Mwangi & another v Inspector General of Police & 2 others (Petition 2 of 2018) [2025] KEHC 3106 (KLR) (5 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3106 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

PETITION 2 OF 2018

HI ONG'UDI, J

MARCH 5, 2025

BETWEEN

BENARD MACHARIA MWANGI .... 1ST PETITIONER

ISAAC NDERITU WAITHERERO .... 2ND PETITIONER

AND

INSPECTOR GENERAL OF POLICE .... 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION .... 2ND RESPONDENT

THE ATTORNEY GENERAL .... 3RD RESPONDENT

JUDGMENT

1. The petitioners moved the court through the petition dated 25th January 2018 against the respondents jointly and severally claiming damages as hereunder:

   i. A declaration that the assault on the 2nd petitioner by the Chief of Kabatini Location without any legal justification whatsoever was a violation of the fundamental rights of the 2nd petitioner to human dignity, to the security and integrity of the human person especially the freedom against all forms of violence guaranteed by Articles 28 and 29(c) of *the Constitution*.

   ii. A declaration that the refusal and/or failure by the 1st and 2nd respondents to take any legal action against the said chief for the said assault on the 2nd petitioner was a violation of the fundamental right of the 2nd petitioner to the equal protection and equal benefit of the law and to a fair adjudication/trial of a legal dispute before a court under Articles 27(1) and 50(1) of *the Constitution*.

   iii. A declaration that the arrest of the 1st petitioner on 23th August 2013 and the arrest of both petitioners on 27th February 2015 without giving them any reasons for the arrest and their detention by the police for seven (7) and three (3) days respectively, was arbitrary, unlawful,

unjustifiable and in violation of the fundamental rights of the petitioners not to be deprived of personal freedom arbitrarily or without just cause and the right to be given reasons upon arrest guaranteed by Articles 29(a) and 49(1 (ai) of *the Constitution*.

iv. A declaration that the storming into the home of the 1st petitioner on 23rd August 2013, conducting a search thereon without warrants of search or arrest were arbitrary, unlawful, oppressive and in violation of the fundamental rights and freedoms of the 1st petitioner as to human dignity, privacy, prohibition from arbitrary entry and search guaranteed by Articles 28 and 31(a) of *the Constitution*.

v. A declaration that the prosecution of the petitioners in Nakuru Chief Magistrate's Court Criminal Case No. 2891 of 2013 and Criminal Case No. 470 of 2015 on the false, pretended and trumped-up charges was an abuse of the criminal law and the process of court by the police, an oppressive, malicious prosecution and a violation of the fundamental rights of the petitioners to the equal protection and equal benefit of the law guaranteed by Articles 27(1), (2) of *the Constitution*.

vi. A declaration that the arrest and detention of the 1* petitioner and his prosecution in Nakuru Chief Magistrate's Court Criminal Cases Nos. 2891 of 2013 and 470 of 2015 on account of his human rights activities and association with the 2nd petitioner was a violation of the fundamental right of the 1st petitioner to freedom of expression particularly the freedom to seek, receive and impart information or ideas and freedom of association as a human rights defender (HRD) particularly the freedom to participate in human rights defence and advocacy guaranteed by Articles Article 33(1)(a) and 36(1) of *the Constitution*.

vii. Special damages.........................Kshs. 1,301,080/=

viii. General damages as the court shall asses consequent to the declarations of violations of fundamental rights and freedoms in prayers (i) to (vi) above.

ix. Exemplary, aggravated and/or punitive damages for excessive, oppressive and highhanded conduct of the police.

x. Costs of the Petition.

xi. Interests on prayers (v) to (vii).

