REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL APPEAL NO. 2 OF 2016

PYRAMID HAULERS LIMITED...........................APPELLANT

VERSUS

JAMES OMINGO..1ST RESPONDENT

VINCENT KINYUA..2ND RESPONDENT

GEORGE ORLANDO.....................................3RD RESPONDENT

THE HON.ATTORNEY GENERAL...............4TH RESPONDENT

JUDGEMENT

This Appeal emanates from CRMCC No.11 of 2007 Kajiado where the 1st Respondent sought damages for malicious prosecution.

The cause of action was triggered by the Nairobi Criminal Case No.36 of 2005, the judgement of which was read on 17th of November 2015 in favour of the Respondent to which the Appellant launched a memorandum of Appeal on the 22nd of January 2016.

BRIEF FACTS AT THE TRIAL

James Omiga Nyaaga, the 1st Respondent herein filed a case against the Appellant and two others jointly and severally vide plaint dated 23.1.2007 at Kajiado Chief Magistrate Court. The Civil claim in CMCC 11 of 2007 was premised on the facts that on or about 30.12.2004, 5.1.2005 and 6.1.2005 the Appellant's agent, servant, employee or director, wrongfully caused the 2nd Respondent and 3rd Respondent police officers attached to Kitengela Police Station to arrest the Applicant/Plaintiff and took him to custody on trumped up charges that he had stolen ten (10) tyres being the property of the Appellant.

Subsequently the case which was decided after a full trial entered judgement against the defendants/respondents jointly and severally on liability. The Learned Trial Magistrate awarded Kshs.500, 000/- as specials together with costs and interest at court rates.

At the hearing of the Application directions were issued to have the case disposed off by way of written submissions. The Appellant filed submission on the 30th August 2018 through Chigiti and Chigiti Advocates.

THE APPELLANT'S CASE.

The Appellant's position as depicted in its submissions is that the 1st Respondent was a marketing manager for the Appellant and was the supervisor in charge of the guards for the Company. By virtue of his position, the 1st Respondent was entrusted to be in charge of the security of the Appellants property and when the tyres belonging to the Appellant went missing, the 1st Respondent was expected to give an explanation for the occurrence. Failure by the 1st Respondent to give an explanation for the missing tyres prompted them to report the matter to the police who then commenced investigations on the same. The 1st Respondent was arrested by the police as part of investigation and subsequently arraigned in court. It's not in dispute that the 1st Respondent herein had been prosecuted at the institution or that the prosecution ended in the 1st Respondent's favour. However, the Appellant disputes the 1st Respondent's claim of malice and prosecution without reasonable and probable cause and that is what the 1st Respondent failed to prove at the lower court. The Appellants placed reliance on the case of ***John Ndeto Kyalo v Kenya Tea Development Authority & another (2005) eKLR*** page 2, in support of its case.

The Appellant is of the view that the 1st Respondent at the trial failed to show that the Appellant's actions were motivated by malice, ill motive and or without any justification whatsoever. It is for these reasons the Appellant submitted that the trial Magistrate erred in finding

that the arrest and prosecution of the 1st Respondent were actuated by malice. The Appellant cited the decision in ***Civil Appeal No.10 of 2016 Kenya Power & Lighting Co. Ltd v Florence Musau Nthenya & Another 2017) eKLR page 4***, cited ***Standard Charted Bank Kenya Ltd Vs Intercom Services Ltd and 5 others Civil Appeal No. 37 of 2003***, where it was held that:-

> ***"Where a complainant reports a commission of a crime to the police and police upon independent investigations initiate a prosecution; the reporter is not liable for the tort of malicious prosecution unless the report is made falsely and maliciously."***

The Appellant opposed the 1st Respondent's testimony and submission that it was the police who arrested, detained him and failed to give him any reasonable cause for the detention. Reliance was placed on the decision in ***Civil Appeal No.27 of 2014 Steven Gachau Githaiga & Another vs Attorney General (2015) eKLR page 3,*** where malicious was defined as an action for damages brought by one against whom a civil suit or criminal proceeding has been unsuccessfully commenced without probable cause and for a purpose other than that of bringing the allegation offender to justice. It was the Appellant's submission that there was probable cause in reporting the theft to the police and being in charge of the investigations the police must have seen it fit to have the 1st Respondent arrested being the supervisor of the security guards.

