REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO.11 OF 2015

KIOKO MWAKAVI MAKALI.....APPEALLANT

VERSUS

1. ATTORNEY GENERAL

2. CHARLES MACKENZIE NDOLA.....RESPONDENTS

(Appealing from the judgment of the Chief Magistrate's Court at Machakos (C.K Kisiangani, RM) dated 10th December 2014 in CMCC No.773 of 2012).

KIOKO MWAKAVI MAKALI….……..PLAINTIFF

VERSUS

1. ATTORNEY GENERAL

2. CHARLES MACKENZIE NDOLA……..DEFENDANTS

JUDGEMENT

1. The Appellant herein who was the Plaintiff in the lower court, by a plaint dated 14th day of September, 2012 and filed on 17th September, 2012 sued the Respondents herein, as Defendants for special damages in the sum of Kshs 40,000/=, general damages, costs and interests arising from the tort of malicious prosecution.

2. According to the Respondent, on or about 16th December, 2010, the 2nd Respondent without any reasonable or probable cause and/or lawful justification and/or excuse and knowing the same to be untrue and/or having reason to believe the same to be untrue, maliciously placed information before police officers at Machakos Police Station to the effect that the Appellant had cut his trees.

3. As a result of the said report the plaintiff pleaded that he was unlawfully arrested by police officers from Machakos Police Station and on 5th January, 2011 arraigned in court charged with the offence of stealing contrary to section 275 of the ***Penal Code***. Alternatively, he was charged with being in possession of stolen goods contrary to section 322(2) of the ***Penal Code*** in Criminal Case No. 37 of 2011.

4. However, it was pleaded that on 22nd September, 2011 the Appellant was acquitted of both charges under section 210 of the ***Criminal Procedure Code***. The Appellant proceeded to particularise the facts which in his view constituted malice.

5. It was the Appellant's case that as a result of the foregoing his reputation was harmed and he suffered mental anguish and was put into expenses in defending himself as a result of which he suffered loss and damages hence the suit.

6. In his evidence, the Appellant, who was the sole witness in his case, testified that on 5th January, 2011, he was at his place of work at Machakos Rescue Centre when police officers in the company of the 2nd Respondent picked him up and informed

him that they were carrying out some investigations following a report by the 2nd Respondent on 26th December, 2010 that the plaintiff had cut down his 14 trees. According to the Appellant this allegation was not true and was in fact malicious.

7. The Appellant was then taken to Court and charged in Machakos Criminal Case No. 37 of 2011 which case was dismissed. The Appellant exhibited copies of the proceedings and judgement in support of his case and testified that in that case he was represented by an advocate whom he paid Kshs 45,000/-. Upon his discharge, he served the defendants with a notice and commence the proceedings in the lower court seeking compensation for the loss suffered by him.

8. According to the Appellant, he was arrested for cutting down trees on his father, **Makau Muindi's** land Muputi/Kiima Kimwe/102. He therefore denied that he was on the 2nd Respondent's land and stated that the 2nd Respondent lied to the police. Prior to this report, the Appellant disclosed, there was a case being number 1358 of 2009 in which the 2nd Defendant was claiming that the Plaintiff wanted to cut him with a *panga* but the same was dismissed. It was the Appellant's case that the case before the trial court was brought about by the dispute between the Appellant and the 2nd Respondent and that there was no valid reason for doing so. He therefore blamed the 2nd Respondent for lying to the police but also blamed the police for not doing their investigations before arresting him and charging him on a baseless case.

9. In cross examination on behalf of the 1st Respondent, the Appellant conceded that the police were brought by the 2nd Respondent who showed the police the appellant and that the police did not know him prior to that date. He however insisted that the police did not investigate the matter and arrested him though he was not on the wrong. He however admitted that the police were doing their work.

10. In answer to the questions posed to him on behalf of the 2nd Respondent, the Appellant stated that the report was made by the 2nd Respondent to the police who prosecuted him. It was his evidence that they did not go to the place where the trees were cut but just went home. It was his evidence that it is the police who undertakes investigations and not the 2nd Respondent. According to the Appellant the land in question had not been sold but only the boundary was straightened. He disclosed that there were succession proceedings in which the 2nd Respondent was one of the claimants but the matter had not yet been decided on. He however conceded that it was the 2nd Respondent who was cultivating the land though it was not his. He however stated that it was not wrong to report to the police.