2. The 2nd petitioner claims that on 6th April 2013 he was with the 1st petitioner lawfully going about his business at Kwa Amos Shopping Centre in Bahati within the County of Nakuru when the local area Chief of Kabatini Location who without any provocation and without any lawful justification brutally assaulted him. That on 9th April 2013 he went to Bahati Police Station where he reported the assault which was duly booked in the station's occurrence book (OB). He was issued with a P3 form which was filled by a doctor and the police promised to take prompt action against the chief. Thereafter they visited the police station on numerous occasions seeking to know what action had been taken against the area chief for assaulting the 2nd petitioner.

3. He further deponed that the two petitioners had an interview at a vernacular radio station where they expressed the police inaction on the reported assault. Later on, 23rd August 2013 the 1st petitioner while at his house at Kwa Amos village was invaded by a squad of about seven (7) police officers in plain clothes who had no warrants of search or arrest. They invaded his home claiming that they were looking for a firearm and ammunitions he was allegedly keeping. That in the afternoon of 27th February 2015, two (2) years since he reported the assault, he was arrested from his place of work by APs attached to the same area Chief for no reason.

4. Further, on 27th February 2015 the petitioners were arrested, and detained at Bahati Police Station and after three (3) days were granted a cash bail of kshs. 10,000/=) each. It was upon reading the cash bail receipts that they realized that they were being jointly accused of committing an offence of conspiracy to defeat justice contrary to section 117(a) of the *Penal Code*. The 2nd petitioner was also being accused of being in 'possession of pornographic materials. No particulars of these offences were given to them. However, on 9th December 2015 the charge against the 2nd respondent of being in possession of pornographic material was substituted with the charge of giving false information to a person employed in the public service contrary to section 129(A) of the *Penal Code*.

5. He averred that on 20th July 2016 the court granted the 2nd respondent's application to withdraw the Criminal Case No. 470 of 2015 under section 87(a) of the *Criminal Procedure Code* for lack of police file and witnesses and the petitioners were discharged of the charges. Further, in the judgment in Criminal Case No. 2891 of 2013 the learned trial magistrate was explicit that both criminal cases brought against the 1st petitioner were framed-up and malicious.

6. He deponed that following their arraignment in court over criminal charges the petitioners hired counsel and incurred the total sum of Kenya Shillings One Million Three Hundred Thousand (Kshs, 1,300,000/-) in legal fees and disbursements, a sum of kenya shillings One Thousand One Hundred and Eighty (kshs. 1,180/=) as court fees for certified record of proceedings of the said criminal cases nos. 2891 of 2013 and 470 of 2015.

7. As a result of all this the 1st petitioner was shunned by the community at Kwa Amos and the entire area of Bahati viewed him as a dangerous armed criminal. He could not secure any jobs within that area and was forced to relocate to Naivasha causing him an inconvenience and hardship.

8. The petitioners stated that the violated provisions of *the Constitution* 2010 include; Articles 27(1), 28, 29 (a) and (c), 31(a), 33(1)(a), 36(1), 49(1)(a)(i) and 50 (1).

9. The petition is supported by an affidavit sworn by the 1st petitioner on 25th January 2018 which reiterates the contents of the petition.

10. The 2nd respondent filed grounds of opposition dated 14th August 2019 in response to the petition. The Assistant director of prosecution stated that the decision to charge the petitioners was based on sufficientt evidence. Further, that the petitioners had not demonstrated that they were maliciously prosecuted or that the 2nd respondent in executing its constitutional mandate, acted in excess of the powers conferred upon it by the law. He added that they had also not demonstrated that the 2nd respondent in executing its constitutional mandate infringed or violated any of their constitutional rights.

11. It was stated in the 2nd respondent's further affidavit and the testimony by the respondents' witness (RW1) that the 1st and 2nd respondents responded to the petition by filing a replying affidavit sworn by one John Thuo Mwangi on 6th March 2019. I however note that the said affidavit is not in the court file or the CTS portal.

