannot override an Act of Parliament, such as the Government Proceedings Act, and reference to demand letter in Order 3 Rule 2 of the Civil Procedure Rules could very well include the notice referred to in section 13A (1) of the Government Proceedings Act. Order 3 Rule 2 of the Civil Procedure Rules says:

*"2. Documents to accompany suit [Order 3, rule 2.]*

*All suits filed under rule 1(1) including suits against the government, except small claims, shall be accompanied by ... (d) copies of documents to be relied on at the trial including a demand letter before action:"*

11. The question then is whether the omission by the 2<sup>nd</sup> respondent to serve the said notice of intention to sue rendered her subsequent claim incompetent.

12. The courts have over time wrestled with the matter of service of a notice of intention to sue. In *Stanley Kaunga Nkarichia vs. Meru Teachers College & another* [2016] eKLR, the court stated:

*"It has never been the law that a defendant should always have notice of intention to bring suit against him before action is filed in court. There are cases which, by their very nature or due to obtaining circumstance, it is impractical to issue a notice of intention to sue or issuing such notice of intention to sue will only be to the detriment of the interests of the Plaintiff and justice. For instance in trade-marks and patent rights cases or where Anton Piller orders or ex parte temporary injunctions are the subject of the suit, issuance of notice of intention to sue will militate against the very core of the litigation. So, where there is a possibility that by giving notice of intention to sue, the defendant may dissipate or destroy evidence, or blow away the substratum of the plaintiffs' cause of action, the law does not place a necessity to issue a notice` of intention to sue before an action is commenced; it will be overlooked. And in such circumstances, it will be injudicious to deny a successful suitor his costs of suit merely on the basis that Notice of Intention to sue was not given. But in all other cases, I should think that Notice of Intention to sue ought to be given unless the plaintiff's interests are likely to be harmed by prior communication with the opposite party. However, I should also state here that absence of or failure to issue notice of intention to suit is just one of the considerations that the court must take into account in awarding costs.*

13. In *Mavuno Industries Limited & 2 Others vs. Keroche Industries Limited* [2012] eKLR, it was stated:

*"With respect to the issue of demand notice, I am not aware of any provision in law that renders a suit incompetent for failure to send a letter before action. I am aware that such a letter is one of the documents to be included in the documents to be filed with the complaint. However, for obvious reasons it would unreasonable to make it mandatory that in all cases a letter before action or demand notice be sent. It is recognized the due to urgency of certain matters it may be irrational to expect that a demand letter be sent before the suit is filed. Failure to send a demand notice, where the suit would have been unnecessary had such a demand been made, nonetheless, is a factor which the court may take into account in exercising its discretion in awarding costs."*

14. In addition to the holdings above, which I wholly associate with, it is important to state that going by the substance and spirit of Article 159(2) of the Constitution of Kenya, local jurisprudence and decisional law no longer countenances this kind of technical and formalist justice. Courts are more interested in delivering justice without really combing through the details of form and procedure in as much as the same is an important frame of Kenya's justice system. If an omission did not prejudice the opposing party, so as to occasion a miscarriage of justice, then a court can always overlook the said omission and delve into the crux and merits of the case, and at the end of it all, satisfy itself that justice was delivered.

15. In the instant case, I am not persuaded that the appellant was prejudiced by reason that the respondents did not serve him with the notice of intention to sue and as can be seen from the record, the suit was properly defended after it was filed by the respondents. For that reason I find this ground by the appellant lacking in merit and the court ought to dismiss the same.

