REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 27 OF 2014

STEPHEN GACHAU GITHAIGA.....…….....APPELLANT

VERSUS

MARGARET WAMBUI WERU.....……..……1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

(An appeal from the Judgment and Decree of the Hon. Stella Muketi, C.M. delivered on 13.7.2011 in Nyeri C.M.C.C. No. 534 of 2007)

JUDGMENT

This appeal arises from the decision of the Chief Magistrate at Nyeri in C.M.C.C No. No. 534 of 2007 in which the appellant and the second Respondent had been sued by the first Respondents for recovery of special and general damages for malicious prosecution, false imprisonment and gross abuse of process.

The first Respondents claim in the lower court against was enumerated in a plaint dated 21.8.2007 in which the first Respondent averred *inter alia* as follows:-

That as a result of false and malicious complaints by the Respondent, the first Respondent was arrested without any justifiable cause and was charged with the offence of arson contrary to Section 322 (a) of the Penal Code[1] in Nyeri Magistrates Criminal Case Number 2134 of 2006, that he stood trial for the said offence and he was acquitted by the court under Section 210 of the Criminal Procedure Code.[2]

However, upon being acquitted as aforesaid, the Appellant herein colluded with the said police officers and the first Respondent was re-arrested and confined in police cells, arraigned in court and charged under Section 339 (1) of the Penal Code[3] in Criminal case number 3819 of 2006 which case was also determined in favour of the first Respondent.

It was the first Respondents case that the two prosecutions foresaid were actuated by malice and gross abuse of process by the Police.

The Appellant herein filed a defence in the said case in which he denied the said allegations. The second Respondent did not enter an appearance or file a defence in the said proceedings.

This being a first appeal, this court is enjoined to re-evaluate and re-analyse the evidence tendered in the lower court so as to arrive at its own conclusions. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions.(See ***Stanley Maore -vs- Geoffrey Mwenda[4] "the duty of the Appellate court is to re-evaluate the evidence, assess it and make its own conclusions..."***

The first Respondent's evidence in the lower court was that she was an employee of the Appellant as a teacher and she resigned in 2006 and started similar business, that on 18. 5.2006 she was arrested because the first Respondent's office was burnt. She was arrested on 19th May 2006 and was charged in criminal case number 2134 of 2006 with the offence of arson but was acquitted under Section 210 of the Criminal Procedure Code.[5] She was re-arrested and charged again in case number 3819 of 2006. The charge sheet bore the same police reference number but different dates. The second case was malicious damage to property. Curiously, this was the same property that was alleged destroyed in the alleged arson. Both cases were based on the same evidence.

The first appellants' case was that the Appellant instituted the said cases because she had started her own school within the same neighbourhood, hence, the cases were actuated by malice because she was now competing with her former employer in the same business. She stated that she slept in police cells for one night and that she was arrested because she was competing with the Appellant in business. After the second arrest she was detained in the sells over night. She produced receipts in support of special damages in respect of costs incurred for defending the cases and purchasing the proceedings. She also confirmed serving the Hon. Attorney General with the requisite notice.

PW2 the executive officer of the Nyeri Law courts produced the two court files in respect of the criminal cases referred to above, namely Criminal case number 3819 of 2006, the accused in the said case were the first Respondent and a one James Ndua Kairu. The accused were acquitted under Section 210 of the Criminal Procedure Code.[6]

The witness also produced file in respect of criminal case number 1326 of 2006, in which the accused was a one James Ndua Karui. The charge in the said case was withdrawn under Section 87A of the Criminal Procedure Code.[7]

Further, PW2 also produced file for criminal case number 2134 of 2006 in which the first Respondent was the accused together with a one Jmes Ndua Karui. The offence was arson but the case was withdrawn under Section 210 of the Criminal Procedure Code.

The Appellants' evidence was that his school was burnt, he reported to the police and they arrested the first Respondent who was the head teacher, and that he has no control over the manner in which the police investigate cases and that his role was limited to reporting. On cross examination he insisted he only knew of one case.

