



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 13 OF 2014

JANET ATIENO OTIENO.....APPELLANT

-VERSUS-

PHARMACY & POISONS BOARD.....1st RESPONDENT

THE ATTORNEY GENERAL2nd RESPONDENT

(Being an appeal from the judgment and decree by Hon. Nyagah, Ag. Principal Magistrate (as he then was) in Migori Principal Magistrate's Civil Case No. 108 of 2012 delivered on 21/10/2014).

JUDGMENT

Introduction:

1. There was once a dispensing chemist at Awendo town within Awendo Sub- County of Migori County known by the name of **SAMNET CHEMIST**. It was then owned and operated by **JANET ATIENO OTIENO**, the Appellant herein.
2. On 10/12/2008 the said Chemist was visited by officers from the **PHARMACY & POISONS BOARD**, the first Appellant herein, who were in the company of a Police Officer. The team was on their ordinary tour of duty within the larger Nyanza region; indeed the officers were carrying out an inspection exercise on outlets which dispensed drugs and poisons to the public in general. That is how the officers found their way into Samnet Chemist and met the Appellant who was actually running the facility.
3. Upon request for the usual documentation reasonably expected in such a facility, the Appellant herein produced some documents which the officers readily suspected to be highly irregular if not genuine. One of the officers made a call to the Pharmacy and Poisons Board in Nairobi and confirmed that indeed the documentation were suspect. The Appellant was then arrested and some drugs which are usually classified as 'Part 1 Poisons' and are only dispensed by a qualified practitioner and on a prescription were seized under an inventory signed by both the officers and the Appellant. The said drugs were also suspected to be counterfeits.
4. The Appellant was then led to Migori Police Station for further interrogation and was subsequently arraigned before the Senior Principal Magistrate's Court at Migori on 11/12/2008 and charged with various counts relating to the authenticity of the documents in Criminal Case No. 573 of 2008.
5. The Appellant was later acquitted in the criminal case and filed the Migori Senior Principal Magistrate's Court Civil Case No. 108 of 2012 seeking damages for *inter alia* unlawful arrest, wrongful

confinement and malicious prosecution which suit was dismissed on 21/10/2014 thereby prompting the appeal subject of this judgment.

6. For the purposes of this judgment I shall refer to JANET ATIENO OTIENO as '**the Appellant**', the SAMNET CHEMIST as '**the Chemist**', the Pharmacy and Poisons Board as '**the Board**', the Attorney General as '**the AG**', the Board and the AG jointly as '**the Respondents**', the Migori Senior Principal Magistrate's Court Criminal Case No. 573 of 2008 as '**the criminal case**' and the Migori Senior Principal Magistrate's Court Civil Case No. 108 of 2012 of 2012 as '**the suit**' respectively.

The Appeal:

7. By a Memorandum of Appeal dated 21/11/2014 and evenly filed in Court the Appellant preferred the following ten grounds challenging the dismissal of the suit:-

1. The Learned Magistrate erred in law and in fact by holding that the Appellant herein was acquitted upon failure by the document examiner to adduce evidence as to the authenticity of the exhibits produced when it is the duty of the Respondents herein to procure the attendance of the witness.

2. The learned magistrate erred in law and in fact by holding the Appellant herein was acquitted on technicality when the Criminal Proceedings indicate that the Respondent herein procured attendance of a number of witnesses who testified on oath.

3. The Learned Trial Magistrate erred in law and in fact, in finding that the Appellant herein did not prove malice on the part of the Respondents herein when he was very much aware that the Respondents did not prove their case against the Appellant beyond reasonable doubt.

4. The Learned Trial magistrate erred in law and fact and forgot that he was conducting Civil hearing and not a Criminal Hearing as he was aware that the witnesses who testified for the Respondents testified during Criminal Hearing and did not prove their case beyond reasonable doubt. Consequently the Appellant herein was acquitted.

5. The Learned Trial Magistrate erred in law in finding and holding that the Appellant herein was arrested by officers of the Respondents after conducting and/or carrying out investigations, when there was no evidence on record whatsoever to vindicate that any investigations were ever mounted and/or carried out.

6. The Learned Trial Magistrate misconceived and/or misapprehended the evidence on record and the law on unlawfully arrest and wrongful confinement and thus failed to arrive at a fair and just conclusion in the line with evidence on record.