12. In response to the petition the 1st and 3rd respondents filed a replying affidavit sworn by one PC Paul Mutinda on 6th March 2019. He averred that the law and the directive from the President is that the provincial administration maintain law and order. Further, that they were well within their statutorily mandated obligation when they acted the way they did

13. The 2nd petitioner filed two further affidavits dated 15th November 2019 and 18th February 2020. In the said affidavits he admitted to some of the averments in the replying affidavits by the 1st and 3rd respondents while vehemently denying others.

14. When the matter came up for hearing, the 1st petitioner testified as PW1. He relied on his affidavit dated 25th January 2018 and the exhibits annexed therein PM1-8. In cross examination he stated that he had been arrested but later released for lack of evidence and he therefore wanted kshs. 1,300,000 million paid to him as special damages.

15. The 2nd petitioner testified as PW2 and relied on his affidavits and the annexures therein (1-4c). In cross examination he stated that he was operating a video shop but he had no licence. In re-examination, he testified that he was charged in court on pornographic material and there was no evidence and the case was withdrawn.

16. The 1st and 3rd respondents called one witness one P.C Paul Mutinda who informed the court that he wished to rely on his affidavit dated 6th March 2018 together with its annexures.

17. In cross examination he stated that he was not aware if the 1st petitioner was a robber. He confirmed that the 2nd petitioner filed a complaint, the report was in the O.B and he was the investigating officer. He made recommendations and concluded that the report made by the 2nd petitioner was false. He confirmed that he never visited the scene of pornographic materials but the chief had brought adult witnesses since the children witnesses ran away. He also confirmed that the chief had not reported any matter to them but they charged the petitioners with a criminal case.

18. The counsel for the 1st and 3rd respondents informed the court that they wished not to call any other witness and would instead rely on the replying affidavit of John Thuo Mwangi sworn on 6th March 2019.

19. By consent parties agreed to file and exchange written submissions.

Petitioners' submissions

20. These were filed by Mbugua Mureithi & Company Advocates and are dated 30th January 2025. Counsel gave a summary of the case and identified four issues for determination.

21. The first issue is whether the petition is properly before the court. Counsel submitted that the petition was precise and was supported by affidavits showing how the petitioners' fundamental rights were violated. It is in line with the Mutunga Rules and the cited decision in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013jeKLR (para 41);

> "41.....In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and judicial decision is ta define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.' [Emphasis ours]."

22. The second issue is whether the petitioners have proved violation of their rights and freedoms. Counsel equally submitted in the affirmative and cited several decisions including Diamond Hasham Lalji &

another v Attorney General & 4 others [2018] eKLR, where the Court of Appeal rendered itself thus (para 33 and 34);

> " {33] From the foregoing, there cannot be any doubt that the prosecutorial discretion of DPP is not absolute, It is limited by Article 157(1 1) which specifies the mandatory considerations that underlie the exercise of discretion; by the constitutional principles to which we have referred and by statute......[34] it is also indubitable that the constitutional prosecutorial power of DPP is reviewable by the High Court as Article 165(2)(d){(ii) ordains."

23. The third issue is whether the petitioners are entitled to the remedies sought. Counsel submitted in the affirmative and placed reliance on several decisions including Emmanuel Kuria Wa Gathoni v Commissioner of Police & Another [2017] eKLR where the court held as follows;

> " [10].....(i) 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. (ii) 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. (iii) 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. iv. 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 that he has been acquitted of the charge......the Plaintiff, in order to succeed has to prove that the four essentials or requirement 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." (See also Jaston Ongule Onyango v Attorney General & Another (supra) at paragraphs 63 to 64).