11. In re-examination, the Appellant stated that the criminal court found that the 2nd Respondent had no land there and did not see the appellant cutting the trees. He therefore made a report without any basis. He however admitted that the trees were found at his home and while admitting that it was the responsibility of the police to do investigations, it was his case that the 2nd Respondent the mater without any evidence.

12. At the close of the Appellant's case, the 2nd Respondent testified that he knew the Appellant and that the Appellant's father was his neighbour as they were from the same area. According to him there was a piece pf land which was sold to him by the Appellant's father in 1986 whose purchase price he paid in full. He produced the agreement as exhibit.

13. In cross examination the 2nd Respondent admitted that he reported to the police and that the Appellant was arrested and charged but was acquitted and that he did not appeal. He stated that the agreement did not refer to the parcel of land being sold. He however insisted that the Appellant's father was the one who sold to him the parcel of land and that one **Justus Mutua** was present, but he was since deceased. According to the 2nd Respondent the land was registered in the name of the Appellant's father and he was unaware of the existence of letters of administration, though he had objected to the issuance of letters of administration to the Appellant. It was his evidence that though the Appellant was charged twice, he was acquitted on both occasions.

14. It was the 2nd Respondent's case that he wrote to the 2nd Respondent to transfer his portion of the land to him and that they marked the boundaries though it was not surveyed. He however admitted that the land was still registered in the names of the Appellant's father.

15. In re-examination he explained that he went into the occupation of the land in 186 and that the land has trees which were cut leading to the complainant to the police who charged him in a criminal case in which he testified.

16. In her judgement, the Learned Trial Magistrate, based on **Kagame & Others vs. AG & Another [1969] EA 643** and the evidence adduced by PW1 and PW2 in the criminal case found that the Appellant herein had failed to prove that the Respondents acted without reasonable and probable cause since as much as the evidence in the criminal case only showed that 3 stumps had been cut, it was not in doubt that the 2nd Respondent's trees were cut. The Court therefore found that the Respondents had enough reason to prosecute the Appellant and also testify against him. Based on **James Karugu Kiiru vs. Joseph Mwamburi & Others [2001] eKLR**, it was found 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 found that in this case there was no evidence that in prosecuting the Appellant, the Prosecution was acting as an agent of the 2nd Respondent and further there was no evidence of malice. To the court, the fact that the 2nd Respondent's trees were cut and the same kind of logs as the 2nd Respondent's trees found in the Appellant's compound may have reasonably led to the police believing that s crime had been committed hence the Appellant's arrest and prosecution were based on reasonable suspicion that a criminal offence had been committed. The court therefore found that the Appellant had failed to prove the ingredients of malicious prosecution. In the end

while assessing damages in the sum of Kshs 200,000/- had the Appellant succeeded, as she was bound to do, the learned trial magistrate found that the Respondents were not liable to compensate the Appellant.

17. Aggrieved by the sais decision the Appellant herein has appealed to this Court based on the following grounds:

> **1) THAT, the learned Magistrate erred in law and fact by considering extraneous factors which were not material to the case.**
>
> **2) THAT, the Learned Magistrate erred in law and fact by disregarding the evidence tendered by the Appellant before arriving at her decision.**
>
> **3) THAT, the Learned Magistrate erred in law and fact by wholly disregarding submissions tendered by the Appellant before arriving at her decision.**
>
> **4) THAT, the Learned Magistrate erred in law and fact in holding that the 1st Respondent had not acted maliciously even when the 1st Respondent did not tender evidence to the contrary.**
>
> **5) THAT, the Learned Magistrate erred in law and fact in holding that the Appellant had not proved his case on balance of probabilities as required by the law.**
>
> **6) THAT, the Learned Magistrate erred in law and fact by failing to advise the Appellant that he had a right of appeal.**
>
> **7) THAT, the Learned Magistrate erred in law and fact by dismissing the Appellants suit with costs when there was enough evidence against the Respondents.**