16. On whether the claim by the 2<sup>nd</sup> respondent was incompetent for failure to grant written authority to the 1<sup>st</sup> respondent to conduct the suit on her behalf, the appellant submits that the 2<sup>nd</sup> respondent never testified at the hearing and, therefore, there was no material before the court to justify award of damages in her favour. The explanation or justification was, ostensibly, that the evidence that the 2<sup>nd</sup> respondent would have tendered would have been similar to that of the 1<sup>st</sup> respondent. The appellant argues that the 1<sup>st</sup> respondent ought to have taken up the conduct of the case on behalf of the 2<sup>nd</sup> respondent after complying with Order 1 Rules 12 and 13 of the Civil Procedure Rules, 2010. The appellant further submits that it was erroneous for the respondents to swear a joint verifying affidavit as in law, there was no provision for a joint affidavit. The appellant stated that an affidavit was evidence and there was no practical reality for joint testimony, and that where there are several parties or individuals involved, then it must be drawn in the first name as per Order 19, Rule 5 of the Civil Procedure Rules, 2010. The appellant added that the joint affidavit was fatally and incurably defective and incapable of supporting the claim, and that the same could not be cured under Order 19 Rule 7 of the Civil Procedure Rules, 2010 as it goes to the substance and not the form. The appellant further contends that it was also erroneous for the respondents to file a joint witness statement, and that the said witness statement did not comply with the law regarding filing of witness statements thus rendering the case incompetent.

17. Order 1 Rules 12 and 13 of the Civil Procedure Rules, 2010 provides as follows:

*“12. Conduct of suit [Order 1, rule 12.]*

*The court may give the conduct of the suit to such person as it deems proper.*

*13. Appearance of one of several plaintiffs or defendants for others [Order 1, rule 13.]*

*(1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.*

*(2) The authority shall be in writing signed by the party giving it and shall be filed in the case.”*

18. On the other hand, Order 4 Rule 2 and 3 of the Civil Procedure Rules, 2010 provides as follows:

*“(2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1) (f) above.*

*(3) Where there are several plaintiffs, one of them, with written authority filed with the verifying affidavit, may swear the verifying affidavit on behalf of the others.”*

19. While Order 19 Rule 5 of the Civil Procedure Rules, 2010 provides that:

*“5. Manner of drawing affidavit [Order 19, rule 5.]*

*Every affidavit shall be drawn in the first person and divided into paragraphs numbered consecutively which shall be confined as nearly as may be to a distinct portion of the subject.”*

20. And Order 19 Rule 7 states:

*“7. Irregularity in form of affidavit [Order 19, rule 7.]*

*The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.”*

21. From the record, the respondents' verifying affidavit and statement were deposed jointly and reads in part as:

*“We, Stanley Ajonya Kivasa and Violet Kawai Imbuga...”*

22. The Court of Appeal, in *Francis Kariu Gakumbi & another vs. Piliska Njoki Maina* [2008] eKLR, held that an affidavit can be sworn by two or more persons. In *Re the Estate of Mwangi Nganga (Deceased)* [2005] eKLR, the court stated:

*“In my understanding first person refers to a situation where a person describes himself or herself as ‘I so and so’. In that event, if the persons are more than one person describing themselves as ‘we’ does not change the first person. The difference is just that one is first person singular, the other one is first person plural. The supporting affidavit sworn jointly by John Nganga Mwangi and Joseph Njuguna Mwangi is not defective on that account. I dismiss this objection as it has no merits.”*

23. Similarly, in *Thomas Malinda Musau & 2 Others vs. Independent Electoral & Boundaries Commission & 2 Others* [2013] eKLR stated:

*“What the law requires here is for an affidavit to be sworn in the first person. A singular form of first person is ‘I’ and the plural form is ‘we.’ An affidavit basically presents facts. Facts are usually within personal knowledge. It is for this reason that every affidavit must be expressed in the first person. The question I must pose at this point is whether more than one person can swear an affidavit? It is possible for more than one person to swear an affidavit jointly especially so when they are deposing to the same facts. However, cases would differ depending on their circumstances.”*

24. I have gone through the verifying affidavit on record, which was sworn by the respondents, on 8<sup>th</sup> August 2012. Both of them depose to facts which I think are not peculiar to each of them individually, in that they were verifying the contents of the plaint, as being factually correct, and instructing the same firm of advocates to take up conduct of their case. To this end, I find that the verifying affidavit was indeed drawn in the first person, in the plural form, and that the same was proper in substance as the deponents were deposing to similar facts. It can also be said that the 2<sup>nd</sup> respondent actively participated in the proceedings, as she signed the verifying affidavit and witness statement, in support of their claim. The fact that she was not a witness in the trial did not mean that she had abandoned her case, or that the 1<sup>st</sup> respondent was testifying on her behalf. Similarly, I have gone through their joint witness statement on record, and find that the circumstances of the case were similar to both respondents. They were arrested together on the same day, jointly charged with the same offence, whose particulars were similar, and subsequently discharged together. I do not see how the appellant was prejudiced because, from the record, his advocate appeared to have been satisfactorily cross-examined.

