Kenya Power & Lighting Co. Ltd v Mayaka & 3 others (Civil Appeal E028 of 2024) [2025] KEHC 3832 (KLR) (7 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3832 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E028 OF 2024

DKN MAGARE, J

MARCH 7, 2025

BETWEEN

KENYA POWER & LIGHTING CO. LTD ..... APPELLANT

AND

HYLINE MAYAKA ..... 1ST RESPONDENT

THE COMMISSIONER OF POLICE ..... 2ND RESPONDENT

THE HON. ATTORNEY GENERAL ..... 3RD RESPONDENT

PERMANENT SECRETARY INTERNAL SECURITY ..... 4TH RESPONDENT

(Appeal arises from the Judgment and decree of the lower court delivered on 13.2.2024 by Hon. B.O. Omwansa (SPM) in Kisii CMCC No. 354 of 2012)

JUDGMENT

1. This appeal arises from the Judgment and decree of the lower court delivered on 13.2.2024 by Hon. B.O. Omwansa (SPM) in Kisii CMCC No. 354 of 2012. The Appellant was the 1st Defendant in the lower court. The lower court delivered its judgment in the following terms:
    a. Liability, jointly and severally – 100%
    b. General damages Ksh. 750,000/=
    c. Special damages – Nil.
2. The Appellant filed this appeal and preferred a lengthy 11 grounds of appeal, which are repetitive and prolixious. I shall not set the same out herein verbatim as there is neither space nor time for such

convoluted grounds. This offends Order 42 Rule 1 of the Civil Procedure Rules, which provides as follows:

> " Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
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> (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

3. The Court of Appeal had this to say about compliance with Rule 86 of the Court of Appeal Rules (which is pari materia with Order 42 Rule 1 of the Civil Procedure Rules) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

> " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:
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> > "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

4. The court abhors repetitiveness of grounds of appeal which tend to cloud the key issues in dispute for determination by the court. In the case of Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR, the court of appeal observed that : -

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013, this Court stated:
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> > "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

5. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time. In the Plaint amended on 24.9.2014, the 1st Respondent sought general damages for malicious prosecution and false imprisonment against the Respondents. The 1st Respondent stated that on 29.10.2010, the 1st Defendant's police officer, based in Nyamira Police Station and answerable to the inspector general commissioner of police(sic), arrested her and arraigned her in court on 1/11/2010 vide CMCR No. 585 of 2010 at Nyamira Law Courts. She pleaded not guilty and was set at liberty on 4.4.2012 under section 202 of the *Criminal Procedure Code*.

6. The claim arose from averments that the 1st Respondent was arrested and charged with the offence of making a false document without authority contrary to Section 357(1), and in count 2 on forgery contrary to Section 249 of the *Penal Code*. It was pleaded that the arrest was malicious and not based on reasonable cause.

7. The Appellant entered appearance and filed an amended defence dated 24.9.2014 denying the allegation in the complaint. They stated that they were not in control of the police actions. They stated that the matter was not heard, hence it could not be a basis for malicious prosecution.

8. The state entered appearance and stated that it did not fail to advise the government. If any arrest was made, it was lawful. Defamation and torture were denied. The Attorney General also denied jurisdiction of the lower court.

Evidence

9. The 1st Respondent testified as PW1. She was arrested on 20.10.2010. She produced her documents in court. She was accused of forgery claims. She was informed that Kenya Power, the Appellant, was the complainant. The police arrested her but the witnesses failed to attend court. She did not lay out what constituted malice on the part of the defendants.

10. During cross-examination, she stated that the document examiner found that the 1st Respondent had forged the hospital stamp. She further said she was arrested because she had filed an illegal claim against the Appellant. She was informed of the forgery. She stated that she did not have the document allegedly forged. It was her case that it was the police's duty to investigate.

11. The police found, through the document examiner's report, that the impugned document was a forgery. Instead of owning the document she used to file suit as genuine, she equally disowned the same. She stated that the doctor and the document examiners were lying that she forged the hospital records, which she disagreed with. She said that she did not file any documents showing that she went to hospital.