24. He further submitted that the fact that the trial of criminal case no. 470 of 2015 was terminated midstream under section 87(a) of the CPC does not detract it from the fact that the case was terminated in favour of the petitioners. The court's attention was drawn to the decision in Benjamin Iravonga v Rose Iravonga & another [2016] eKLR where the Court held as follows;

> " 17....The prosecution commences when the charges are read out to the accused and he pleads to them. So in the instant case, the trial and prosecution of the appellant had begun by the time the trial was terminated by way of noile prosequi. A nolle prosequi is a device in the hands of the prosecutor to terminate a prosecution that is in motion, see Crispus Njogu vs. The Attorney-General High Court criminal application number 39 of 2000. Was the termination of the trial in favour of the appellant" The answer to that question is in the affirmative, to the extent that the said termination naturally resulted in his discharge or release from the proceedings. The terminated criminal proceedings ended and no liability or culpability ascribed to him.",

25. He thus urged the court to grant all the prayers sought and award the petitioners both the special and general damages. On this he relied on the cases of Kimunai Ole Kimeiwa & 5 others v Joseph Motari Mosigisi (The then District Commissioner, Rongai District) & 3 others [2020] KEHC 10267 (KLR), Gitobu Imanyara & 2 others v A.G [2022] KESC 78 KLR. He urged the court to award costs of the petition to the petitioners since the petition was triggered by the respondents' misconduct.

26. Counsel reiterated that the case clearly shows that the 2nd petitioner reported a case of assault by the chief to the police and the same was duly booked. Thus, the alleged subsequent efforts by the respondents through a secret police inquiry to discredit the 2nd petitioner's complaint against the chief was a cover up. This deprived the 2nd petitioner of the right to equal benefit and equal protection of the law, and fair trial before a court of law. Counsel cited the case of Samson Muoki Joel V republic [2012[eKLR where the court in allowing the appeal held as follows;

> " 12......The Appellant did report to the police that he was assaulted. He was issued with a P3 form and it was filled and the injuries noted by the medical personnel were classified as harm. The fact that the alleged culprit PWI denied assaulting the Appellant did not mean that the Appellant gave false information as the alleged culprit had a right to deny the allegation under the law and Constitution."

Also see

i. J. Diamond Hasham Lalji & another Vs Attorney General & 4 others 2018 eKLR

ii. Jared Masore Nyamweya V Republic [2016] eKLR

27. Counsel submitted further on how the invasion of the 1st Petitioner's home by police officers who had no search warrant, or any court order to do so had violated the petitioners rights. That this had clearly come out during the hearing of the Criminal case no. 2891 of 2013. It is his submission that these actions plus the unlawful arrests and detention of the petitioners was a violation of their rights.

The 1st and 3rd Respondents' submissions

28. These were filed by the litigation counsel Sonia Wanjeri and are dated 3rd February 2025. Counsel gave a brief background of the petition and identified four issues for determination.

29. The first issue is whether the tort of malicious prosecution had been proved by the petitioners. Counsel submitted in the negative and cited Article 157 of *the Constitution* of Kenya 2010, section 24 of the Natonal Police Service and several decisions including Murunga vs The Attorney General (1976-1980) KLR 425 where the elements of tort of malicious prosecution were discussed by Cotran J. He listed them as follows:

i. "That a prosecution was instituted by the Defendant or by someone for whose acts he is responsible.

ii. That the prosecution terminated in the Plaintiff's favour.

iii. That the prosecution was instituted without reasonable and/or probable cause.

iv. That the prosecution was actuated by malice."

30. She further submitted that the above elements apply conjunctively and must all be proven in order to successfully sustain a claim for damages for malicious prosecution. In support she cited the case of Attorney General v Peter Kirimi Mbogo and another, Meru Civil Appeal 52 and 56 of 2020 (consolidated) [2021] eKLR. Also see section 24 of the National Police Act.

31. Counsel further submitted that the Director of Public Prosecution under Article 157 of *the Constitution* and the *Office of the Director of Public prosecutions Act* No. 2 of 2013 has the mandate to institute and undertake prosecution of criminal matters on all other aspects thereto. That authority could therefore not be challenged by the petitioners. She thus contended that the arrest of the petitioners was not tainted with personal or spiteful agenda but was for the good of the republic. Thus,

malicious prosecution had not been proved and that termination of the criminal case by the court did not automatically lace the criminal proceedings with malice. Counsel submitted that no evidence was adduced that the petitioners ever complained to the Ministry of Interior about the conduct of the chief on any allegations.