18. It was submitted on behalf of the Appellant that since the 1st Respondent herein filed their memorandum of appearance and a defence but did not appear in court to defend the suit, the particulars of malice attributed to the 1st respondent for arresting, detaining and charging the appellant in Machakos Criminal case number 37 of 2011 without carrying out proper investigations remain unrebutted. Accordingly, the learned magistrate erred in law and fact by holding that the 1st Respondent herein had not acted maliciously in the absence of evidence to the contrary. To the Appellant, the evidence of the appellant which is on record ought to have guided the learned magistrate but she decided to consider extraneous factors which didn't form part of any party's evidence. In support of the submissions, the Appellant relied on **Shaneebal Limited vs. County Government of Machakos (2018) eKLR** adopted with approval in the ruling in **Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997.**

19. Based on Section 3(2) of the ***Evidence Act*** and **Tadis Travel & Tours ltd & Another vs. Astral Aviation Limited (2015) eKLR** adopted with approve the ruling of **Lord Denning** in ***Miller v Minister of Pensions [1947] 2 All ER 372,*** *it was submitted that* the appellant herein had proved his case beyond reasonable cause. From the evidence on record your lordship, it is easy to draw a conclusion that it is more probable that the 2nd respondent made a false report at Machakos Police Station and the 1st respondent maliciously caused the arrest, illegal detention and charging of the appellant in Machakos Chief Magistrate's court criminal case number 37 of 2011. It is also not in doubt that that the appellant was subsequently acquitted of the malicious charges.

20. The Appellant therefore prayed:

> **i) The court do set aside findings of the subordinate court dismissing the Appellant case for being devoid of merit and do proceed to find that the same has merit and grant the same as prayed.**
>
> **ii) That, the court to assess and award general damages to the appellant for malicious prosecution, detention and suffering together with costs of both this appeal and the lower court case and interests at court rates.**
>
> **iii) That, court does award the appellant costs of this appeal and costs in the superior court.**

21. The 2nd Respondent on his part was contended with the decision of the learned trial court and in his submissions associated therewith and urged the court to dismiss the appeal with costs.

22. I however did not see any submissions filed on behalf of the 1st Respondent.

Determination

23. I have considered the issues raised in this appeal. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

> **"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the**

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

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

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

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

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

"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given…Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question…It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

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

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

28. In this case, it is clear that the issue to be resolved is whether the appellant, based on the evidence presented before the Trial Court proved his case. Section 107(1) of the ***Evidence Act***, Cap 80 Laws of Kenya provides that:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

29. This is called the legal burden of proof. There is however evidential burden of proof which is captured in sections 109 and 112 of the same Act as follows:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

30. The two provisions were dealt with in **Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334,** in which the Court of Appeal held that:

> **"As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act."**

31. It follows that the initial burden of proof lies on the plaintiff, the appellant in this appeal, but the same may shift to the defendants, the respondents in this case depending on the circumstances of the case.

32. In **Evans Nyakwana vs. Cleophas Bwana Ongaro [2015] eKLR** it was held that:

> **"As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore the evidential burden … is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person…The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side."**

33. The question then is what amounts to proof on a balance of probabilities. **Kimaru, J** in **William Kabogo Gitau vs. George Thuo & 2 Others** [2010] 1 KLR 526 stated that:

> **"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."**

34. Therefore, the Plaintiff, the Respondent in this appeal, had the duty of proving the aforesaid facts even if the Respondents chose to remain silent. In other words, the silence of a defendant does not necessarily boost the Plaintiff's Case and if despite the Defendant's silence, the ingredients necessary to prove the Plaintiff's case are lacking the Court still dismiss the suit. The failure of the defendant to testify only means that the Plaintiff's evidence remains unrebutted hence is deemed to be true but that is not the same thing as saying that that truthfully deemed evidence necessarily satisfied the standard of proof. In **Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR**, the judges of Appeal held that:

> **"Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say;-**
>
> **"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties…are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."**

35. It was therefore held by **Ringera, J** (as he then was) in **Gandhi Brothers vs. H K Njage T/A H K Enterprises Nairobi (Milimani) HCCC No. 1330 of 2001**, that in those circumstances the Court is constrained to decide the matter on the basis of fundamental rule of evidence, which is codified in section 3 of the ***Evidence Act*** Cap. 80 Laws of Kenya that a fact is not proved if it is neither proved nor disproved. It is therefore not proved.