7. The Learned Magistrate erred in law in dismissing the Appellant's case in its entirety, when the Appellant had tendered sufficient evidence and uncontroverted evidence linking the Respondents to unlawful arrest and confinement complained of.

8. The Learned Trial Magistrate erred in law in failing to assess the quantum of damages awardable in favour of the Appellant notwithstanding the fact that the Learned Trial Magistrate had arrived at a conclusion that Appellant's case was untenable and thereby worthy of dismissal.

9. The Learned Trial Magistrate erred in law and fact by failing to properly evaluate and/or analyze the magistrate misapprehended the Crux and/or gist of the matter before the court and thereby arrived at a wrong Judgment.

10. The Judgment of the Learned Trial Magistrate is deficient and devoid of reasons for such determination. Consequently, sought to be impeached is contrary to Order 21 Rules 4 & 6 of the Civil Procedure Rules, 2010

8. The Appellant then prayed for the following reliefs:-

a) *The appeal herein be allowed and the Judgment and Decree of the Trial Magistrate dated 21st day of October 2014, vide **MIGORI PMCC NO. 108 OF 2012**, be set aside, reviewed, varied and/or quashed.*

b) *The Honourable Court be pleased to substitute therefore an Order allowing the Appellant's suit in the Subordinate Court vide **MIGORI PMCC NO. 108 OF 2012**.*

c) *The Honourable Court be pleased to assess and award General Compensatory Damages for unlawful arrest, wrongful confinement and Defamation in favour of the Appellant.*

d) *Costs of this Appeal and Costs incurred in the subordinate court be borne by the Respondents.*

e) *Such further and/or other relief be granted as the court may deem expedient*

9. Upon taking of directions with the concurrence of the Counsels, parties filed their respective written submissions to the appeal which they opted not to highlight on.

Analysis and Determinations:

10. The appeal to this Court is a first appeal. It is now well settled that the role of this Court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. This Court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278 and Kiruga –versus- Kiruga & Another (1988) KLR 348.**

11. It was further held in the case of **Hahn vs. Singh (1985)KLR 716** that the appellate Court will hardly interfere with the conclusions made by a trial court after weighing the credibility of the witnesses in cases where there is a conflict of primary facts between witnesses and where the credibility of the witness is crucial.

12. In discharging the said duty, this Court will endeavour to ascertain whether the suit was rightly dismissed by the lower court. The starting point will therefore be a look at the legal position relating to the causes of action in malicious prosecution, unlawful arrest and wrongful confinement. I will mainly deal with the issue of malicious prosecution and therein equally deal with the issue of unlawful arrest and wrongful confinement since those are distinct causes of action and each has its respective outcome.

13. For an action to succeed in malicious prosecution, certain conditions must be demonstrated. The legally acceptable criteria was set out by **Cotran, J.** in the High Court decision of **Murunga =vs= The Attorney General (1979) KLR 138** as well as by **Rudd, J** in the **Kagane -vs- Attorney General (1969) EA 643** 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) *That the prosecution terminated in the plaintiff's favour.*

c) *That the prosecution was instituted without reasonable and probable cause;*

d) *That the prosecution was actuated by malice;*

14. The following discussion was taken up by Justice G. V. Odunga in the case of **Chrispine Otieno Caleb v Attorney General (2014) eKLR** in expounding the foregone principles. The Judge referred to several decisions on the issue and in the following manner:-

“32. 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”.

33. 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”.

34. 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”.

15. The above says it all. Turning to the matter at hand and on the first principle, it is clear that the proceedings in the criminal case were instituted by the police on behalf of the Board. Accordingly that settles the issue affirmatively.

16. The second principle relates to how the criminal proceedings were terminated. I have carefully perused the proceedings in the criminal case. The appellant was acquitted under **Section 210** of the **Criminal Procedure Code** Chapter 75 of the Laws of Kenya. That was a perfect acquittal. As I stated in the High Court case of **Asman N. Waluhbuka and Shaban N. Echesa vs. Timothy Misikoi & Attorney General Civil Appeal No. 4 of 2007 at Kakamega (unreported)**, I hereby reiterate that it matters not at what point in time the appellant was vindicated, even on an appeal; as long as the charges were disproved, that amounts to determining the criminal proceedings in favour of the appellant. In this case I hence find that the acquittal of the appellants under Section 210 of the Criminal Procedure Code was a determination in favour of the appellant.