It was also the Appellant's contention that it was not in charge of the investigation into the theft of the tyres. It was the investigating officer and therefore the Appellant should have not have been found liable for malicious arrest and prosecution all of which were carried out by the police. The Appellant cited the case of ***Steven Gachau Githaiga & Another V AG (Supra)*** in support of its argument.

The Appellant also faulted the trial court pointing out that no any justification was given for finding the Appellant herein jointly and severally liable together with the 2nd to 4th Respondents. It was further contended that the court did not fault the Appellant for reporting the crime, rather , it emphasized that proper investigation was not done evidenced by the fact that the investigating officer did not give evidence in court to substantiate the charge brought against the 1st Respondent. A portion of the trial magistrate's judgement was quoted to elaborate this contention.

In concluding its submissions, the Appellant argued that the burden of proof resides with the 1st Respondent who made the allegations of malicious prosecutions. Further that, it's clear that he failed to make out a case against the Appellant but instead made a case against the police and prosecution who conducted the investigation and subsequent arrest and prosecution respectively. Based on the foregoing reasons, the Appellant prays that the appeal be allowed the judgement of the lower court be set aside with costs.

The 1st Respondent responded to the appeal by way of submissions filed on the 20th day of November 2018. It was asserted in the submissions that in case of malicious prosecution, it must established that the plaintiff was prosecuted by the defendant, that the prosecution was determined in his/her favour, that the defendant in prosecuting him acted without reasonable and proper cause and that the prosecution was actuated by malice. The burden of proof is balance of probabilities.

The Counsel for the 1st Respondent contended it was the Defendant/Appellant who orchestrated his prosecution as depicted by the trial record. The 1st Respondent went to the police to report the theft to the police under the instruction of Mr. Zaddock, Mr. Peter Njenga and the human resource manager and had the matter reported for the second time. At that time the police were already handling the matter and he had aided them in arresting two suspects. He pointed out that oral testimonies by the said Mr. Zaddock as the Director and the various supporting affidavits by Mr. Peter Njenga as head of Human Resource on record show that internal investigations were first done by the said two on behalf of the Appellant. He then instructed the 1st Respondent to report the matter to the police and later aid the police. When the suspects were arrested, he was instructed by the Respondent to record statements where he was arrested upon surrendering himself to the Police station. On that day, Mr. Zaddock and his mechanic were already at the Police Station when he arrived. He did not even record a statement of evidence to give his side of the story which Counsel for the 1st Respondent termed an elaborate hatch to prosecute him.

It was further contended that the police could have simply arrest a company officer who has come to Report a theft and who aids in investigations towards arresting the culprits without probable cause or tip off. Counsel relied on the case of ***Gitau vs. Attorney General (1990) eKLR*** in support of his contention.

Counsel for the 1st Respondent also brought to the attention of the court that the 1st Respondent was the marketing manager and not the security manager, he was not in the office at the time the alleged crime occurred. He contended that the watchmen watching over the Appellants goods on the date of the theft were released without any investigations being made whatsoever. There were no internal investigation, he had no association with the stealing of the goods since they were stolen at night and he was not a shift worker. Further that he reported the matter exclusively as an agent to the Appellant holding the position of supervisor. Reliance was placed on the cases of ***Gitau v East African Power & Lighting Limited (1996) eKLR 365, Kariuki vs East African Limited & Another (1996) eKLR 683*** to advance the argument that courts have held that a person who sets in motion without reasonable and proper cause, the legal machinery that ultimately leads to prosecution of the complainant, can be deemed to have prosecuted him.

Further reliance was placed on the cases of ***Zablon Mwaluma kadori vs. National Cereals & Products Board (H.C.C.C. No. 152 of 1997 at Mombasa) and Susan Mutheu Muia v Joseph Makau Mutua (2018) eKLR*** in support of 1st Respondent's contention.