The second evidence never filed any defence nor did they call witnesses even though counsel for the second Respondent participated in the proceedings. I will revert to this issue later in this judgement.

The learned Magistrate after evaluating the evidence arrived at the following findings:-

> *a. Liability 70% as against the appellants and 30% against the second Respondent.*
>
> *b. General Damages .....Ksh. 300,000/=*

Dissatisfied with the said judgement, the Appellants herein filed this appeal and advanced stated 9 grounds of appeal in their memorandum of appeal which can conveniently be reduced into three, namely:-

> ***(a)*** *whether the first Respondent proved her case to the required standard;*
>
> ***(b)*** *Whether learned magistrate erred in apportioning the blame at 70% as against the appellant and 30% against the second Respondent;*
>
> ***(c)*** *whether the award of damages arrived at was erroneous or inordinately high.*

In their submissions, the Appellants maintain that several key questions were not answered such as whether there was a genuine or reasonable basis for the complaint, whether the withdrawal of the cases

were instigated by the appellant, questioned the basis of apportioning the liability and complained that the damages were unreasonable. Counsel relied on the case on *David Kirimi Julius vs Fredrick Mwenda*[8]in support of the fact the police action cannot be blamed on the complainant who had no control over their actions.

The first Respondent's counsel submitted *inter alia* that the appeal was filed out of time, that the first appellant was acquitted under Section 210 of the Criminal Procedure Code, that the prosecution was actuated by malice, that the evidence adduced proved the plaintiffs case, that the award of Ksh. 300,000/= was reasonable, that the apportionment of liability was proper and that finding that the appellant was to pay Ksh. 270,000/= as opposed to Ksh. 210,000/= was an error that does not affect the finding. Counsel for the Respondent relied on the case of *Peter M. Kariuki vs Attorney Genral*[9].

In my opinion, both counsels did not effectively address the key elements of malicious prosecution and whether they were proved in this case. Also, both advocates completely failed to address the fact that the Hon. Attorney General never filed a defence nor did he adduce evidence and whether this had implications on the courts findings on liability. As stated above

First I address the issue whether or not this appeal was filed out of time. On 2nd April 2014 clearly the appellant was ordered to file and serve the memorandum of appeal and record of appeal within 45 days from the said date. The said order was made by consent. A simple tabulation shows that this appeal was filed two days late. No leave was sought for extension of time. On that basis alone I find that the appeal is not properly before the court and the same must fail.

I now turn to the question whether or not the tort of malicious prosecution was proved to the required standard. Malicious prosecution is an action for damages brought by one against whom a civil suit or criminal proceeding has been unsuccessfully commenced without Probable Cause and for a purpose other than that of bringing the alleged offender to justice.

An action for malicious prosecution is the remedy for baseless and malicious litigation. It is not limited to criminal prosecutions but may be brought in response to any baseless and malicious litigation or prosecution, whether criminal or civil. The criminal defendant or civil respondent in a baseless and malicious case may later file this claim in civil court against the parties who took an active role in initiating or encouraging the original case. The defendant in the initial case becomes the plaintiff in the malicious prosecution suit, and the plaintiff or prosecutor in the original case becomes the defendant.

Malicious prosecution is an intentional tort designed to provide redress for losses flowing from an unjustified prosecution. Under the first element of the test for malicious prosecution, the plaintiff must prove that the prosecution at issue was initiated by the defendant. This element identifies the proper target of the suit, as it is only those who were *actively instrumental* in setting the law in motion that may be held accountable for any damage that results.

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

The third element which must be proven by a plaintiff — absence of reasonable and probable cause to commence or continue the prosecution — further delineates the scope of potential plaintiffs. As a matter of policy, if reasonable and probable cause existed at the time the prosecutor commenced or continued the criminal proceeding in question, the proceeding must be taken to have been properly instituted, regardless of the fact that it ultimately terminated in favour of the accused.