32. Counsel also submitted that the arrest and later charging of the petitioners in Criminal case No 2891 of 2013 and 470 of 2015 was lawful and emanated from a reasonable cause. She argued that the 2nd petitioner was arrested after the chief witnessed children come out of the 2nd petitioners video joint and when the chief entered there the pornographic video was still on.

33. On reasonable and probable cause counsel relied on the cases of Kagane & others Vs Attorney General and another (1969) E.A 6443. (ii) Hicks V Faulkner (1878) 8 E.B D 167 at 171. (iii) Robert Okeri Ombeka v Central Bank of Kenya [2015] eKLR. Counsel thus submitted that the petitioners have not shown that the arrest, investigations and charging were done out of malice against them.

34. The second issue is whether the petitioner stated with precision which constitutional rights had been violated. Counsel submitted in the negative and cited the decision in Anita Karimi Njeru v Republic [1979] eKLR where the court held that a petitioner alleging violation of constitutional rights must set out with precision the particulars of the alleged violation. She also referred to Mumo Matemu v Trusted Society of Human Rights Alliance & 50 Others [2013] eKLR.

35. Counsel further argued that the petitioners filed a constitutional petition seeking for directives and determination that can be made under the *Civil Procedure Act* and Rules. This to her, was not correct since *the Constitution* should only be invoked when there is no other recourse for disposing of the matter. On this she relied on the case of John Jarum Mwau V Peter Gastron & 3 others [2014] eKLR where it was held:

> " Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition to a breach of the other declaration of rights......It is an established practice that where a matter can be disposed of without recourse to *the Constitution*, *the Constitution* should not be invoked at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so".
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> See also Uhuru Muigai Kenyatta V Nairobi Star Publications Limited {2013} eKLR

36. The third issue is whether the respondent's replying affidavit dated 6th March 2019 should be struck out since the deponent was not called to give viva voce evidence, counsel submitted that in terms of Rule 15 *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, commonly referred to as the Mutunga Rules, the 3rd respondent could respond to any petition by filing a replying affidavit.

37. In conclusion, she urged the court to dismiss the petition with costs.

Analysis and Determination

38. Upon carefully analyzing the facts of the case, evidence and the submissions tendered by the parties, it is my view that the following issues arise for determination namely; whether the respondents maliciously prosecuted the petitioners in violation of their constitutional rights and freedoms; whether the petitioners are entitled to damages.

39. On the issue of jurisdiction, it is my finding that this court has the requisite jurisdiction at the first instance to entertain this petition pursuant to the provisions of Article 165 (3) of *the Constitution* of Kenya 2010. In addition, Article 22 of *the Constitution* provides as follows:

> '22(1) Every person has the right to institute court proceedings claiming that a right or a fundamental freedom in the Bill of Rights has been denied. violated or infringed, or is threatened.

2. In addition to a person acting in their own interest, court proceedings under clause may be instituted by –

    a. A person acting on behalf of another person who cannot act in their own name;

    b. A person acting as a member of, or in the interest of a group or class of persons;

    c. A person acting in the public interest; or

    d. An Association acting in the interest of one or more of its members.'

40. In A.O.O & 6 Others v Attorney General & Another [2017] eKLR that:

> "Article 165 (3) (d) (i) & (ii) of *the Constitution* vests power to the High Court to hear any question respecting the interpretation of *the Constitution* including the determination of the question whether or not any law is inconsistent with or in contravention of *the constitution* and also the question whether anything said to be done under the authority of *the constitution* or of any law is inconsistent with, or in contravention of, *the constitution*. An unconstitutional statute is not law; and more important judicial function includes the power to determine and apply the law, and this necessarily includes the power to determine the legality of statutes. The judiciary has a special role in our system with respect to constitutional interpretation. Courts are bound by *the Constitution* and must interpret it when a dispute so requires."