25. On whether the trial court made an error in finding that those who stole the appellant’s mattresses were the appellant’s own employees, and not the respondents, even though the criminal case was never heard, and that no evidence availed to support such conclusion at the criminal trial, the appellant submits that the trial court in Vihiga SPMCCC No. 71 of 2012 made conclusions that were not supported by the record in Vihiga PMCCRC No. 1017 of 2010, even after it had noted that no evidence was adduced in the criminal trial. The appellant wonders where the trial court got the evidence that it was the appellant’s employees and not the respondents who stole from him. I have gone through the record in Vihiga SPMCCC No. 71 of 2012, and more so the testimony of the appellant, who testified as DW1. He stated that when 30 mattresses disappeared from his shop a second time, he suspected that it could be his employees behind it, and it was after that that he reported the matter to Vihiga Police Station, where he gave the police the names of two of his employees. He went on to testify that after a while, the police informed him that mattresses had been recovered from the respondents’ shop, and the appellant stated that he was shown receipts from the respondents, who stated that they had bought the mattresses from his shop.

26. For the trial court, in Vihiga SPMCCC No. 71 of 2012, to determine whether the prosecution was without reasonable and probable cause, it had to have a background of the events leading up to the arrest and prosecution of the respondents. That was done, when both the 1<sup>st</sup> respondent and the appellant gave their testimonies. It was from the evidence on record in Vihiga SPMCCC No. 71 of 2012, that the trial court drew the conclusion that the appellant knew that the respondents had not stolen from him, and that, as he had suspected, it must have been his employees. I do not find this conclusion by the trial court to be so much far-fetched, in light of the evidence that was before it.

27. The other issue raised by the appellant is whether the withdrawal of the proceedings against the respondents, under section 87(a) of the Criminal Procedure Code, meant that the prosecution had been terminated in the respondents’ favour. The appellant submitted in the negative, stating that under the said section, the respondents were discharged and not acquitted, and that the discharge was not absolute, in that the respondents were still liable to fresh arrest and prosecution. The respondents submitted that the charge against them was terminated in their favour, having been withdrawn under Section 87(a) of the Criminal Procedure Code, and that no criminal proceedings were instituted thereafter against them.

28. Section 87 of the *Criminal Procedure Code* provides as follows:

*“87. Withdrawal from prosecution in trials before subordinate courts*

*In a trial before a subordinate court a public prosecutor may, with the consent of the court or on the instructions of the Director of Public Prosecutions\*\*, at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal—*

*(a) if it is made before the accused person is called upon to make his defence, he shall be discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts;*

*(b) If it is made after the accused person is called upon to make his defence, he shall be acquitted.”*

29. The Court of Appeal, in *Paramount Bank Limited vs. Vaqvi Syed Qamara & another* [2017] eKLR , stated:

*“The favourable termination requirement of criminal charges may be satisfied in various ways depending on how the proceedings are concluded in favour of the accused person. For instance, by acquittal, a discharge or a withdrawal.*

*Courts in this jurisdiction have relied, over the years on the following passage from the case of Egbema v. West Nile Administration [1972] EA 60 for the foregoing proposition;*

*“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...”*

*Although the withdrawal of a charge under Section 87 is technically not an acquittal and does not operate as a bar to subsequent proceedings against an accused person on account of the same facts, guided by the foregoing holding, we note in this appeal that five years after the charges were withdrawn on 30th July, 2012, ostensibly pending the arrest of Lawrence Atieno, no fresh charges have been preferred against the 1st respondent. There was no indication whether Lawrence Atieno was ever arrested and charged. The discharge of the respondent, therefore amounted to a termination of the prosecution in his favour.”*

30. With regard to the same issue, the court, in *Stephen Gachau Githaiga & another vs. Attorney General* [2015] eKLR, said:

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

31. The court, in *Bobby Macharia vs. Attorney General & 3 others* [2018] eKLR, expressed similar views. So did the court in *Chrispine Otieno Caleb vs. Attorney General* [2014] eKLR, where it was said:

*“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. “*

32. In the instant case, the charge that the respondents faced in Vihiga PMCCRC No. 1017 of 2010 was withdrawn in the year 2011. There was no indication that they were going to be re-arrested and re-charged on account of the same facts. By the time the trial court in Vihiga SPMCCC No. 71 of 2012 was delivering its judgment in 2014, the respondents still had not been re-arrested and re-charged. Going by the said circumstances and the authorities cited above, the discharge of the respondents herein amounted to a termination of the criminal case that they faced, and that the said discharge could be equated to be an acquittal. A discharge under section 87 of the Criminal Procedure Code is one of the ways that a prosecution can be terminated in favour of an accused person, and that that sufficed as proof by the respondents that the prosecution terminated in their favour.

33. The appellant raised the related issue that the trial court had exceeded its jurisdiction in observing that the court in Vihiga PMCCRC No. 1017 of 2010 ought to have marked the charge to have been withdrawn under section 202 of the Criminal Procedure Code, rather than under section 87(a). I would agree. The mandate of the trial court in Vihiga SPMCCC No. 71 of 2012 was limited to handling the case before it, based solely on the record in Vihiga PMCCRC No. 1017 of 2010. It was not open to it to venture into what the court in Vihiga PMCCRC No. 1017 of 2010 ought to have done or not done, for the trial court in Vihiga SPMCCC No. 71 of 2012 was not sitting on appeal on the decision in Vihiga PMCCRC No. 1017 of 2010. However, that issue has no effect on the appeal herein as it does not go to the core of the matter.

34. There is also the issue that the appellant, as a complainant in Vihiga PMCCRC No. 1017 of 2010, was not a prosecutor. That issue was raised with respect to the conclusion by the trial court that the appellant knew at the time the respondents were charged in court that they had not stolen his mattresses. The conclusions drawn by the trial court were rather robust, and are of kind that the trial court in Vihiga SPMCCC No. 71 of 2012 could not draw given that the available evidence was not tested at the trial in Vihiga PMCCRC No. 1017 of 2010, and the court was only working with the evidence that ought to have been presented in Vihiga PMCCRC No. 1017 of 2010. Be that as it may, criminal cases are always initiated at the behest of the complainant, that is the person who originates the case by making a report with the police, who then carry out investigations, conduct arrests, formulate charges and initiate them in court. The complainant is the driver of the charge, and without his input the matter cannot possibly move forward. When he testified in Vihiga PMCC No.71 of 2012, the appellant stated that he was with the police when the respondents were arrested at Kimilili and mattresses removed from their shop. The goods were taken to the Mbale Police Station, where he had made a report. The respondents produced receipts, which he acknowledged had been issued by one of his employees, while other receipts he said were from a receipt book whose pages had been plucked, and he could not tell who did it. He stated that the receipts and receipt books were taken away by the police. He recorded a statement with the police, and it would appear that that statement was the basis of the prosecution that was mounted against the respondents. He pleaded ignorance of the charges, saying he was never told that the police had taken anyone to court, neither was he bonded to appear in court.