Finally, the initiation of criminal proceedings in the absence of reasonable and probable grounds does not itself suffice to ground a plaintiff's case for malicious prosecution, regardless of whether the defendant is a private or public actor. Malicious prosecution, as the label implies, is an intentional tort that requires proof that the defendant's conduct in setting the criminal process in motion was fueled by malice. The malice requirement is the key to striking the balance that the tort was designed to maintain: between society's interest in the effective administration of criminal justice and the need to compensate individuals who have been wrongly prosecuted for a primary purpose other than that of carrying the law into effect.

Quoting from the Supreme Court of Canada decision in *Nelles v. Ontario**[10]***, the Alberta Court of Appeal, in *Radford v Stewart*, said:-

> *"There are four elements to the tort of malicious prosecution: the prosecution must have been initiated by the defendant, the proceedings must have been terminated in favour of the plaintiff, there must be an absence of reasonable and probable cause and there must be malice or a primary purpose other than that of carrying the law into effect."*

In 1999, the Alberta Court of Queen's Bench, in *Chopra v. T. Eaton Co.**[11]*** adopted these words in relation to this tort:-

> *"The underlying basis for actions founded on malicious prosecution is the allegation of facts which, if believed, would establish abuse of the judicial process while acting out of malice and without reasonable and probable cause and which judicial process did not result in a finding of guilt of the party alleging the abuse."*

I find useful guidance in the wise words of Duffus V.P. in the case of *Kasana Produce Store Vs Kato*[12] at page 191, paragraph G-I where he laid down the ingredients for malicious prosecution as follows:-

> *i. The plaintiff was prosecuted by the defendant in that the law was set in motion against him by the defendant on a criminal charge. The test is not whether the criminal proceedings have reached a stage at which they may be described as a prosecution but whether they have reached a stage at which damage to the plaintiff result.*
>
> *ii. That the prosecution was determined in the plaintiffs favour.*
>
> *iii. That it was without reasonable or probable cause-On the evidence the defendant did not believe in the justice of his own case.**[13]***
>
> *iv. It was malicious-The defendant had improper and indirect motives in pursuing the false charge against the plaintiff.*

As mentioned above, the Second Respondent never filed an appearance or defence, nor did they call witnesses but counsel participated in the proceedings. What are the consequences of a party failing to adduce evidence? In the case of *Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited**[14]*** **Justice Lesiit**, citing the case of *Autar Singh Bahra and Another vs. Raju Govindji,**[15]*** stated:

> *"Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail".*

Again in the case of *Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others**[16]*** the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence

adduced by the plaintiff against them is uncontroverted and therefore unchallenged. In the present case, the second Respondent did not file any pleadings at all, hence as far as the first Respondents case is concerned, the case was uncontested.

In the case of *Interchemie EA Limited vs. Nakuru Veterinary Centre Limited**[17]** Mbaluto, J. held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted. If one is still in doubt as to the legal position reference could be made to the case of *Drappery Empire vs. The Attorney General**[18]** where **Rawal, J** (as she then was) held that where evidence is not challenged and stands uncontroverted due to the failure by the defendant to adduce evidence, the standard of proof in civil cases (on the balance of probabilities) has been attained by the plaintiff.

In view of the foregoing I find that there was no basis at all for the trial magistrate to apportion the liability as she did and it's not clear how she arrived at the 70 % on the part of the Appellant and 30% on the part of the second Respondent. From the evidence on record, this is was a proper case for the leaned Magistrate to find both defendants jointly and severally liable.

It is not disputed that the first Respondent was arraigned by the police, locked in police cells and charged in court. It not disputed both prosecutions were premised on the same complaint, same set of facts and circumstances and same evidence and same complainant. It was not disputed that in such cases the proper defendant is always the Attorney General.

It is not disputed that both prosecutions ended in the plaintiff's favour as she was acquitted under section 210 of the Criminal Procedure Code. According to the first appellant the prosecutions were instituted without reasonable and probable cause. It is also clear that the first Respondent had left employment of the Appellant and had opened a similar businesses and it was the first Respondents case that she was being persecuted for being a business competitor of the Appellant and in this regard the police were misused and acted in bad faith in instituting the criminal proceedings when there was no evidence at all.

