REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 99 OF 2009

(CORAM: F. GIKONYO J)

JOSEPHAT KUGERIA……1ST APPELLANT

INSPECTOR ERASTUS GICHUKI……2ND APPELLANT

HON ATTORNEY GENERAL……3RD APPELLANT

Versus

SABINA NJIRA MUTHUNGU……..……RESPONDENT

(Appeal from the judgment of Hon. W.K. Korir Principal Magistrate Meru in CMCC. NO. 506 of 2008)

JUDGMENT

[1] Being aggrieved by the Judgment of Hon W.K Korir, (as he then was) Principal Magistrate, Meru of on 28th August 2009, in which he awarded the Respondent Kshs 950,000 as General Damages for wrongful arrest, unlawful confinement and malicious prosecution, the 2nd and 3rd Appellants filed this Appeal. They stated the following grounds of appeal in the Memorandum of Appeal filed in court on 17th September 2009:

1. ***That the Learned Principal Magistrate erred in law and fact in finding that the prosecution was instituted without reasonable and probable cause in spite of the overwhelming evidence by the 2nd and 3rd appellant and the exhibits produced.***
2. ***That the judgment of the Learned Principal Magistrate is against the weight of evidence.***
3. ***That the Learned Principal Magistrate erred in law and fact in not finding that the suit was time barred and even if leave to file suit out of time, the reasons given by the plaintiff that the proceedings had not been typed was outside the meaning and reasons given by section 5 of Public Limitations Authorities Act CAP 39 of the Laws of Kenya.***
4. ***That the Learned Principal Magistrate erred in law and fact in finding that proper investigations had not been carried out despite evidence on record to the effect that there was blood discovered in the plaintiffs bed.***
5. ***That the Learned Principal Magistrate erred in law and fact in disregarding the evidence by DW1 while delivering judgment yet the same was overwhelming in favour of the 2nd and 3rd appellants.***
6. ***The Learned magistrate erred in law and fact in purporting to infer/impute malice on the side of the 2nd and 3rd appellant yet the burden of proof was on the side of the plaintiff to prove the***

same.

7. ***The Learned Principal Magistrate used the wrong principles of law in arriving at the judgment purporting to rely on criminal proceedings No. 32 of 2003 yet the learned judge in those proceedings did find any malice on the side of the 2nd and 3rd appellants.***
8. ***The Learned Principal Magistrate erred in law and fact in awarding the plaintiff excessive general damages which was neither unsupported [sic] nor proved by the plaintiffs.***
9. ***The Learned Principal Magistrate erred in law and fact in finding that the prosecution was instituted maliciously against the weight of evidence and which malice was never proved by the plaintiff.***

[2] When the matter came up for hearing on 9th June 2011, it was agreed that the Appeal be disposed off by way written submissions. Parties filed their respective submissions which I shall state and evaluate below.

2nd and 3rd Appellants submissions

[3] Briefly it was submitted for the 2nd and 3rd Appellants that that the Learned Magistrate erred in law in finding that the prosecution was instituted without reasonable and probable cause and that the Learned Magistrate overlooked the provisions of CAP 39 Laws of Kenya section 5 when allowing this suit to be filed out of time and that the suit ought to have been dismissed *ab initio.* It was further submitted for the 2nd and 3rd Appellants that in a suit for malicious prosecution it was incumbent upon the plaintiff to prove, on a balance of probability four essential aspects as follows:

1. ***The defendant instituted the prosecution against the plaintiff.***
2. ***The prosecution ended in plaintiff's favour.***
3. ***The prosecution was instituted with reasonable and probable cause.***
4. ***Prosecution was activated by malice.***

[4] The 2nd and 3rd Appellants further contended that the Learned Magistrate erred in law and fact in awarding the Respondent exclusive general damages which was not supported and proved by the plaintiff; that the award was excessive. They also argued that the trial magistrate erred in entering judgment against the 2nd Appellant who was a police officer and in turn a government officer. Consequently it was submitted that there was a misjoinder of parties and the Appellants urged the suit against the 2nd Appellant to be dismissed.

Respondent's submissions

[5] On the other hand it was submitted for the Respondent that she had demonstrated and proved that the prosecution had been instituted without reasonable and probable cause and that she was arrested solely because the deceased was her husband's relative which could not be a reasonable cause. She contended that she had obtained leave to file suit out of time and that evidence was produced in court. The leave was not challenged in the trial court and so, it cannot be challenged on appeal. She stated that the order for extension of time had been properly given. It was further contended for the Respondent that the 1st Appellant did not resist this claim and judgment was entered against him since he knew that he had given wrong information and that he wanted to settle scores on a land dispute against the Respondent's family.