The Counsel for the 1st Respondent argued that the action of the 1st & 2nd Defendant as interpreted by the trial court were undoubtedly malicious. He cited the case of ***G.B.M Kariuki vs Attorney General (2016) eKLR & Justice G V Odunga in Christine Otieno Caled vs Attorney General (2014) eKLR*** in support of that argument. The 1st Respondent further cited the case of ***Kagare vs Attorney General (1969) EA 69*** which sets out the test as to whether a prudent and cautious man would point to a finding of malice in the analysis of facts to find the arrest probable. It was also contended that the prosecution acted without Reasonable or probable cause and the case of ***Thomas Mutsotso Bisembe vs Commissioner of Police & Another and Gitau vs AG (supra)*** in support of that contention.

Lastly the counsel for the 1st Respondent urged the court to dismiss the appeal with costs to the 1st Respondent.

As this is a first Appeal, I'm obliged to subject the evidence on record to my own evaluation and assessment and come up with an independent decision on the issues raised before me. I shall also give due regard to the findings and determinations arrived at by the Learned Trial Magistrate who had the added advantage of physically seeing and listening to the witnesses testify before him. (**See Okeno v R (1972) EA 32**).

ANALYSIS AND DETERMINATION.

The main cause of action herein is that of malicious prosecution. The law on this tort is well settled in the case of **Sammy Kiprotich Tangus vs Attorney General [2015] eKLR** where the judge referred to the case of **Muringa vs the Attorney General [1979] KLR 138.** The essential elements of malicious prosecution are as follows:-

> ***(a) The Plaintiff must show that the prosecution was instituted by the Defendant or by someone for whose acts he is responsible.***
>
> ***(b) The prosecution was instituted without reasonable and probable cause.***
>
> ***(c) The prosecution was actuated by malice.***
>
> ***(d) The prosecution ended in favour of the Plaintiff.***

The law as regards the tort of malicious prosecution is now well settled. In the case of **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".***

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".

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".***

On the issue of whether the prosecution determined in the plaintiff's favour, it is not dispute that Nairobi Criminal Case No. 36 of 2005 was heard and determined in favor of the 1st Respondent. He was acquitted under Section 210 of the Criminal Procedure Code for failure by prosecution to establish a prima facie case against him after he has been detained in custody for about eleven months. This means that the trial court in the aforementioned criminal case found the 1st Respondent without a case to answer hence he had not been put to his defence which evinces the position that the criminal court considered the prosecution's evidence to be of no value whatsoever as to establish a prima facie case. 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 of no case to answer was clearly a termination in favour of the Plaintiff.

Further, this in my view supports the 1st Respondent's argument that the prosecution had no reasonable and probable cause for the decision to charge the 1st Respondent with the offence of theft.

On whether the prosecution was instituted by the defendant, the evidence on record suggest that theft of some tyres happened at night when the premises of the Appellant were under the protection of two watchman whose names have not been given herein. The Company Director, Mr Zoddock and the Head of Human Resource Mr. Peter Njenga instructed the 1st respondent to report the matter and aid the police in the investigations and he complied. The said Company Director and Head of Human Resource conducted internal investigations and the 1st Respondent was instructed to report the matter. At the time the 1st Respondent had already helped the police to arrest two suspect who were the watchman the night the theft took place. Upon reaching the police station, the 1st respondent was arrested and when he arrived Mr. Zoddock and his mechanic were already at the police station. The 1st respondent never recorded a witness statements at the police station. He was later charged with theft and arraigned in court. After his arrest, the watchmen who had been arrested in connection with the theft were released without being charged of the alleged theft.

In light of the above evidence, the assumption is that investigations by the police are done independent of control or direction of the Complainant. Whether to charge or prosecute anyone with any reported crime is the independent decision of the police investing the matter as was held in **Nyaga vs Mucheke Civil appeal No. 59 of 1987 - Nyeri**. In that case, the Court of appeal pointed out –

> **"The appellant having reported to the police about the Respondent's action of damaging his crops, the police took over the matter to investigate the Respondent for a possible offence… once the appellant gave the report, he ceased to have anything to do with the matter…."**