Without any evidence emanating from the first Respondent on how the decision to arrest and charge the first Respondent was arrived at the Court has no option but to find that there was no probable and reasonable cause. In *Thomas Mutsotso Bisembe vs. Commissioner of Police & Another**[19]*it was held that the failure by the police to take statements from relevant witnesses was prove that the police neglected to make a reasonable use of the sources of information available and therefore there was want of reasonable and probable cause and also malice.

Having taken into account the pleadings, the evidence adduced as well as the submissions made, the following are, in my respectful view, 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?*

The law surrounding the tort of malicious prosecution is well settled in this country. In *Mbowa vs. East Mengo District Administration**[20]*, 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. It's essential ingredients are: (1) the criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority; (2) the defendant must have acted without reasonable or probable cause i.e. there must have been no facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified; (3) the defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose; and (4), the criminal proceedings must have been terminated in the plaintiff's favour, that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge...The plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must "unite" in order to create or establish a cause of action. If the plaintiff does not prove them he would fail in his action. The damage that is claimed is in respect of reputation but other damages might be claimed, for example, damage to property...The damage to the plaintiff results at the stage in the criminal proceedings when the plaintiff is acquitted or, if there is an appeal, when his conviction is quashed or set aside. In other words, the damage results at a stage when the criminal proceedings came to an end in his favour, whether finally or not. The plaintiff could not possibly succeed without proving that the criminal proceedings terminated in his favour, for proving any or all of the first three essentials of malicious prosecution without the fourth which forms part of the cause of action, would not take him very far. He must prove that the court has found him not guilty of the offence charged...The law in an action for malicious prosecution has been clearly defined and in so far as the ordinary criminal prosecution is concerned the action does not lie until the plaintiff has been acquitted of the charge. In this case the respondent could have brought his action for malicious prosecution until the prosecution ended in his favour. He could not have maintained his action whilst the prosecution was pending nor could he have maintained an action after he had been convicted. His right to bring the action only accrued when he secured his acquittal of the charge on appeal, and he then had the right to bring this action for damages...Time must begin to run as from the date when the plaintiff could first successfully maintain an action. The cause of action is not complete until such a time, and in this case this was only after he was acquitted on appeal".

In *Egbema vs. West Nile Administration* **[21]** the same Court held:

"False imprisonment and malicious prosecution are separate causes of action; a plaintiff may succeed on one and fail on the other. If he established one cause of action, then he is entitled to an award of damages on that issue...For the purposes proof that the criminal proceedings have been determined in the appellant's favour it is enough that the criminal proceedings have been terminated without being brought to a formal end. The fact that no fresh prosecution has been brought, although five years have elapsed since the appellant was discharged, must be considered equivalent to an acquittal, so as to entitle an appellant to bring a suit for malicious prosecution...There was no finding that the prosecution instituted by Uganda Police was malicious, or brought without reasonable or probable cause. The Uganda Police, unlike Administration Police, are not servants or agents of the respondent...The decision whether or not to prosecute was made by the Uganda Police, who are not servants of the respondents after investigation. There is no evidence of malice on the part of the respondent. The appellant was an obvious suspect as he was responsible for the security of the office from which the cash box disappeared. It cannot be said that there was no reasonable and probable cause for the respondent instigating a prosecution against the appellant. The actual decision to do so was taken by the Uganda Police. As the Judge

has made no finding as to whether the instigation of the prosecution was due to malice on the part of the respondent, this Court cannot make its own finding. The circumstances of this case reasonably pointed to the appellant as a suspect and there was not sufficient evidence that in handing the appellant over to the Uganda Police for his case to be investigated and, if necessary, prosecuted, the respondent was actuated by malice".

In *Gitau Vs. Attorney General**[22]***,**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".

In *James Karuga Kiiru –vs- Joseph Mwamburi and 3 Others***,[23]** 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."

Rudd, J in *Kagane –vs- Attorney General***,[24]** set the test for reasonable and probable cause. Citing *Hicks vs. Faulkner*,[25] *Herniman vs. Smith*[26] and *Glinski vs. McIver**[27]*** 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."