[6] Further submissions were made for the Respondent to wit; she had proved all the 4 essential elements that her prosecution was malicious. Finally with regard to damages it was submitted that no award of damages would restore what had been destroyed and the courts try as much as possible to restore the victim's lives. Indeed, she submitted that the Appellant did not submitted on any sum and they could now not turn around and claim the awarded damages were excessive. According to her, the court would only disturb an award of damages when the trial court has taken into account a factor he ought not to have or failed to take into account something he ought to have or if the award is so high or so low that it amounts to an erroneous estimate. Consequently the Respondent urged the court to find the appeal

without merit and accordingly dismiss the same.

DETERMINATION

[7] I have carefully considered this Appeal and the rival submissions by the parties. I would summarize the grounds of appeal into four issues:

> ***(1) Whether the 2nd Appellant was wrongly joined as a party in the primary suit.***
>
> ***(2) Whether leave to file suit out of time could be challenged on appeal when it was never challenged at the trial.***
>
> ***(3) Whether a claim of malicious prosecution was proved, and***
>
> ***(4) If the answer to (3) above, whether the award of damages herein was excessive.***

Misjoinder of parties

[8] Needless to over-emphasize that, proper parties must be before the court if the court is to exercise its jurisdiction in the suit. See the Nigerian case of **GOODWILL & TRUST INVESTMENT LTD AND ANOTHER vs. WILT & BUSH LTD.** However, this is not a case of lack of proper parties but of mere misjoinder of parties as the AG has been sued on behalf of the government. The arguments I am hearing is that the 2nd Appellant was a mere officer of Government exercising his functions as a police officer and could not therefore be sued as a party in the suit. My take is that the suit cannot be defeated by a misjoinder, even if I were to find there is misjoinder. For this proposition, I rely on Order 1 rule 9 of the Civil Procedure Rules which provides that***:***

> ***"No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and obligations of the parties actually before it."***

But is really there a misjoinder of the 2nd Appellant? I should state that there is no misjoinder of the 2nd Appellant in the suit, because in a case for malicious prosecution the particular officer who investigated the matter should be joined as a party. Although, however, the government will be held vicariously liable for the actions of the police officer: because the arrest and prosecution were carried out within the scope of officer's authority. See what the Court of Appeal said in the case ***of*** **NYAGA vs. SILAS MUCHEKE – COURT OF APPEAL AT NYERI C.A. NO. 59 OF 1987** (unreported) that:

> ***"...the Respondent's case as it appears in the plaint was that he claimed damages for false arrest, malicious prosecution and false imprisonment. He did not join the police in the suit although it was clear that the acts complained of were in fact committed by the police. The Appellant had made a complaint or the report to the police and nothing more. What followed had nothing to do with him. The decision to arrest the Respondent was made by the police who must have found some merit in the report. They decided to detain, to charge and to prosecute the Respondent. The mere fact that the prosecution aborted for failure of the prosecution witness including the Appellant to attend the hearing is not here or there. It was the responsibility of the police to bond possible prosecution witness including the Appellant. They did not do that but instead the prosecutor told the court that he had no witness to call instead of applying for an adjournment to try and secure these witnesses. The blame for the abortive prosecution was squarely on the police but not the appellant. The Respondent's suit was a non-starter for failure to join the police who were the main actors on the stage as far as the Respondent's claim was concerned. It is trite law that false arrest and false imprisonment may very well be founded where prosecution is dismissed and the accused***

> ***acquitted. Malicious prosecution may also be found where determination of prosecution is in favour of the accused. The police investigated the complaint and arrested the Respondent. The arrest by the police could not be attributed to the appellant. The position would have been different if the appellant had arrested the Respondent himself or that the report was false. Police action cannot be attributed to the Respondent who had no authority over them. There was no evidence to suggest that the arrest and prosecution of the Respondent was brought without reasonable or probable cause."***

On the basis of the above, there is no misjoinder of the 2nd Appellant especially because the acts complained of were alleged to have been committed by the 2nd Appellant. The grounds of appeal on that point fails. I reject it.