However, the courts have over the years maintained the position that a person who sets in motion without reasonable and proper cause, the legal machinery that ultimately leads to the prosecution of the plaintiff (1st Respondent in this case), can be deemed to have prosecuted him. ***See Gitau Vs East African Power & Lighting Limited (1996) KLR 365 and Kariuki vs African Limited & Another (1996) KLR 683.*** In this case, I don't find it to be coincidence that the 1st Respondent was instructed to go and report the theft for the second time and upon arrival at the police station he was arrested and detained in custody without recording any statement. Further that by the time he arrived at the police station, the same person who send him to the police station to report had already arrived. It is therefore clear from the circumstances of the case that Mr. Zaddock propagated in arrest on behalf of the Appellant.

Further, the circumstances of the case suggest a very clear connivance between the Appellant and the police officers who arrested and detained the 1st Respondent. This is seen by the fact that the 1st Respondent was arrested and detained without recording any statement to give his side of the story and no investigation was conducted. When the 1st respondent was arraigned before the criminal court, no single piece of evidence was tendered by the prosecution which link the 1st respondent with the offence of the theft that he faced. The two watchman who had been on duty the day the theft occurred were released without being tried before court and no explanation was given to explain why that happened. In the premises, I am of the view that the Appellant, second, third and fourth respondents took part in the prosecution of the 1st Respondent.

Was the Plaintiff prosecuted without reasonable and probable cause?

The test for that which constitutes reasonable cause was set by Rudd, J in **Kagane –vs- Attorney General (1969) EA 643, citing Hicks vs. Faulkner [1878] 8 QBD 167 at 171, Herniman vs. Smith [1938] AC 305 and Glinski 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 judges 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."***

Further, in **Simba vs. Wambari (1987) KLR 601** the Court also endeavored to define what constitutes a reasonable and probable cause as:

> **"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"**

The case of Samson John Nderitu Vs the Attorney General 2010 eKLR is also relevant on the issue at hand thus;

> ***"It is trite and this court has judicial notice of the fact that before an accused person is taken to court, and arraigned in court for criminal prosecution, the prosecuting authority namely the police or whatever unit, whose function fall under the office the defendant, usually carry out investigations, record statements from potential witnesses and analyzed the facts to determine if the facts disclose an offence before arraigning such a person in a court of law."***

According to ***Halsbury's Laws of England,*** **4th Edition - Reissue, Vol. 45 (2).**

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

On this limp, there is no doubt that the 1st Respondent was arrested, detained and charged for no apparent reason. Given the above guidelines by the case law, there was no basis for the arrest and detention let alone prosecution of the 1st Respondent without any reasonable suspicion or any piece of evidence linking him to the alleged theft. What is startling is that after he was arrested and detaining him for 11 months, he never recorded a statement with the police for purposes of giving his side of the story. Further, no investigations were conducted in respect of the said arrest and the police proceeded to charge and prosecute him with no evidence whatsoever. To my mind, it was an unwarranted arrest, detention and prosecution. There was no probable or reasonable cause for arresting him hence the conclusion I make is that it was actuated by malice as the police officers intended to please their master, the Appellant.

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. The Court is guided by **Nairobi High Court Civil Appeal No. 595 of 2000 Socfinaf Kenya Limited vs Peter Guchu Kuria (unreported)** where it was stated –

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

In the case of ***Chrispine Otieno Caleb v Attorney General [2014] eKLR,*** the court observed that:-

> ***"Malice, however, can either be express or can be gathered from the circumstances surrounding the prosecution. A prosecution can either be mounted based on an offence committed in the presence of law enforcement officers or by way of a complaint lodged by a person to the said officers or agencies. However, the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. I say ordinarily because the mere fact that the version of one of the parties is not considered does not make the subsequent prosecution malicious. However, where the police deliberately decide not to take into account the version of the suspect and acts on a story that eventually turn out to be improbable and which no ordinary prudent and cautious man would have relied upon that failure may constitute lack of reasonable and probable cause for the purposes of malicious prosecution. On the other hand it would be obviously absurd to make a defendant liable because matters of which he was not aware put a different complexion upon facts, which in themselves appeared a good case for prosecution. But neglect to make a reasonable use of the sources of information available before instituting proceedings would be evidence of want of reasonable and probable cause and also malice. It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but whether there is a reasonable and probable case for a prosecution. Circumstances may exist in which it is right before charging a man with misconduct to ask for an explanation but no general rule can be laid down. In the present case as already held hereinabove the circumstances from which the court can deduce that the arrest and arraignment of the plaintiff was probably justified have not been disclosed to the court. Was for example the plaintiff's version sought with regard to the complaints, if any, made against him? In the absence of any evidence as to the facts and circumstances upon which the defendants relied, the court can only conclude that there was no probable and reasonable cause for charging the plaintiff and that constitutes malice for the purposes of the tort of malicious prosecution."***