36. In this case the claim arose from the tort of malicious prosecution. As rightly appreciated by the Learned Trial Magistrate, he following are the issues that fall for determination in this suit:

> **1. Whether the criminal proceedings were instituted by the defendant.**
>
> **2. Whether the said prosecution was actuated by malice.**
>
> **3. Whether there was reasonable cause and/or justification to make the complaint to the police.**
>
> **4. Whether the criminal proceedings terminated in the plaintiff's favour.**

5. Whether the defendant is liable to compensate the plaintiffs and if so what should be the award of damages.

6. Who should bear the costs of the suit?

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

> **"The action for damages for malicious prosecution is part of the common law of England...The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than for the public benefit. It originated in the medieval writ of conspiracy which was aimed against combinations to abuse legal procedure, that is, it was aimed at the prevention or restraint of improper legal proceedings...It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion of the truth. Its essential ingredients are: (1) the criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority; (2) the defendant must have acted without reasonable or probable cause i.e. there must have been no facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified; (3) the defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose; and (4), the criminal proceedings must have been terminated in the plaintiff's favour, that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge...The plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must "unite" in order to create or establish a cause of action. If the plaintiff does not prove them he would fail in his action. The damage that is claimed is in respect of reputation but other damages might be claimed, for example, damage to property...The damage to the plaintiff results at the stage in the criminal proceedings when the plaintiff is acquitted or, if there is an appeal, when his conviction is quashed or set aside. In other words, the damage results at a stage when the criminal proceedings came to an end in his favour, whether finally or not. The plaintiff could not possibly succeed without proving that the criminal proceedings terminated in his favour, for proving any or all of the first three essentials of malicious prosecution without the fourth which forms part of the cause of action, would not take him very far. He must prove that the court has found him not guilty of the offence charged...The law in an action for malicious prosecution has been clearly defined and in so far as the ordinary criminal prosecution is concerned the action does not lie until the plaintiff has been acquitted of the charge. In this case the respondent could have brought his action for malicious prosecution until the prosecution ended in his favour. He could not have maintained his action whilst the prosecution was pending nor could he have maintained an action after he had been convicted. His right to bring the action only accrued when he secured his acquittal of the charge on appeal, and he then had the right to bring this action for damages...Time must begin to run as from the date when the plaintiff could first successfully maintain an action. The cause of action is not complete until such a time, and in this case this was only after he was acquitted on appeal".**

38. 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".**

39. 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".

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

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

41. **Rudd, J** in **Kagane vs. Attorney General (1969) EA 643,** set the test for reasonable and probable cause. Citing **Hicks vs. Faulkner [1878] 8 QBD 167 at 171**, **Herniman vs. Smith [1938] AC 305** and **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."

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

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

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

44. On the first issue whether the criminal proceedings were instituted by the Respondents there is no dispute that the said proceedings were instituted by the 1st Respondent as a result of a complaint made by the 2nd Respondent. Accordingly, there is no question that the 2nd Respondent did prosecute the Appellant.

45. With respect to the second issue whether the making of the said report was malicious, the law is clear that the mere fact that a person has been acquitted of the criminal charge does not necessarily connote malice on the part of the prosecutor. As was held in **James Karuga Kiiru vs. Joseph Mwamburi and 3 Others, Nrb C.A No. 171 of 2000,** to prosecute a person is not

prima facie tortuous, but to do so dishonestly or unreasonably is, the burden of proving that the prosecutor did not act honestly or reasonably being on the person prosecuted. 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.

46. In his evidence the Appellant's case is premised on two grounds: Firstly, that there was no investigation conducted by the police before he was charged and secondly, that the charge was based on baseless allegations. In the criminal case, it is clear that the investigations officer did not testify. Similarly, in this case, he was never called to do so. There was therefore no evidence at all as to what, if any investigations were carried out on the 2nd Respondent's complaint. In his judgement, the learned magistrate in the criminal case found, rightfully in my view, that in the absence of the evidence from the investigating officer clarifying who was in the wrong when the complainant and the accused disagreed on the use of the land claimed by both of them, there was a possibility that the case was being used to put the Appellant behind the bars to intimidate him from insisting on his rights in the succession cause. In my view, it was necessary either before this court or before the criminal court for the investigating officer to have testified as to what informed his decision to charge the appellant. The Learned Trial Magistrate seemed to have based her decision on the existence of reasonable and probable cause on the evidence of PW1 and PW2 in the commercial case. However, the criminal court does not seem to have been satisfied with that evidence.