17. On the aspect of the prosecution having been instituted without any reasonable and probable cause, **Salmond**, a legal scholar in his book **Salmond on the Law of Torts** defines reasonable and probable cause to mean:-

“... a genuine belief, based on reasonable grounds, that the proceedings are justified”.

18. Rudd, J in the **Kagane case (supra)** adopted the definition of **Hawkins, J** in **Hicks =vs= Faulkner (1878) 8 QBD 167** where reasonable and probable cause was defined as follows:-

“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 reasonable lead any ordinary prudent and cautious man placed in the position of the accused, to the conclusion that the person charged was probably guilty of the crime imputed. This definition was relied upon also in the case of **Thomas Mboya Oluoch & another –vs- Lucy Muthoni Stephen & another (2005) eKLR** (appellant’s list of authorities). The prosecutor must himself honestly believe in the case which he is making. The defendant (in this case the respondent) is not required to believe that the accused is guilty: it is enough if he believes there is reasonable and probable cause for a prosecution. He need only be satisfied that there is proper case to lay before the court. If the prosecution is based on information received, it was held in the **Kagane** case cited above that, **“.....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.”**

19. In **James Karuga Kiiru =vs= Joseph Mwamburi & 3 Others (Nrb. C. A. No. 171 of 2000)** the Court held that:-

“.... 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.”

And, in **Simba =vs= Wambari (1987) KLR 601** reasonable and probable cause was defined 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 demonstrated 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..”

20. The Appellant in essence contended that the Board officials and the police by arresting her and confiscating her goods on the allegation that she was not qualified to run the Chemist and even without confirming the true position given that the Appellant was a qualified and registered Pharmaceutical Technologist acted unreasonably and without any probable and justifiable cause. That, the Appellant further contended, resulted to an unlawful arrest, confinement and a malicious prosecution. The Appellant was the only witness in the suit.

21. The Respondents took the opposite position. They jointly contended that their actions were based on reasonable and probable cause, were justified in the circumstances of the case and were within the law and as such the Appellant's suit ought to rightly fail. To that end the Board availed three witnesses whereas the AG availed one witness in the suit.

22. It is now on this Court's shoulder's to weigh the two rival positions and being guided by the law, to decide on the matter. I will in the first instance revisit the events that led to the arrest, confinement and subsequent charging of the Appellant. In doing so I will refer to the proceedings in the criminal case as well as those in the suit.

23. As stated elsewhere above, the Appellant operated the Chemist within Awendo town. On the fateful day three people walked into the Chemist and two of them introduced themselves as officers from the Board who were on an inspection tour in the region and the other one as a Police officer who accompanied the two Board officials. The two officers from the Board were **JAMES MBOGO KINGORI** (who testified as PW1 and as DW1 in the criminal case and the suit respectively and I will

hereinafter refer to him as "DW1") and **ABDINASIR AHMED SHEIKH** (who only testified in the criminal case as PW4 and I will hereinafter refer to him as "PW4"). The Police officer was one **No. 80883 PC JEFF KIPTOO** (who only testified in the criminal case as PW5 and I will hereinafter refer to him as "PW5").

24. DW1 was a Pharmaceutical Inspector and his duties included *inter alia* the issuance of licences to Pharmacists and also the inspection of those who practice pharmacy to ensure that they comply with the law. DW1 had also been trained by the Criminal Investigation Department (CID) in investigations and prosecutions. PW4 was an Inspector of Drugs with the then Ministry of Medical Services but who was, at the time of the inspection, attached to the Board. His duties mainly dealt with the enforcement of the Pharmacist and Poisons Act.

25. After the formal introductions DW1 informed the Appellant that they wished to see the relevant documents relating to the business which included the professional documents, a Practising Certificate and the premises license. The Appellant handed over copies of four documents to DW1. He looked at them and requested for the original documents. The Appellant informed them that the original documents were not at that premises and she was escorted by PW5 to where she retrieved the said original documents. Those are the same documents the Appellant produced as exhibits in the suit. They were as follows:-

(a) Diploma Certificate in Pharmaceutical Technology from Kenya Medical Training College, Nairobi.