12. DW1 was Wilfred Namisi. He relied on his witness statement dated 26.2.2013 and produced documents in his bundle. He stated that he was the appellant's Operations Officer. On cross-examination, he testified that the police conducted their own independent investigations. He provided evidence that Nyamira CMCC 354B of 2012 was filed against the Appellant by the 1st Respondent. He stated that the police carried out investigations and found the document to be a forgery. He stated that he was never informed of a hearing date.

13. Proceedings in CC 355 of 2012 were adopted as evidence in the related matter, CC 355 of 2012. 14 documents, including a forensic report, were produced as evidence by consent of the parties.

Submissions

14. The Appellant submitted that the 1st Respondent had not proved the case against the Appellant. It was submitted that acquittal was not a ground per se to find malicious prosecution.

15. The 1st Respondent, on the other hand, submitted that she had proved her case as required under the law. She stated that the prosecution was triggered by the Appellant. It was her case that vigilance in litigation was material.

Analysis

16. This court will determine whether the lower Court erred in allowing the suit and awarding Ksh. 750, 000/= in general damages for malicious prosecution.

17. This being a first appeal, the court should, re-evaluate the evidence, consider arguments by parties and apply the law thereto, and determine the issues in controversy. However, it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies. In the case of Selle & Another vs. Associated Motor Board Company Ltd. [1968] EA 123, the Court stated as follows:

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

18. On perusal of the Memorandum of Appeal and the entire record of the lower court, the court is alive to the fact that my task is to re-evaluate the evidence to establish whether or not the lower court erred in finding malicious prosecution.

19. The lower court found that the nonattendance by witnesses of the Appellant in the criminal case was negligence. The Appellant did not keenly follow up to ensure prosecution of the criminal matter despite having caused the 1st Respondent to be prosecuted. Discerning the lawfulness of the arrest and malicious prosecution, the elements to be proved in an action for malicious prosecution are well settled. The law guiding 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."

20. False imprisonment and malicious prosecution are separate causes of action; a plaintiff may succeed on one and fail on the other. 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".

21. 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. 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."

22. Therefore, the mere fact that someone has been acquitted, even under Section 210 does not ipso facto entitle a party to damages. There must be dishonestly or unreasonableness in doing so. In the case of 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."

23. The 1st Respondent was acquitted under section 202 of the *Criminal Procedure Code*. The same provided as follows:

> " If, in a case which a subordinate Court has jurisdiction to hear and determine, the accused person appears in obedience to the summons served upon him at the time and place appointed in the summons for the hearing of the case, or is brought before the Court under arrest, then, if the complainant, having had notice of the time and place appointed for the hearing of the charge, does not appear, the Court shall thereupon acquit the accused, unless for some reason it thinks it proper to adjourn the hearing of the case until some other date, upon such terms as it thinks fit, in which event it may, pending the adjourned hearing, either admit the accused to bail or remand him to prison, or take security for his appearance as the Court thinks fit."

24. The effect of Section 202 of the CPC was an acquittal. In Stephen Gachau Githaiga & another vs. Attorney General [2015] eKLR Mativo J (as he then was), stated that a termination of a prosecution would be favourable to a party regardless of the route taken, be it an acquittal, a discharge, a withdrawal or a stay. In that case, the court said:

> " 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."

25. Similar sentiments were expressed in Paramount Bank Limited vs. Vaqvi Syed Qamara & another [2017] eKLR where (Makhandia, Ouko and MÍnoti JJA), stated:

> " The favourable termination requirement of criminal charges may be satisfied in various ways depending on how the proceedings are concluded in favour of the accused person. For instance, by acquittal, a discharge or a withdrawal.
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> Courts in this jurisdiction have relied, over the years on the following passage from the case of Egbema v. West Nile Administration [1972] EA 60 for the foregoing proposition;
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> > "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..."

> Although the withdrawal of a charge under Section 87 is technically not on acquittal and does not operate as a bar to subsequent proceedings against an accused person on account of the same facts, guided by the foregoing holding, we note in this appeal that five years after the charges were withdrawn on 30th July, 2012, ostensibly pending the arrest of Lawrence Atieno, no fresh charges have been preferred against the 1st respondent. There was no indication whether Lawrence Atieno was ever arrested and charged. The discharge of the respondent, therefore amounted to a termination of the prosecution in his favour.

26. The 1st Respondent had the duty to prove malicious prosecution and false imprisonment as against the Appellant herein. On this subject, Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

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

27. In Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:

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

28. Of cardinal importance, the claim by the Respondent was untenable and offended Order 2 rule 10 (1) and (2) of the *Civil Procedure Act*. The said rule requires particularization of particulars of negligence. The Rule provides as follows:

> Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—
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> (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and
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> (b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind, except knowledge, particulars of the facts on which the party relies.
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> (2) The court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the court thinks just.

29. The burden of proof lies on the 1st Respondent. However, he cannot prove that which is not pleaded. Failure to particularize the particulars made a claim untenable. It is important to recall that parties are

bound to plead their cases fully. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A C Mrima stated as doth: -

> " 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
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> > ".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....
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> > ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

30. In the case of Malawi Railways Ltd vs Nyasulu [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled "The Present Importance of Pleadings" published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

> As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings .....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....
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> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

31. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in an election petition: -

> " In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....'"

32. The question of what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526 as follows:

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

33. The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not, as stated by Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 that;

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability....."

34. In Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Judges of Appeal held that:

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

35. In proving the case for malicious prosecution and false imprisonment as against the Appellant, the 1st Respondent had the duty to satisfy a critical element of malicious prosecution. In my reevaluation, no action without a probable or reasonable cause was demonstrated on the part of the Appellant.

The Appellant never made any false report or a report actuated my malice but just reported the offence for action by the 3rd Respondent, the police. The parties produced the forensic report showing forgery. There was thus no unreasonableness in reporting the matter. The Appellant has no role in the prosecution of witnesses.

36. Further, no malice was seen. The case reported was plausible and cannot be said to be unreasonable. There was no evidence of malice. In the case of Phen Gachau Githaiga & Another V Attorney General [2015] eKLR Justice Mativo discussed the tort of malicious prosecution and stated as follows:

> " 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 dam age that results.
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> 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.
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> 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.
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> 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."

37. The third and fourth elements of malicious prosecution were not proved. The tort of unlawful arrest was not proved. The claim in the court below is liable for dismissal. The court erred in finding the claim as proved when not all crucial elements were pleaded and proved. In the case of Dr. Lucas Ndungu Munyua v Royal Media Services Limited & Another (2014) eKLR, it was stated that:

> With respect to malice, 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."

38. The court treated the two torts as one and the same. Without being a private prosecution and citizen's arrest, the Appellant has no role in the arrest and prosecution of the 1st Respondent. In the case of James Karuga Kiiru v Joseph Mwamburi and 3 Others (2001) eKLR the court stated as follows:

> To prosecute a person is not prima facie tortious, but to do so dishonestly or unreasonably is. Malicious prosecution thus differs from wrongful arrest and detention, in that the onus of proving that the prosecutor did not act honestly or reasonably, lies on the person prosecuted.

39. In Samuel Gitonga Ringera v Henry Mutegi Maingi & 2 others [2021] eKLR, PJO Otieno J stated as follows regarding the belief in the guilt of the Accused:

> The law makes it imperative that the belief in the guilt of the accused be founded upon a decision made after due inquiry into and consideration of the facts presented to the respondents. But the reasonable belief need not be based on actual existence of a definite cause, but upon reasonable belief held in good faith in the existence of facts as are perceived by the respondents. The converse is that where there is no basis to believe that the accused is guilty of the accusation and the prosecution is all the same set in motion, there is clear evidence of malice.

40. In a rather cavalier manner, the 1st Respondent's refusal is that the Appellant was not vigilant. She did not impeach the forensic report. She did not show any lack of belief in the guilt of the 1st Respondent. Indeed, the cases filed and examined had documents in the name of the Appellant that were forged as per the forensic report. It is thus not plausible to find any malice on the part of the Appellant. The appeal is thus for allowing.

41. The next question is quantum. The court awarded Ksh. 750,000/=. There was no evidence relating to the loss by the 1st Respondent. There was no material placed before the court on the loss incurred. The figure of 750,000/= was thus plucked from the air. It has no basis, both in fact and in law. When a party fails to prove damages, where the same are incurred or shown to exist, the court is bound to award nominal damages.

42. The court must assess damages even if it finds that liability has not been established. In the case of Lei Masaku vs Kalpana Builders Ltd [2014] eKLR, the court noted as follows: -

> It has been held time and again by the Court of Appeal that the court of first instance assesses damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address the issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court needs to know the view by the Court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum.

43. However, where damages cannot be ascertained, nominal damages suffice. In the case of *Ndiritu v Muigai & 3 others (Civil Appeal E258 of 2023)* [2024] KEHC 3796 (KLR) (15 April 2024) (Judgment), this court stated as doth:

> A normal award is given where the appellant plays a minimal role. In the case of Jamuto Enterprises Limited v County Government of Meru [2021] eKLR, Justice Patrick J.O Otieno posited that:

19. It is thus not the law that no general damages are ever awardable where a clear breach is established. My appreciation of the law is that every time there is a breach of a contract, the innocent party is, from the onset, entitled to nominal damages but will also get general damages where he proves an injury flowing as a natural consequence from the breach. I find this to be the congruent position in both text books and stare decisis. The author of The Halsbury's Laws of England, Third Edition vol. II, takes the position that:

> "where a plaintiff whose rights have been infringed has not in fact sustained any actual damage therefrom, or fails to prove that he has; or although the plaintiff has sustained actual damage, the damage arises not from the defendant's wrongful act, but from the conduct of the plaintiff himself; or the plaintiff is not concerned to raise the question of actual loss, but brings his action simply with the view of establishing his right, the damages which he is entitled to receive are called nominal---. Thus in actions for breach of contract nominal damages are recoverable although no actual damage can be proved.

20. In Kinakie Co-operative Society v Green Hotel (1988) KLR 242, the Court of Appeal while taking the position that damages are indeed awardable for breach of contract in deserving cases held:

> "Where damages are at large and cannot be quantified, the court may have to assess damages upon some conventional yardstick. But if a specific loss is to be compensated and the party was given a chance to prove the loss and did not, he cannot have more than nominal damages."

44. The nature of the damages was not proved. Had the case been proved, the court would have awarded nominal damages of Ksh 50,000/=. Nevertheless, the suit is dismissed accordingly. 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.

45. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> " It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously

meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

46. It was the duty of the 3rd Respondent to instigate the matter and hand a report to the DPP for further action. Failure to ensure the attendance of witnesses was not a sufficient basis for finding malicious prosecution. Based on the above, the appeal is merited. I set aside the judgment of the lower court against the Appellant, both on liability and quantum. Having found no liability against the Appellant, there was no basis for the award of damages of Ksh. 750,000/=.

Determination

47. In the upshot I make the following orders:-

    a. The appeal is allowed. The finding on liability is set aside, and in lieu thereof, I substitute an order dismissing the 1st Respondent's suit with costs to the Appellant.

    b. The Appellant shall have costs in the court below payable by the 1st Respondent.

    c. The Appellant shall have costs of the appeal of Ksh. 75,000/= payable by the 1st Respondent.

    d. Right of appeal 14 days.

    e. Stay of execution for 30 days.

    f. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 7TH DAY OF MARCH, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

Represented by:-

Wamaasa, Masese, Nyamwange & Co. Advocates for the Appellant

Ombuhi K. Mogire & Co. Advocates for the Respondent

Court Assistant – Michael