41. Regarding the first issue, the law on malicious prosecution is well settled. In Sylvanus Okiya Ongoro v Director of Criminal Investigations & 4 others [2020] eKLR, the court stated:

103. What I gather the petitioner to be complaining about is that his prosecution was malicious as it was not justified.

104. The principles governing a claim founded on malicious prosecution were laid down by Cotran, J in Murunga vs. Attorney General (1979) KLR, 138 as follows;

    a. The Plaintiff must show that the prosecution was instituted by the Defendant, or by someone for whose acts he is responsible;

    b. The Plaintiff must show that the prosecution terminated in his favour;

    c. The Plaintiff must demonstrate that the prosecution was instituted without reasonable and probable cause;

    d. He must also show that the prosecution was actuated by malice."

42. The question that begs an answer at this point is whether the requirements for a malicious prosecution claim have been met in this case. The first and second limbs required in proving a claim for malicious prosecution are not contested and I therefore find and hold that they have been proven. There is no

doubt that the prosecution of the petitioners in Criminal Case No. 2891 of 2013 and 470 of 2015 was instituted upon arrest of the petitioners by the agents of the 1st and 3rd respondents. It is also not in question that the charges against the 2nd petitioner were withdrawn by the 2nd respondent in Criminal Case No. 470 of 2015. However, this was after the trial court denied the prosecution an adjournment in order to call more witnesses. Further, Criminal Case No. 2891 of 2013 was terminated in favour of the 1st petitioner by a judgment delivered on 26th January 2017. He was acquitted under Section 215 of the *Criminal Procedure Code* meaning he had been placed on his defence.

43. What follows is whether the actions of the respondents were undertaken without reasonable or probable cause to make it a product of malice on the part of the 2nd respondent. In Gitau vs. Attorney General [1990] KLR 13 the court held as follows:

> "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."

44. In this petition, the 1st and 3rd respondents' witness P.C Paul Mutinda (RW1) confirmed during cross examination that the chief did not make any complaint against the petitioners and that he was not aware of any prior complaint against the 1st petitioner or of him being a robber. He also confirmed that they had charged the petitioners with criminal cases. In his affidavit dated 6th March 2018, he confirmed that the 2nd petitioner had lodged a complaint against the area chief. That when they summoned the chief he gave his version of the story and that is when they opened an inquiry against the 2nd petitioner. From his own averments he confirmed that the arrest of the petitioners was purely from the doubt that arose after interrogating the chief. There is no doubt that no complaint had been made against the petitioners to justify their arrest at this point. I, therefore, find that the prosecution of the petitioners in Criminal Case No. 470 of 2015 was instituted without reasonable and probable cause.

45. Whether the prosecution was actuated my malice, the Court of Appeal in Robert Okeri Ombeka vs Central Bank of Kenya, Civil Appeal No. 105 of 2007 [2015] eKLR referred to its decision in Jediel Nyaga vs Silas Mucheke, (CA NO. 59 OF 1987 (NYERI) (UR) where it was stated:

> "It is trite law that false arrest and false imprisonment may very well be found where prosecution is dismissed and the accused acquitted. Malicious prosecution may also be found where determination of prosecution was in favour of the accused i.e. in cases where the prosecution was withdrawn and the accused is not re-charged or where prosecution has been terminated with the acquittal of the accused. False arrest may also be constituted where the matter of the false report was actuated by malice. ….. "Comparative judicial experience in other jurisdictions also shows an emerging legal principle that an acquittal or discharge in a criminal prosecution should not necessarily lead to a cause of action in malicious prosecution law suits. A malicious prosecution plaintiff cannot establish lack of probable

cause based on having obtained in an earlier action an acquittal based on insufficiency of the evidence. Successfully defending a prosecution or a law suit does not establish that the suit was brought without probable cause. It is the state of mind of the one commencing the arrest or imprisonment, and not the actual facts of the case or the guilt or innocence of the accused which is at issue. Probable cause is determined at the time of subscribing a criminal complaint and it is immaterial that the accused thereafter may be found not guilty."