(b) Leaving Certificate from Kenya Medical Training College, Nairobi dated 20/10/1999.

(c) Certificate of Registration as a Pharmaceutical Technologist from the Pharmacy and Poisons Board dated 18/03/2007.

(d) Certificate for Registration of Premises from the Pharmacy and Poisons Board dated 15/11/2007.

26. DW1 also managed to retrieve the Board's blank letterhead from the Chemis which was eventually marked as DMFI-7 and produced as DEXBT -7 in the suit.

27. DW1 took time to inspect the original documents. He readily noted significant discrepancies on them and highly doubted their authenticity. For instance he was aware that Kenya Medical Training College did not offer a '**Diploma in Pharmaceutical Technology**' but it instead offered a '**Diploma in Pharmacy**'. DW1 was truly astonished by what he saw in the documents allegedly issued by the Board. The alleged '**Certificate of Registration as a Pharmaceutical Technologist**', was an outright false document. First, the Board issued a '**Certificate of Enrolment as a Pharmaceutical Technologist**' instead. Second, the date usually appeared on the first column instead. Third, the genuine form is Form 28 with a serial number and not Form III. Fourth, the qualification of the holder did not usually appear on the Certificate. On the alleged '**Certificate for Registration of Premises**', DW1 noted the anomaly with the registration number. According to the Board's mode of registration, all Certificate for Registration of Premises start with '**PPB/.....**' and is followed by the first letter of the business name. In the Appellant's case therefore since the name of the Chemist was '**SAMNET CHEMIST**' then the Certificate ought to have been '**PPB/S/...**' and not '**PPB/W/018**' as was so appearing on it.

28. Even on that revelation, DW1 did not stop there. He called the Board in Nairobi and made some clarifications and confirmations. It was confirmed that the number **PPB/W/018** appearing on the Certificate for Registration of Premises of the Appellant's premises instead belonged to a completely different premises known as '**WANZARO CHEMIST**' in Nairobi. It was further confirmed that according to the sole records held by the Board the Appellant was not a registered pharmaceutical technologist. DW1 produced a certified copies of the Roll of Pharmaceutical Technologists and the record of the registered premises from the Board in a further bid to sustain his position.

29. It was DW1 who expounded on how one becomes a registered Pharmaceutical Technologist in Kenya. Upon attaining the required High School grades one is admitted into a Medical Training Institute to undertake a study in Diploma in Pharmacy. On successful completion and on an award in Diploma in Pharmacy one is required to sit and pass further examinations. Such a person is then registered by the Board as a Pharmaceutical Technologist and his/her name entered into the Roll of Pharmaceutical Technologists which is solely kept and maintained by the Board. One is required to personally sign the Roll and is then issued with a '**Certificate of Enrolment as a Pharmaceutical Technologist**'. To enable a registered Pharmaceutical Technologist practice pharmacy one must obtain and maintain an annual renewable license. DW1 clarified that the Board was the only entity in Kenya vested with the legal powers and duty to register and license those practicing pharmacy.

30. It was on that background that DW1 ordered for the arrest of the Appellant who was arraigned on court the following day.

31. The investigations in the criminal case were further conducted by one **No. 76786 PC. DOUGLAS ONGICHO** (who testified as PW7 and as DW4 in the criminal case and the suit respectively and I will hereinafter refer to him as ***"DW4"***). In the first instance DW4 preferred four counts against the Appellant under the Penal Code, Chapter 63 of the Laws of Kenya but later on added seven more counts under the Pharmacy and Poisons Act, Chapter 244 of the Laws of Kenya thereby making a total of eleven counts. DW4 also wrote to both the Board and the Kenya Medical Training College at Nairobi to verify if the various documents in issue emanated from those institutions and their authenticity. He later received confirmations from the two institutions that the Certificates in issue did not emanate from the alleged institutions and further that the Appellant had never been enrolled as a student at the Kenya Medical Training College at Nairobi neither was she a registered Pharmaceutical Technologist in Kenya. DW4 further interrogated the staff at the Kenya Medical Training College at Nairobi and the Board over the matter who even attended court and confirmed that the Appellant had no link with the institutions.

32. It is also on record that DW4 then took various specimens including some from the Appellant and forwarded them to the Government Document Examiner together with the questioned documents for further analysis. DW4 informed the trial court in his evidence in the criminal case that he received two reports from the Document Examiner which revealed the culpability of the Appellant to various offences and which he marked as PMFI-37 and PMFI-40. The record further reveals that the said Document Examiner did not testify as a witness since when the Document Examiner attended court on 17/03/2011 to give evidence the Appellant's Counsel was absent hence necessitating an adjournment. That witnesses did not however attend court again.

33. The criminal case was subsequently terminated under Section 210 of the Criminal Procedure Code. The basis of terminating the criminal case at that point as clearly stated by the trial Magistrate in his ruling was twofold. One, the failure of the Document Examiner to testify and produce the twin reports and two, the failure to adduce expert evidence that the seized drugs were counterfeits.

34. I have carefully gleaned through the record but only found Charge Sheets on the first four counts and not those on the substituted eleven counts. I have however seen from the ruling that the eleven counts were made up of ***four counts of forgery*** contrary to Section 349 of the Penal Code, ***three counts of uttering false documents*** contrary to Section 353 of the Penal Code, ***unlawfully carrying the business of a Pharmacist while not registered as a Pharmacist contrary to Section 19(2) of the Pharmacy and Poisons Act, Cap. 244*** of the Laws of Kenya, ***carrying a business of a Pharmacist in premises not registered by the Pharmacy and Poisons Board contrary to Section 23(6) of the Pharmacy and Poisons Act, Cap. 244 of the Laws of Kenya*** and ***unlawfully being in possession of Part 1 Poison contrary to Section 26(1) of the Pharmacy and Poisons Act, Cap. 244 of the Laws of Kenya***,

35. It is a fact that the Penal Code and the Pharmacy and Poisons Act prescribes several offences relating to the practice of pharmacy as well as forgery and uttering false documents. It is also a fact that DW1, PW4 and PW5 were on a lawful course in inspecting outlets dispensing pharmaceutical drugs and it equally remains a fact that for a business to operate as a Chemist in Kenya at least three crucial documents must be obtained being **'Diploma in Pharmacy'**. **'Certificate of Enrolment as a**

Pharmaceutical Technologist' and a **'Certificate for Registration of Premises'**. It is also not in doubt that DW1 being an Inspector from the Board and charged with the duty of issuing licenses had the requisite knowledge and experience to reasonably interrogate any such documents.

36. In this matter it appears that DW1 was the main determinant of the arrest and arraignment in court of the Appellant. Therefore the question that begs an answer is whether there was a reasonable and probable cause for the arrest of the Appellant.

37. When the Appellant availed the original documents, DW1 did not disregard them. As an accomplished Inspector, investigator and Prosecutor, DW1 took time and examined the documents and readily noted some glaring anomalies on their face. From the look of the documents DW1 was already satisfied that they were indeed not authentic. However he further made a call to the Board and sought to verify the information in the documents. DW1 confirmed that indeed PW1 was neither a registered Pharmaceutical Technologist nor were the premises licensed to operate as a Chemist. The confirmation came on the backdrop of the fact that the Board was the only entity in the country charged with the licensing of Pharmacist and like premises.

38. There was also another equally important issue which arose during time the Appellant was being interrogated by the officials of the Board. When the Appellant was asked by PW4 to state where the Kenya Medical Training College in Nairobi was since she must have been there for a period of three years as to acquire the Diploma, she instead stated that the college was in Westlands as opposed to Kenyatta National Hospital. I have also confirmed from the record before the trial court in the suit that the Appellant was again asked the location of the college and failed to give it. That so happened twice when the same question was put to her. (See page 10 and 12 of the Record of Appeal). Further, the team managed to retrieve the Board's blank letterhead from the premises. Even without insinuating anything adverse on the Appellant, it leaves very grave and unanswered questions on how the Board's blank letterhead left Board to the premises, if the same was indeed genuine in the first instance,

39. Having said so and by taking all the above into account, the totality of it is that a reasonable and prudent person placed in such circumstances will no doubt suspect that the Appellant was involved in the commission of several offences, at least on a *prima-facie* basis. The upshot is that DW1 acted with extreme caution and care by even seeking confirmations from the Board before making the decision to order the arrest of the Appellant. There was ample *prima-facie* evidence of commission of several offences both under the Penal Code as well as the Pharmacy and Poisons Act. That position equally applies to DW4 who carried out quite impressive and comprehensive investigations up to obtaining reports from the Document Examiner (which were only marked but not produced) on the culpability of the Appellant. Of course this Court is alive to the fact that the reason the criminal case failed was mainly due to the failure of the Document Examiner to testify in the matter. I however take note that the Document Examiner attended court to testify but for the absence of the Appellant's Counsel.