35. The appellant made a report of a theft of his goods with the police. The police traced goods from his shop to the shop of the respondents, who produced receipts, that the appellant confirmed were issued from his receipt books. The receipts were taken away by the police, and he recorded a statement. The goods were removed by the police from the shop of the respondents to the police station. Against this background, the appellant cannot be heard to say that he was not the initiator of the proceedings or that he did not prosecute the respondents. It was his report to the police, his statement that he recorded with the police and the goods and receipts from his shop that formed the basis of the charge. He clearly cannot wash his hands of the matter. He cannot plead that he did not initiate the process for he did not, after the recovery of the goods and production of the receipts withdraw his report from the police. He gave his statement to the police, and allowed them to take away the receipts and the receipt books. As a man of the world, a businessman or trader to boot, he must have known what the police were to do with those items. I am, therefore, not persuaded that he did not know that a criminal charge had been laid against the respondents.

36. Related to that is the submission that it was the respondents, through their advocate, who applied for the termination of the case. In the first place, it does not matter who caused the termination of the prosecution. It is a matter which is neither here nor there. What matters is that the prosecution terminated in favour of the respondents. Two, the record does not bear the appellant out. The respondents did not apply for termination of the matter. From what I can see on the record, in Vihiga PMCCRC No. 1017 of 2010, the trial court had allowed a last

adjournment, on 26<sup>th</sup> July 2011, and fixed the matter for hearing on 20<sup>th</sup> September 2011. Come 20<sup>th</sup> September 2011, the prosecution was not ready, the police file was not in court, neither were the witnesses. The respondents opposed any suggestion of an adjournment, and said that the prosecution could withdraw the charges under section 82(a) of the Criminal Procedure Code. The court declined the adjournment, and ordered that the matter proceed, whereupon the prosecutor applied to withdraw the charge under section 82(a), which the court obliged. It cannot, therefore, be said that the termination was instigated by the respondents. The prosecution had a last adjournment, and were seeking another adjournment. The respondents bore no responsibility whatsoever for the collapse of the prosecution.

37. The appellant has isolated two receipts and argued that they were suspect, and that the trial court ought to have scrutinized that, and submitted that they were among those that appeared to have had been plucked from his receipt books. Ideally, the genuineness of the receipts was a matter that ought to have been tried in Vihiga PMCCRC No. 1017 of 2010, where the burden of proof is higher, rather than in the civil case, where the burden of proof is lower. The appellant had a chance to prove the lack of authenticity of the two receipts in Vihiga PMCCRC No. 1017 of 2010. He could not possibly do so in the civil trial. Furthermore, he admitted that the receipts were in fact from his shop, the only challenge being that, for some of them, it appeared that the duplicates had been plucked from the books, and he could not ascribe responsibility therefor to the respondents. There was, therefore, no basis upon which the trial court in Vihiga SPMCCC No. 71 of 2012 could rule that the respondents had obtained them illegally. The trial court was entitled, on a balance of probability, to rule that there was no probable cause for the prosecution of the respondents given that they had been issued with receipts upon the purchase the alleged stolen goods. The burden in criminal cases is always on the prosecution to prove any fact beyond doubt, and accused persons are only required to offer explanations of how they came to be in possession. It was up to the appellant to prove that the goods were with the respondents' irregularly, which he should have done at the criminal trial. The issue of the two receipts having been stolen from the appellant was not before the criminal court. He conceded that he never reported the loss of the receipts to the police, and, therefore, he cannot be heard to question their genuineness at the civil court.

38. On the vagueness of the judgment, in not being clear on whether the award of Kshs. 200, 000.00 to each of the respondents or to both. I would agree, the trial court should have pronounced this in clearer language. My understanding of it is that it was meant to be an award to the two respondents jointly. It was submitted that the award must be based on some evidence of degree of injury or loss occasioned. This, I believe, calls for a consideration of what ought to have been taken into account in assessing damages for malicious prosecution.

39. The considerations to be taken into account were addressed in *Dr. Willy Kaberuka vs. Attorney General* [1994] II KALR 64, where the court said:

*"The plaintiff suffered injury to his reputation ... He must have suffered indignity and humiliation. He is also entitled to recover damages for injuries to his feelings especially the responsibility 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 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 why the defendant is responsible."*

40. For the appellate court to interfere with the award made by the trial court, the general principle is that assessment of damages is within the discretion of the trial court, and the appellate court should only interfere with the quantum of damages awarded by the trial court where the trial court took into account irrelevant factors or left out a relevant factor or the award was excessive or where the assessment was not based on any evidence. See *Kemfro Africa Limited t/a Meru Express & Another vs. AM Lubia and Another* [1982-88] 1 KAR 727, *Peter M. Kariuki vs. Attorney General* [2014] eKLR, *Bashir Ahmed Butt vs. Uwais Ahmed Khan* [1982-88] KAR 5, *Johnson Muendo Waita vs. Odillah Mueni Ngui* [2018] eKLR, among others.