46. No evidence was tendered by the respondents on how the decision to arrest and charge the petitioners was arrived at. Further, for the respondents to rely on the Chief to avail witnesses to testify against the petitioners yet a complaint for assault had been made against him is really questionable. In addition, the police chose to believe the chief's version of the incident without conducting any investigations. They should have first charged the chief with assault before preferring any charges against the petitioners Therefore, this court has no option but to find that the prosecution of the petitioners in Criminal Case No. 470 of 2015 was actuated by malice to protect the Chief.

47. Further, in Criminal Case No. 2891 of 2013, the trial magistrate findings were that the prosecution failed to prove any of the two counts against the 1st petitioner. He was acquitted under section 215 of the *Criminal Procedure Code*. This means that the court had initially found that the 2nd respondent had established a prima facie case against the 1st petitioner warranting him to be put on his defence. Otherwise, the court would have acquitted him under section 210 of the *Criminal Procedure Code* on no case to answer if there was no evidence. Thus, the prosecution of the 1st petitioner in that case was not actuated my malice.

48. Further, the petitioners based their petition for malicious prosecution on infringement of Articles 27(1), 28, 29 (a) and (c), 31(a), 33(1)(a), 36(1), 49(1)(a)(i) and 50 (1).

49. It is trite law that the burden of proving violation or threat of violation of rights is upon the Petitioners as was established in Anarita Karimi Njeru (supra) and reiterated by the Court of Appeal in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (supra). The petitioners pleaded that their constitutional rights were infringed by the respondents. As found above, they adduced evidence to show that there was malice on the part of the respondents in preferring charges against them in Criminal Case No. 470 of 2015. At paragraph *47* above this court has already addressed the issue of malicious prosecution in respect on Criminal Case No. 2891 of 2013.

50. I now turn to the issue of whether the petitioners are entitled to damages. The general principal is that the assessment of damages is within the discretion of the trial court. The law is very clear that special damages must be specifically pleaded and proved. There must be evidence of payments by way of receipts. In Hahn v Sighn 1985 KLR 716, the Court of Appeal held s follows;

> " Special damages must not only be specifically pleaded but also strictly proved… for they are not the direct or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves"

51. The 1st petitioner in his claim for special damages must demonstrate that he actually made the payments or suffered the specific loss or injury. He is seeking special damages amounting to kshs.1,301,080/= however the amount proved in the receipts annexed to the affidavit is kshs.901,180/=.

52. With respect to general damages for malicious prosecution, the Court must consider the applicable principles as was held in the Uganda case of Dr. Willy Kaberuka vs. Attorney General Kampala HCCS No. 160 of 1993 that:

> " The plaintiff suffered injury to his reputation. He testified that the news of his appearance in court was published in a newspaper whose circulation is believed to be generally wide. He spent a period of over four months appearing in court on charges, which were hardly investigated by the defendant's servants. 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". [emphasis added].

53. The petitioners herein claimed for kshs. 5,000,000/= million each as general damages for malicious prosecution and relied on several decisions. They did not however satisfy this court on the real damage suffered to warrant the said claim.

54. Taking into account all the circumstances of this case, and the level of proof of the malicious prosecution, I find a global award of Ksh 500,000/= for each petitioner as general damages to be reasonable.

55. I therefore enter Judgment for the petitioners as follows against all the respondents jointly and severally;

    i. 1st Petitioner Ksh 500,000/= as general damages

    ii. 2nd Petitioner Ksh 500,000/= as general damages

    iii. 1st Petitioner special damages Ksh 901,180/=

    iv. Costs to the Petitioners

    v. Interest on general damages from today's date and interest on special damages from date of filing suit.

56. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 5TH DAY OF MARCH, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE