



REPUBLIC OF KENYA



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**Moseti v Omao (Civil Appeal E041 of 2024)
[2025] KEHC 1741 (KLR) (24 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1741 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E041 OF 2024
DKN MAGARE, J
FEBRUARY 24, 2025**

BETWEEN

ALLOYS MATAYA MOSETI APPELLANT

AND

VINCENT MARIITA OMAO RESPONDENT

*(Being an appeal from the Judgment and Decree of Hon. P.K. Mutai
- PM in Kisii CMCC No. 808 of 2021 delivered on 6.03.2024)*

JUDGMENT

1. This is an appeal from the Judgment of Hon. P.K. Mutai - PM in Kisii CMCC No. 808 of 2021, delivered on 6.03.2024. The Appellant was the 1st Defendant in the case.
2. The Respondent filed suit against the Appellant and the Attorney General. He stated that on or about 28.1.2018, the Attorney General wrongfully and maliciously set in motion through a report by the Appellant on the offense of causing Public Annoyance contrary to Section 175 of the *Penal Code*. However, without investigating to verify the truthfulness or otherwise of this report, the Attorney General's agents maliciously arrested the Respondent.
3. Subsequently, the Respondent was arrested and detained at the Kisii Police Station. He was charged in Kisii CMCR 333 of 2018, but upon hearing, he was found not to have a case to answer on 19.7.2019.
4. The Appellant filed a defence denying the case in general terms. It is not clear what defence the Appellant set out. It is this kind of defences that the Court of Appeal addressed in the case of Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR, where the court stated as doth: -

“The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R.



in *Thorp v Holdworth* (1876) 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible”, (underling supplied).

I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in the appellant’s defence. This was that if the respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence for all purposes including that of 0 6 r 13(1)(a).”

5. The suit against the Attorney General was struck out on 19.12.2022 since the claim was filed out of time, contrary to Section 3(1) of the *Public Authorities Limitation Act*, Cap 39 Laws of Kenya. The matter thus proceeded against the Appellant, who was the complainant.
6. The Respondent posited that he was acquitted of the offence of Causing Public Annoyance as charged in Criminal Case Number 333 of 2018 on 12th July 2019. The court found the case against the Appellant proven and made the following orders:
 - a. The appellant was the source of the arrest and prosecution of the Respondent. The Appellant was found liable for wrongful arrest and prosecution.
 - b. General damages of Ksh. 150,000/=
 - c. Special damages of Ksh 100,000/=

Submissions

7. The Appellant filed submissions dated 29.11.2024. They stated that there are 4 grounds to be proved before a tort of malicious prosecution is to be proved. These are:
 - a. That the prosecution was instituted by the defendant or by someone for whose acts he is responsible.
 - b. That the prosecution was instituted without reasonable and probable cause.
 - c. That the prosecution was actuated by malice.
 - d. That the prosecution was terminated in the plaintiff’s favour.
8. He postulated that all four grounds must be proved to succeed in a claim for damages for malicious prosecution. They stated that the Appellant made the complaint, but not all grounds were proved. He noted that the discretion to charge was on the part of the Office of the Director of Public Prosecution. He is the necessary party to the suit. He stated that the court found no fault on the part of the police. Having so found, there was no basis to hold the Appellant liable. There was no allegation in the pleadings of lack of reasonable and probable cause.
9. They stated that there was no evidence of malice.
10. He arguably argued, in a rather circumlocutory manner, that if a complaint is made maliciously, it cannot be malicious unless there is evidence of collusion with the prosecution.



11. The Respondent filed submissions dated 2.1.2025. It was submitted that the lower court properly evaluated the evidence as the Appellant lodged a report to the police without a justifiable cause. Reliance was placed on *Ndungu vs Crown Paints Kenya Ltd & 2 Others (2023) eKLR*.
12. On the cross-appeal, it was submitted that the lower court's award was inordinately low. They stated that a sum of Ksh. 2,000,000/- would be adequate compensation to the Respondent as damages. No authority was cited in this regard.
13. The Appellant was aggrieved and appealed to this court, setting out four grounds of appeal as follows:
 - a. That the learned trial magistrate erred both in law and in fact, failing to find and hold that the Appellant caused the prosecution of the Respondent vide Kisii Cr. Case No. 808 of 2021, on the basis of sound probable and reasonable cause of malicious damage to his character.
 - b. That the learned trial magistrate erred in both law and fact in condemning the Appellant to pay the Respondent damages for malicious prosecution, yet he did not make a specific or express finding that there was bias against the Respondent during the investigations and/or prosecution.
 - c. That the learned trial magistrate erred both in law and facts, failing to find and hold that there was probable cause in charging the Respondent in the said Kisii CMCR Case No. 808 of 2021, wherein the Respondent was placed on his defense.
 - d. That the learned trial magistrate erred both in law and facts in finding and holding that the Prosecution of the Respondent in the said criminal case was actuated by malice against the weight of the evidence.
 - e. That the learned trial magistrate erred both in law and facts by holding that the Respondent had proved his case of wrongful arrest, confinement, and malicious prosecution against the Appellant.

Analysis

14. This being a first appeal, this court must reevaluate and assess the evidence and make its own conclusions. It must, however, remember that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand. This was aptly stated in the case of *Peters vs Sunday Post Limited [1958] EA 424* where, the Court of Appeal therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

15. The first Appellate court is not necessarily bound to accept the findings of fact by the court below, in particular, where he failed to take into consideration the evidence on record. In the case of *Selle and another Vs Associated Motor Board Company and Others [1968]EA 123*, Law JA stated as follows:-

“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular



circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

16. The Court must bear in mind that it had neither seen nor heard the witnesses. The trial court has observed the demeanor and truthfulness of those witnesses. However, the documents still speak for themselves. The observation of documents is the same as the lower court, as parties cannot read into those documents, matters which are extrinsic to them. In *In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017) eKLR*, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

“Courts adopt the objective theory of contract interpretation and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.

17. In *Prudential Assurance Company of Kenya Limited v Sukhwender Singh Jutney and Another*, Civil Appeal No. 23 of 2005, the Court citing a passage in *Odgers Construction of Deeds and Statutes (5th edn.)* at p.106 emphasized that in construing the terms of a written contract;

“It is a familiar rule of law that no parole evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parole evidence, it does in fact apply to all forms of extrinsic evidence.”

18. In discerning the lawfulness of the arrest and malicious prosecution, the elements to be proved in an action for malicious prosecution are well settled. The Appellant did not arrest or prosecute the Respondent. The power to arrest and prosecute lies squarely with different bodies. The power to prosecute lies with the Office of the Director of the Public Prosecution pursuant to Article 157 of *the constitution*. The power of arrest was exercised by the police. The Appellant's role was that of a witness.

19. The court below had no jurisdiction to question the arrest, having struck out the suit against the state. The court cannot go around striking out on the basis that the Appellant was the source of prosecution. Not having impugned the actions of the police and the director of public persecution, the Respondent's goose was cooked in so far as prosecution and arrest were concerned. Malicious prosecution cannot stand without questioning the decision to charge.

20. This then brings me to the first question to address - jurisdiction. It is not enough that it may not have been raised. In the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR*, the Supreme Court held as doth: -

“In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”



21. The foregoing was echoing voices from the past as well elucidated in the case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR, where Justice Nyarangi JA, as he then was stated as doth;

“With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what

I have already said is consistent with authority: “By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.

22. The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. In the case of Mbowe vs. East Mengo District Administration [1972] EA 352, the East African Court of Appeal posited 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".

23. There was no role in the arrest or false imprisonment of the Respondent. The two torts of wrongful arrest and malicious prosecution are separate causes of action. A party may succeed on one and fail on the other. In *Egbema vs. West Nile Administration* [1972] EA 60, the same Court posited as doth:

"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 the administration Police, are not servants or agents of the respondent...The decision on whether or not to prosecute was made by the Uganda Police, who are not servants of the respondents, after the 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”.

24. Prosecution means 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. Prosecution is state-controlled unless it is private prosecution. 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 has set the law in motion against him on a criminal charge. Setting the law in motion” in this context does not have 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”.

25. Therefore, to prosecute a person does not ipso facto mean that a tort of malicious prosecution is committed. There has to be evidence that the prosecution was unreasonable and had no probable cause. In *James Karuga Kiiru –vs- Joseph Mwamburi and 3 Others*, Nrb C.A No. 171 of 2000, the court held:

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

26. Therefore, there is a need for all the actors in the series to be in the cause of action. By letting a claim for malicious prosecution lapse as against the state, the claim against the complainant equally lapsed as the court cannot discuss the property of the two torts in the absence of the state. It is only in very limited areas, where false information was given that the court can act on malicious prosecution. It cannot, however, act on wrongful arrest as the same was carried out by the police.

27. The state of mind of the complainant is crucial. In this case, the message that is said to have been authored was made by the Respondent. The Acquittal was based on the fact that the Appellant was not specifically named and was only referred to as Mayor. In other words, the prosecution fell on whether the mayor referred to the complainant or not. It is only the state that could have explained why they



found the evidence probable. In *Robert Okeri Ombeka v Central Bank of Kenya (2015)* eKLR it was held as follows:

A malicious prosecution plaintiff cannot establish a lack of probable cause of action based on having obtained in an earlier action an acquittal based on insufficiency of evidence... It is the state of mind of one commencing the arrest or imprisonment and not the actual fact of the case or the guilt or innocence of the accused which is at issue.

28. The net result is that I do not find the tort of malicious prosecution proved. In the circumstances, the appeal is merited and is accordingly allowed.
29. The counterclaim was that an amount of Kshs. 2,000,000/= would have sufficed. There were no authorities referred to. The record showed that the Respondent was released on bond immediately after they were charged. The Respondent was working in Kisii. There were no unnecessary expenses incurred in travelling. The offence was a minor one. The Respondent was charged with an offence of causing public annoyance contrary to section 175 of the penal code. The Common nuisance offence is described as common nuisance.
 - (1) Any person who does an act not authorized by law or omits to discharge a legal duty and thereby causes any common injury, or danger or annoyance, or obstructs or causes inconvenience to the public in the exercise of common rights, commits the misdemeanour termed a common nuisance and is liable to imprisonment for one year.
 - (2) It is immaterial that the act or omission complained of is convenient to a larger number of the public than it inconveniences, but the fact that it facilitates the lawful exercise of their rights by a part of the public may show that it is not a nuisance to any of the public.
30. The offence falls under Chapter 17 of the penal code dealing with nuisances and offences against health and convenience. It is a misdemeanor with no serious ramifications. An award of Ksh. 150,000/= was in the circumstance more than generous. The claim of Kshs. 2,000,000/= is an exaggeration.
31. On special damages, there was no basis for the same. The payment of legal fees must be accompanied by a tax invoice within the meaning of the *Tax Procedures Act*. Issuance of a manual receipt for legal fees does not amount to payment. If no receipt is made, the actual payment is necessary, being a payment for amounts exceeding 10,000/=. In the case of *David Bagine vs Martin Bundi [1997]* eKLR, the Court of Appeal stated as follows: -

“It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of *Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990* (unreported) and *Idi Ayub Sahbani v. City Council of Nairobi (1982-88)* IKAR 681 at page 684: “...special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in *Bonham Carter vs. Hyde Park Hotel Limited [1948]* 64 TLR 177 thus:

“Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, ‘this is what I have lost, I ask you to give me these damages.’ They have to prove it”

32. The special damages were not properly proved though pleaded. In the circumstances, the same are set aside. The court ought to have dismissed the Respondent’s suit in the lower court with costs.
33. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:



- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
 - (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.
34. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -
- “(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.
35. The Appeal is thus allowed, the award of damages is set aside, and in lieu thereof, the Appellant is entitled to costs.

Determination

36. The upshot of the foregoing is that I make the following orders:-
- a. The appeal is allowed, the lower court judgment is set aside, and the award of damages is set aside. In lieu thereof, the Respondent’s suit is dismissed with costs.
 - b. Costs of Ksh 55,000/= to the Respondent for the Appeal.
 - c. The counterclaim is dismissed with costs of 55,000/=.
 - d. Costs of the suit in the subordinate court to the Appellant.
 - e. 30 days stay of execution.
 - f. The file is closed.

DELIVERED, DATED, AND SIGNED AT NYERI ON THIS 24TH DAY OF FEBRUARY, 2025.



Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for parties

Court Assistant – Michael Muriuki