In the instant case, Appellant disputes the 1st Respondent's claim of malice and prosecution without reasonable and probable cause and that is what the 1st Respondent failed to prove at the lower court. In my view, the arrest, detention and prosecution of the 1st Respondent was undoubtedly malicious. There was no evidence in the criminal court to implicate the 1st Respondent hence there was no reason whatsoever to arrest, detain and charge him. As I have mentioned earlier there is clear evidence of connivance between the Appellant's agent Mr. Zoddock and the police officers that arrested the 1st Respondent. That is the circumstances which led to his arrest show that there communication between the police officers and him since he was at the police station when the 1st respondent was arrested. It means the appellant upon setting in motion the prosecution to prosecute Mr. Nyaaga, provided no evidence that implicates him to warrant arrest and prosecution. That to me can only be classified as a malicious act.

Further, as held in the above court decisions, the lack of reasonable or probable cause to prosecute the 1st Appellant can also be inferred to be prima facie evidence of malice subject to the circumstances of the case.

In the instant appeal, the historical background on the arrest, detention, and proofing a criminal case against the 1st respondent is implicit of the use of coercive powers of state actors without reasonable and probable cause against innocent citizens. The critical feature of this appeal is that the trial court that the proceedings instituted by the appellant were not bona fide nor initiated in good faith. The prosecution case accepted by the state through the complaint made by the appellant was to put in motion the process of the law without any reasonable or probable cause.

In all the circumstances of this case I agree with the 1st respondent pleas that the criminal case as put together by the appellant using the state machinery was fashioned and prosecuted through the courts maliciously and not to do justice. This is the context of the arrest, detention and malicious prosecution no doubt the 1st respondent was entitled of his liberty, anxiety and reputation.

I recognize that the trial court in its considered judgement awarded general damages of 500,000 for the tort of malicious prosecution and special damages of Kshs. 95,000 much of the jurisdiction of an appellate court on the decision of a trial court in this area is denied from the decision and principles emaciated in the case of ***Mbogo v Shah 1968 EA 93.*** The general principle is that a superior court does not interfere with the exercise of discretion of a trial court save for the clear principles illustrated in the above decision.

Having held as I do taking all matters into consideration the 1st respondent was entitled to what is in the circumstances of the situation is a fair compensation against the appellants. There is no reason in this appeal to warrant departure from the laid down principles to interfere with the award of damages. To me the 1st respondent is not duly entitled to damages for the appellant's malafides action but for the malicious arrest, detention and prosecution. For any person, authority, agency, state officer to put into force the process of the law maliciously which ends up with a malicious prosecution is wrongful punishable by way of an award of damages. The upshot is that the appeals turn out as being dismissed on all grounds advanced by the appellant as against the respondent.

ORDERS

In view of the above arguments on liability this court finds no reason to interfere with the findings of the trial court.

- ***The Appeal has no merit and the same stands dismissed.***
- ***That award of general damages in the sum of Ksh. 500,000/= and 95,000 special damage to the plaintiff are hereby up held.***
- ***That the Appellant shall pay the costs of this appeal.***
- ***That the Appellant and the second, third and fourth Respondent shall jointly and severally pay the costs of the lower court to the first Respondent.***

It is so ordered.

Dated, signed and delivered in open Court at Kajiado this 30th day of January, 2019.

…………………………….

R. NYAKUNDI

JUDGE

Representation:

Mr. Senteu for Musyoka for the 1st respondent

Mr. Mungatana for Chigiti for the appellant