47. Therefore, the police are expected to be professional in the conduct of their investigations and ought not to be driven by malice or other collateral considerations. 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.

48. 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 my view, adopting an equivocal approach to investigations by deliberately denying a suspect an opportunity to put forward his version before a person is arraigned in court surely amounts to maladministration of justice. Similarly, where exculpatory evidence is presented to the police in the course of investigation and for some reasons unknown to them they deliberately decide to ignore the same one may be justified in concluding that the police are driven by collateral considerations other than genuine vindication of the criminal judicial process. Neglect to make a reasonable use of the sources of information available before instituting proceedings may therefore be evidence of malice and hence abuse of discretion and power. In the absence of any evidence as to the facts and circumstances upon which the 1st Respondent arrived at the decision to charge the Appellant, 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.

49. Absence, the factors which the investigating officer considered in preferring the charges against the Appellant, the Court has no option but to find that there was no probable and reasonable cause on the part of the 2nd Respondent in prosecuting the Appellant. Lack of reasonable and probable cause may be evidence of malice. Reasonable and probable cause has been defined to mean the existence of facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified. As was said in **Kagame's Case** (supra) 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 which 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. To constitute reasonable and probable cause therefore 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. In this case, the information that was received, if any, is unknown to the Court. Whether this information was ever considered before the plaintiff was arrested and charged is also unclear.

50. As was held by **Ojwang, J** (as he then was) in **Nairobi HCCC No. 1729 of 2001 – Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another**:

> **"Unless and until the common law tort of malicious prosecution is abolished by Parliament, policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial**

immunities when their victims rightfully seek recompense...I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State's prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes".

51. I therefore find that there was no probable and reasonable cause for the Appellant's prosecution by the 1st Respondent.

52. The next issue is whether the criminal proceedings terminated in the plaintiff's favour. There is no doubt that the criminal proceedings were terminated in favour of he plaintiffs. It is now trite law that acquittal whether after hearing both prosecution and defence witnesses or on a finding that there is no case to answer amounts to a termination in favour of the accused. The law is that for the purposes proof that the criminal proceedings have been determined in the appellant's favour it is enough that the criminal proceedings have been terminated without being brought to a formal end. Accordingly, the finding in favour of the accused whether pursuant to section 210 of the ***Criminal Procedure Code*** of section 215 thereof is clearly a termination in favour of the Plaintiff.

53. In this case the Plaintiff is clearly entitled to an award of damages for malicious prosecution. As regards the quantum of damages, it was held in the Uganda case of **Dr. Willy Kaberuka vs. Attorney General Kampala HCCS No. 160 of 1993** that:

"The plaintiff suffered injury to his reputation. He testified that the news of his appearance in court was published in a newspaper whose circulation is believed to be generally wide. He spent a period of over four months appearing in court on charges, which were hardly investigated by the defendant's servants. He must have suffered the indignity and humiliation. He is also entitled to recover damages for injuries to his feelings especially the possibility of serving a sentence…There are no hard and fast rules to prove that the plaintiff's feelings have been injured or that he has been humiliated as this is inferred as the natural and foreseeable consequence of the defendant's conduct. The plaintiff's status in Society is also a relevant consideration and for all these reasons the plaintiff is entitled to damages…A plaintiff who has succeeded in his claim is entitled to be awarded such sum of money as will so far as possible make good to him what he has suffered and will possibly suffer as a result of the wrong done to him for which the defendant is responsible".

54. I, therefore, have no reason to depart from the assessment made by the Learned Trial Magistrate.

55. In the premises, this appeal succeeds, the judgement of the Learned Trial Magistrate dismissing the Appellant's case against the 1st Respondent herein is hereby set aside and is substituted therefor a judgement in favour of the Appellant against the 1st Respondent. Consequently, the Appellant is awarded Kshs 200,000.00 being general damages for malicious prosecution.

56. The costs, both of the trial court and of this appeal are awarded to the Appellant to be borne by the 1st Respondent.

57. It is so ordered.

Read, signed and delivered in open Court at Machakos this 23rd day of May, 2019

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nthiwa for the appellant

CA Geoffrey