Leave to file suit out of time

[9] The other ground of appeal which bears preliminary importance is that the leave to file suit out of time cannot be challenged on appeal if it was not challenged at the trial. In law the defence of limitation of action is a matter for trial: any ex parte leave to file suit out of time will, therefore, be challenged in the trial- a procedure that departs from the general rule that a party against whom an *ex parte* order has been made should apply to the court which made it to set the order aside. Thus, the law on pleadings as encapsulated in Order 2 Rule 4 of the Civil Procedure Rules is that, the party wishing to rely on limitation as a defence must plead it specifically in any subsequent pleading to the plaint. He may or may not do so for any or no reason. Therefore, the plaintiff is in law entitled to wait to hear from the defendant whether limitation is taken up as a defence. And if it is so taken, it is up to the plaintiff to bring his case within any of the exceptions provided in the relevant statute of limitation. This position of the law is replete with judicial decisions which I do not wish to multiply but you may consider reading: *(1)* **OUTA vs. SAMUEL MOSE NYAMATO [1984] KLR 990*; (2)* TRANSWORLD SAFARIS KENYA LTD vs. SOMAK TRAVEL LTD [1997] EKLR*; (3)* MBITHI vs. MUNICIPAL COUNCIL OF MOMBASA AND ANOTHER [1990-1994) EA*;*** and ***(4)* DISECON LTD vs. SHRINMKHANA S. SAMANI CIVIL APPEAL NO. 142 OF 1997**. The question now becomes: Was the defence of limitation taken up by 2nd and 3rd Appellants in the primary suit? The record will provide the answer.

[10] Paragraph 7 (b) of the defence read as follows:-

> ***(a) That the suit is time barred by virtue of the public authorities Limitations of Actions Act cap 39 laws of Kenya.***

To show that the suit was not time barred, the Respondent produced as exhibit P2 the order extending time to file suit that had been issued in Meru CM Misc. No. 41 of 2008. Surprisingly, the extension of time was not challenged during cross-examination by the 2nd and 3rd Appellant's counsel. The 2nd and 3rd Appellant merely made a terse statement in their submissions on the question of limitation in the following manner:

> ***"Necessarily the evidence tendered shows that the suit was time barred and even if leave was granted, the same was outside the ambit of CAP 39 Laws of Kenya."***

I have not seen the evidence alluded to by the 2nd and 3rd Appellants. Nothing was placed before the trial court to show that the leave was outside the ambit of cap 39 laws of Kenya. Limitation of action was not seriously contested by the appellants in the trial court, and I do not find anything tangible which would make the court overturn the leave granted to file the suit out of time. It was proper for the trial magistrate to have treated the suit to be properly before him. That notwithstanding, it is in order to say something about the applicable laws on extension of periods of limitation in this case. The relevant statutes of limitation are Public Authorities Limitations of Actions Act and Limitation of Action Act, Cap 39 and 22, respectively. Section 3 (1) of the CAP 39 relates to *limitation of proceedings founded on tort* like the current proceedings, which the law states must be brought within twelve months from the time the cause

of action accrued. But under Section 5 of Cap 39, the limitation period prescribed in section 3(1) thereof may be extended in case the plaintiff is under disability on the date when the right of action accrues. Notably, Section 6 of Cap 39 refers to Section 27 of the Limitations of Actions Act in relation to matters of tort under S. 3 (1) of Cap. 39. By dint of Section 6 of Cap 39, except Section 22 and 42 Part III of Cap. 22 on extension of periods of limitation apply to Cap 39. I do not therefore accede to the 2nd and 3rd Appellant's arguments that extension of period of limitation is in violation of the Cap. 39. In this case there is no material on which to determine whether *leave to file suit out of time, the reasons given by the Respondent that the proceedings had not been typed was outside the meaning and reasons given by section 5 of Public Limitations Authorities Act CAP 39 of the Laws of Kenya.* I reject the arguments thereto and the said ground of appeal on limitation fails.

[11] I now turn to the substantive issues. Prosecution of offenders is a constitutional mandate of the state. Thus, prosecution of a person alleged to have committed an offence is not *per se* an infringement of any right. However, not all prosecutions are bone fide: there are those which are malicious or instituted for collateral advantage. A prosecution which amounts to abuse of the process of the court by wrongfully setting the law in motion on a criminal charge is malicious and is actionable in law as a tort. But the person claiming damages for malicious prosecution bears the burden of proof of all the following elements, to wit, that:

> ***(i) The appellant instituted the prosecution.***
>
> ***(ii) The prosecution terminated in his favour***
>
> ***(iii) The prosecution was initiated without reasonable and probable cause; and***
>
> ***(iv) The prosecution was actuated by malice or carried on maliciously.***

On these thresholds, see Contran, J in the case of **MURUNGA vs. ATTORNEY GENERAL (1979) KLR, 138;** and the decision of the Court of Appeal for Eastern Africa in the case of **MBOWA vs. EAST MENGO DISTRICT ADIMINISTRATION [1972] EA 352.** I will apply this test in my re-evaluation of the facts of this case and determine whether the Respondent proved his case on a balance of probability.

There was a prosecution

[12] I will not spend much time on the first element. Doubtless there was a prosecution against the Respondent in Meru Criminal Case no. 32 of 2002. The prosecution was a result of the report made to the 2nd Appellant, who was the officer in charge of investigations. He also had charges preferred against the Respondent. That element is satisfied and I move on to the other one.

Prosecution terminated in Respondent's favour

[13] Again I will, without much ado, and the evidence produced will support this; state that the prosecution terminated in favour of the Respondent when the trial court found that she had no case to answer. The second requirement has been met too. The Learned Magistrate in his judgment also correctly held that the above two essential ingredients for malicious prosecution had been satisfied and stated the following:

> "***The plaintiff before me has a clearly proved the 1st and second ingredients set out in the Murunga case already cited. She has proved that she was arrested and prosecuted at the instigation of the defendants and the prosecution terminated in her favour by way of an acquittal under section 306 (1) of the Criminal Procedure Code.***

The major elements remaining for my determination are; (1) whether the prosecution was initiated without probable and reasonable; and (2) therefore malicious.

Reasonable and probable cause

[14] This element is the linchpin of the tort of malicious prosecution. In a tort for malicious prosecution,

> ***"…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 reasonable 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... ".*** See ***Halsbury's Laws of England*, 4th Edition - Reissue, Vol. 45 (2).**

This test recognizes two important constitutional realities; (1) the innocence of the accused until proven guilty; and (2) the constitutional mandate of government to arrest and prosecute offenders. To balance these two realities, the law makes it imperative that the belief in the guilty of the subject should be founded upon a decision made after due inquiry into and consideration of the facts presented to the police. But the reasonable belief need not be based on actual existence of a definite cause but upon reasonable belief held in good faith in the existence of facts as are perceived by and laid before the police officer. It is not therefore a requirement that the police officer or prosecution should test each and every possible relevant fact before taking action to prosecute. I am persuaded to think that this position is also alive to the Constitutional requirement that an arrested person should be charged within 24 hours of arrest. I will therefore be asking myself whether the impression produced by the facts before the 2nd Appellant, a police officer, and the prosecution would for a discreet and reasonable man justify a prosecution.

[15] The Learned Magistrate in assessing whether the prosecution was instituted without probable and reasonable cause; and whether it was actuated by malice stated the following:

> "…***What remains to be determined is whether the plaintiff proved the third and fourth ingredients…… As for the case before me, the plaintiff testified that the 2nd defendant did not investigate the allegations of the 1st defendant before arraigning her on a charge of murder. On this score, the evidence is supported by the ruling of Justice Sitati who concluded that there was no evidence to connect any of the nine accused (the plaintiff being one of them) with the murder of Daniel Mutemi. The plaintiff and her co accused were not placed on their defence. This clearly means that there was no reasonable and probable cause as to why the plaintiff was charged. Having established that there was no reasonable and probable cause for prosecuting the plaintiff if follows that her prosecution was driven by malice. Her prosecution was therefore malicious. No wonder the 1st defendant opted not to defend himself."***

[16] The trial magistrate was right in making reference to the criminal trial proceedings and judgment; those proceedings were part of record as exhibit P1. But it is this court's duty to assess whether the evidence adduced supported the inferences drawn by the trial magistrate upon those proceedings, the facts before the police officer and the prosecution at the time they charged the Respondent. According to the learned trial magistrate, there was no probable and reasonable cause to prosecute the Respondent. His reasons for reaching that conclusion were two: (1) that the testimony of the Respondent that the 2nd Appellant ***did not investigate the allegations made by the 1st Appellant before arraigning her on a charge of murder is supported by the ruling of Justice Sitati who concluded that there was no evidence to connect any of the nine accused (the plaintiff being one of them) with the murder of Daniel Mutemi;*** and (2) that ***the Respondent and her co-accused were not placed on their defence. This clearly means that there was no reasonable and probable cause as to why the plaintiff was charged.*** The fact that proceedings terminated in favour of the Respondent is only one of the essentials for malicious prosecution. The court must examine the entire record and circumstances of the case to determine what are the facts known to the prosecutor before he made the decision to charge, including the inferences to be made from those facts as they existed or laid before the police or prosecutor in order to establish whether

there was probable and reasonable cause to prosecute the Respondent; which is a matter of fact not law. To hold otherwise would mean that all prosecutions which terminate in favour of the accused for whatever reason will yield strict liability on the government. I do not think that is the law on malicious prosecution. That is why the four essentials for malicious prosecution must be tied together. In fact the major allegation here is that the 2nd Appellant did not investigate the complaint lodged with him by the 1st Appellant which makes the question of probable and reasonable cause a matter of fact. I will examine the record to determine whether there was probable and reasonable cause to prosecute the Respondent.

[17] From the record, there is no doubt that the Respondent was arrested by the 2nd Appellant following a report by the 1st Appellant and others. She was arrested upon that report and later charged with the murder of Daniel Mutemi Garcu in Meru High Court criminal Case No 32 of 2003. Again, it is not in dispute that she was acquitted under Section 306 of the Criminal Procedure Code after the court found that he had no case to answer. At the time of acquittal he had been in custody for about three years. The Respondent testified that they had a land dispute with the 1st Appellant. The 1st Appellant then took her and other off her family members to the police where he made malicious complaint that they had killed one Daniel Mutemi. According to her testimony, the 2nd Appellant did not investigate the complaint by the 1st Appellant before charging her in Court. The 2nd Appellant just arrested her without asking her any questions or informing her of the reason for her arrest. She stated that the 2nd Appellant told her that she would learn later why she had been arrested. She accused the 2nd Appellant of torturing her. She, however, stated that she did not know the 2nd Appellant before the arrest. She testified that the 1st Appellant lied to the court and that the 2nd Appellant relied on the malicious allegations by the 1st Appellant without proper investigations. She, therefore, sought for damages for wrongful arrest, confinement and malicious prosecution. She produced the proceedings in the criminal trial as exhibit P1. That is the evidence as was captured by the trial magistrate.

[19] By consent of the parties, the evidence of DW1 in Meru CMCC NO 505 OF 2008 was admitted in evidence on 16.6.2009. I will take into account this evidence as well as the proceedings in the criminal trial in this decision.

[20] I have looked at the record which includes the evidence by DW1 as well as the proceedings in the criminal case. Is the allegation that the 2nd Appellant did not carry out any investigation supported by the evidence adduced? From the onset, I note that the trial magistrate rehashed the evidence of DW1 but he did not seem to have paid any attention to it or even referred to the said evidence in his overall evaluation of the case. The said evidence was critical as it provided a direct nexus to the proceedings in the criminal trial. I will consider the said evidence here. DW1 testified how the 2nd Appellant conducted investigations and recorded witness statements in the murder investigation herein. He also told the court that the 2nd Appellant and other witnesses testified in court on the murder trial. He produced documents to show this. This evidence is corroborated by the proceedings taken in the murder trial and produced as exhibit P1 as the 2nd Appellant testified in the murder proceedings as PW7 and he narrated all the steps he took in his investigations and the sources of his information. He stated how the father of the deceased one Ruka Mugao came to the station with two other people who are brothers. They were accompanied by three sons of Mr. Muthungu and Mr. Muthungu's wife, the 1st Accused and the Respondent herein. The other accused were also in the group. He stated that the deceased's father narrated all he knew about the death of his son and at the center of things was a land dispute in which the Respondent was one of the disputants. According to the information received by the 2nd Appellant, the deceased was asking for land from the Respondent to settle thereon. The report made and information provided by the deceased's father was that the land dispute could have been a major motive for mischief. PW7 told the court of blood under the bed of the 1st accused person (Respondent) which he said he confirmed was present. The 2nd Appellant recorded witness statements for all the witness who testified in the trial but, for unknown reason, it seems some witnesses recanted their earlier statements. There were confessions which the 2nd Appellant had recorded from the accused persons including the Respondent especially on the alleged disposal of the body of the deceased into the river. But again the confessions were discarded because the law on confessions had been amended and did not support production of the confessions. The court (Sitati

J) observed all these matters and those proceedings are part of the record. Given the steps taken in the investigations it is not true that the 2nd Appellant did not carry out any investigation of the matter as alleged. Again, on the basis of the facts before the police officer and the prosecution, it cannot be said that a prosecution was not justified. A discreet and reasonable man would have instituted a prosecution in the circumstances of this case.

[21] I said earlier and I repeat that; it is not required of any prosecutor that he must test each and every possible relevant fact before he makes a decision to prosecute; his duty is only to ascertain reasonable and probable cause for prosecution based on honest belief in the existence of facts before him and that they justify a prosecution, or may prove the guilt of the accused. I should state also that it is probable and reasonable cause to prefer a charge on *prima facie* evidence as long as the evidence would produce an impression to a cautious and reasonable man to prosecute. And given the circumstances of this case, absence of corroboration of an accomplice statement or recanting of evidence by witnesses or inadmissibility of confessions should not be taken to mean want of probable and reasonable cause for purposes of a claim for malicious prosecution. Accordingly, upon considering the entire circumstances and facts of this case, it is not true that the 2nd Appellant did not conduct any investigations.

Shoddy investigations

[22] It may be that the 2nd Appellant carried out shoddy or sketch investigations on this matter; that failure will only entitle the accused to an acquittal and does not necessarily result into want of probable and reasonable cause to prosecute on which a claim of malicious prosecution could be founded. This court (Sitati J) in her ruling stated:

> ***"The conclusion I have reached is that the case was either not properly investigated or the witness deliberately refused to tell the truth as was the case with PW3. My sixth sense tells me that the accused persons may very well have killed the deceased for the reasons given by PW7, but this is mere sixth sense feeling which has neither legal nor factual basis."***

I must state that the trial magistrate did not consider all the evidence before him; including the evidence by DW1 and the proceedings produced, in reaching the decision that there was no probable cause to institute the prosecution herein. The overall impression from the evidence adduced before the trial magistrate is that, and so find and hold, the Respondent did not prove on a balance of probabilities that the prosecution was instituted without probable and reasonable cause. In view of this finding, the trial magistrate erred in law and fact in finding that the prosecution did not have a probable and reasonable cause to prosecute the Respondent.

Necessity of malice

[21] Despite the above finding, I still have to answer whether the prosecution instituted was actuated by malice. In deciding this, I will consider whether the prosecution was instituted either by spite or ill-will or improper motives or other purpose other than of bringing the Respondent to justice. But I must warn myself that where malice is proved but not want of probable and reasonable cause, the claim for malicious prosecution will still fail. Also I should state that malice may be inferred from want of probable and reasonable cause but not vice versa. At this point, I need to put the record straight; contrary to the submissions by the 2nd and 3rd Appellants, a court of law is entitled to draw an inference of malice from want of probable and reasonable cause to prosecute. But, in this case, I have found that there was probable and reasonable cause to prosecute. I should also state that shoddy investigations due to incompetence or negligence on the part of a police officer does not in itself invariably justify an inference of malice on the part of the 2nd Appellant. See the case of **THACKER vs. CROWN PROSECUTION SERVICE (1997) Times, 29, December,** and **ELGUZOULI-DAJ vs. METROPOLITAN POLICE COMR [1995] QB 335, [1995] 3 All ER 1074, CA.** I do not think in the circumstances of this case, the 2nd Appellant and the prosecution brought the charges against the Respondent for any other reasons other than of bringing the Respondent to justice. There is absolutely no malice shown to have existed on the

part of the 2nd Appellant and the prosecution. Accordingly, the trial magistrate erred in law and fact finding that the prosecution of the Respondent was malicious.

[22] And was there any damage suffered? I have found that the Respondent did not prove the claim for malicious prosecution against the 2nd and 3rd Appellants. Injury for which a remedy would lie in form of an award for general damages is in the proof of malicious prosecution. Where malicious prosecution is not proved there are no damages to be awarded. The Respondent was not entitled to any award of damages for malicious prosecution. He did not prove his case on balance of probabilities. Accordingly the trial magistrate erred in making an award for damages in favor of the Respondent.

[23] The upshot is that I allow this appeal succeeds in it's entirety and I set aside the judgment of the trial Court is so far as it relates to the 2nd and 3rd Appellants. As a consequence, the suit against the 2nd and 3rd Appellants is dismissed. Each party shall bear own costs of the appeal as well as of the lower court. It is so ordered.

Dated, Signed and delivered in open court at Meru this 9th day of June, 2016.

F. GIKONYO

JUDGE

In the presence of:

Mr. Kiongo advocate for appellant

M/s. Njenga advocate for respondent.

F. GIKONYO

JUDGE