The decision in *Simba vs. Wambari***[28]** defines what constitutes a reasonable and probable cause as:

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

The 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. On the first issue whether the criminal proceedings were instituted by the appellant there is no dispute that the said proceedings were instituted by the appellant. Accordingly I find that the second Respondent was prosecuted pursuant to the said complaint.

On 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*,**[29]** 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 offence committed in the presence of law enforcement officers or by way of a complaint lodged by a person to the said officers or agencies. However, the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. 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. 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? Why was the first Respondent charged twice on the same complaint? In the absence of any evidence as to the facts and circumstances upon which the second Respondents' relied, the court can only conclude that there was no probable and reasonable cause for charging the first Respondent and that constitutes malice for the purposes of the tort of malicious prosecution.

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.

As was held by **Ojwang, J** (as he then was) in *Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another**[30]*:-

> *"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".*

Since no evidence was tendered by the second Respondent on how the decision to arrest and charge the plaintiff was arrived at the Court has no option but to find that there was no probable and reasonable cause.

The next issue is whether the criminal proceedings terminated in the first Respondents favour. There is no doubt that the criminal proceedings were terminated in favour of the first Respondent. It is now trite law that acquittal whether after hearing both prosecution and defence witnesses or on a finding that there is no case to answer amounts to a termination in favour of the accused. The law is that for the purposes proof that the criminal proceedings have been determined in the appellant's favour it is enough that the criminal proceedings have been terminated without being brought to a formal end. Accordingly the finding of no case to answer or a withdrawal was a termination in favour of the first Respondent.

I find that the second Respondent was clearly entitled to an award of damages for malicious prosecution.

It was held in the Uganda case of *Dr. Willy Kaberuka vs. Attorney General Kampala**[31]* that**:**

> *"The plaintiff suffered injury to his reputation. .....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".*

I now turn to the issue of quantum of damages. The general principal is that the assessment of damages is within the discretion of the trial court and the appellate court will only interfere where trial court, in assessing damages, either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is not based on any evidence (see *Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another* ***[32]*****,** *Peter M. Kariuki v Attorney General* ***[33]*** and *Bashir Ahmed Butt v Uwais Ahmed Khan.* ***[34]*** *I find no reason to interfere with the award made by the lower court.*

In conclusion, I find as follows:-

i. The appeal was filed out of time and on that ground alone I dismiss it.

II. There was no basis for the magistrate to apportion liability at 70% as against the Appellant and 30% as against the second Respondent and in this connection I set aside the magistrates findings on liability and substitute it with an order that judgement be and is hereby entered against the Appellant and the Second Respondent jointly and severally.

ii. That award of damages in the sum of Ksh. 300,000/= to the plaintiff is hereby up held.

iii. That the Appellant shall pay the costs of this appeal to the first Respondent.

iv. That the Appellant and the second Respondent shall jointly and severally pay the costs of the lower court to the first Respondent.

v. That the amounts in (ii) & (iv) above shall attract interests at court rates from the date of judgement in the lower court while the amount in (iii) shall attract interests from the date of taxation.

Orders accordingly

Dated at **Nyeri** this **18th** day of **December** 2015

John M. Mativo

Judge

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[1] Cap 63, Laws of Kenya

[2] Cap 75, Laws of Kenya

[3] Supra

[4] **Nyeri civil appeal no. 147 of 2002**

[5] Supra

[6] Ibid

[7] Ibid

[8] {2009} eKLR

[9] {2014}eKLR

[10] [1989] 2 SCR 170

[11] (240 A.R. 201)

[12]{1973} E.A. 190

[13] See Clerk & Land Sell on Torts, 12th Edition, P. 902

[14] Nairobi (Milimani) HCCC No. 834 of 2002

[15] HCCC No. 548 of 1998

[16] Nairobi (Milimani) HCCS No. 1243 of 2001

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[33] **CA Civil Appeal No. 79 of 2012 [2014]eKLR**

[34] **[1982-88] KAR 5**