40. I therefore return the finding that the arrest, confinement and prosecution of the Appellant was not instituted without reasonable and probable cause. There were reasonable grounds for the arrest, confinement and prosecution of the Appellant.

But was the said prosecution actuated by malice?

In the case of **Joseph C. Mumo=vs= Attorney General & Another (2008) eKLR** 'malice' was defined as:-

“... prosecution for a reason other than the vindication of justice...”

41. Malice is hence demonstrated when an action is taken for some improper and wrongful instance or interest to use the legal process in question for some other reason than its legally appointed and appropriate purpose. Malice, however, can either be express or can be gathered from the circumstances surrounding the prosecution by imputation. This was so rightly held in the **Kagane case** (supra) thus:-

".....want of reasonable and probable cause to be taken into consideration as being some evidence of malice..."

42. The law remains very clear that the mere fact that a person has been acquitted of criminal charges does not necessarily connote malice on the part of the prosecution. In *Nzoia Sugar Company Ltd v. Fungututi (1988) KLR 399* the Court of Appeal held that:

'Acquittal person on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecutor.....'

43. Having found that there was every reasonable and probable cause that led to the arrest, confinement and prosecution of the Appellant, it naturally flows that there was equally no malice that was demonstrated on the part of the Respondents in undertaking the arrest, confinement and prosecution of the Appellant.

44. This Court hence affirms the finding of the trial court in dismissing the suit. I however agree with the Appellant that even after making the decision to dismiss the suit the trial court was still under a legal duty to ensure that it rendered an assessment of damages. To that end the trial court erred in law.

45. I will hence proceed on to assess the damages which I would have found adequate had the appeal succeeded. Whereas the appellant suffered as a result of the prosecution, I find that there is no evidence of unreasonable incarceration or injuries sustained during the short period she was behind bars. The Appellant was arraigned before court within the constitutional timelines and was readily released on bond and remained at liberty until the termination of the criminal case.

46. I have gone through some awards which dealt with the issue of arrest and prosecution. It however appears that most of them involve long incarcerations with serious infliction of injuries. That was not the case in the matter. Be that as it may, taking into account that the Appellant was a qualified and registered Pharmaceutical Technologist who ran a successful business and the manner in which the events occurred, I would have awarded a global sum of Kshs. 750,000/= on account of damages for the unlawful arrest, wrongful confinement and malicious prosecution.

47. On special damages, I find that the money the Appellant paid to the Counsel for representation in the criminal case is recoverable. According to the receipts, it was **Kshs. 100,000/=**.

The claim on the value of the drugs seized from the Chemist fails as the same was not pleaded in the Plaint. Equally the claim on transport expenses fails as although pleaded it was not proved. On the issue of the rental payments, the Appellant stated on oath that she closed the business but continued to pay rent during the entire period of three years the criminal case was in court. The Appellant ought to have mitigated losses by terminating the tenancy *moreso* after she closed the business. I would not have allowed the recovery of rentals for the entire period of three years but for only six months that being a reasonable period within which the Appellant would have prepared and terminated the tenancy. That translates to an award **Kshs. 18,000/=** on that head. On the loss of profits I would have also awarded the same for a period of six months had the Appellant availed some credible evidence. I say so as I decline to accept the contents of the document entitled '**Balance Sheet and Accouts for the Year ending 31st December 2008**'. The said document does not disclose the maker and is not signed. In sum I would have in total awarded Kshs. 118,000/= on special damages.

Likewise I would have awarded the costs of the suit and interests as prayed for in the plaint.

Disposition:

48. However given the foregone discussion, the upshot is that the appeal is unmerited and is hereby dismissed with costs to the Respondents.

Orders accordingly.

DATED, SIGNED and DELIVERED at MIGORI this 20th day of July 2016.

A. C. MRIMA

JUDGE