41. Did the trial court take any considerations into account before arriving at the figure of award of damages? The court took into account the period the respondents spent in custody before arraignment in court, and also the time the prosecution lasted. It also considered a number of decisions where courts had previously made awards for malicious prosecution. It cannot be said that the trial court did not consider some factor or other before arriving at the award that it did arrive at, but it could have done better. It should have considered the other factors mentioned in *Dr. Willy Kaberuka vs. Attorney General* (supra) and *Nzioa Sugar Company Limited vs. Fungututi* [1988] eKLR, more particularly the elements of defamation and humiliation.

42. The one element of malicious prosecution that must be proved has not been very clearly argued by either side. It must be established that the prosecution was malicious, in the sense that it was founded on spite or malice or ill will. This is what the Court of Appeal in *Nzioa Sugar Company Limited vs. Fungututi* (supra), said about it:

*"... in my opinion, the case of malicious prosecution must founder (sic) on absence of proof of malice or ill will ... It is trite learning that acquittal, per se, on a criminal case charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill will must be proved against the prosecutor."*

43. In *Stephen Gachau Githaiga & another vs. Attorney General* [2015] eKLR, it was said:

*"... Malicious prosecution, as the label implies, is an intentional tort that requires proof that the defendants conduct in setting the criminal process in motion was fueled 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."*

44. The question then is, was the prosecution in Vihiga PMCCRC No. 1017 of 2010 actuated by malice? I have looked at the record carefully. The 1<sup>st</sup> respondent was clear that their arrest by the police was carried out after the appellant led them to his shop, alleging that he had stolen his mattresses. Mattresses were recovered, which he said had been bought from the appellant's shop, and he showed the police receipts that had been issued to him upon the purchase. On his part, the appellant said that when he made his report to the police, he did not

mention the names of the respondents as his suspects. The names he gave were of his employees. The police thereafter, presumably after investigation, took him to Kimilili, to the shop of the respondents, where mattresses were found. He conceded to being shown the receipts, and confirmed that they were from his shop, although he questioned the authenticity of two of them. I have carefully examined the testimony of the respondent, and I do not see any mention of any malice or spite or ill will or ill motive on the part of the appellant in making his report of theft of his mattresses to the police. All what he said is that the appellant gave false information to the police, but he did not demonstrate how that information was false, nor explain why the appellant found it necessary to give the false information. Indeed, the nature of the information that the appellant allegedly gave to the police, which the respondent described as false, was not disclosed, for the relevant police records were not produced, such as the statement that was recorded from the appellant or the report as recorded in the police occurrence book or the log in the investigation diary.

45. I do not think that the respondents were able to prove the element of malice or ill will or spite on the part of the appellant or the police. The trial court did not address itself to this all important factor in malicious prosecutions. Indeed, it is the most critical since the tort of malicious prosecution is built around malice. The trial court expended quite some time, and effort, in determining whether the elements that the prosecution had been initiated by the appellant, whether the criminal case terminated in favour of the respondents and whether the prosecution was instituted with probable cause, had been established. It did not however, advert at all to the fourth element, that the prosecution had been actuated by malice, which is the foundation of the tort.

46. In view of everything that is have stated above, I have come to the conclusion that the appeal herein should succeed, to the extent that the respondents did not establish that their prosecution was actuated by malice and the fact that that was not considered by the trial court. The appeal herein is accordingly allowed. The appellant shall have the costs.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 30<sup>TH</sup> DAY OF APRIL, 2020**

**W. MUSYOKA**

**JUDGE**