Oira v Ethics and Anti-Corruption Commission & another (Civil Case 285 of 2013) [2025] KEHC 7794 (KLR) (Civ) (22 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7794 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE 285 OF 2013

SN MUTUKU, J

MAY 22, 2025

BETWEEN

HEZEKIEL OIRA ..... PLAINTIFF

AND

ETHICS AND ANTI-CORRUPTION COMMISSION ..... 1ST DEFENDANT

DIRECTOR OF PUBLIC PROSECUTIONS ..... 2ND DEFENDANT

JUDGMENT

1. Hezekiel Oira, the Plaintiff, held three positions prior to the circumstances giving rise to this case. He was the Corporation Secretary of the Kenya Broadcasting Corporation (KBC). He held the position of Legal Advisor to the African Union of Broadcasting (AUB) as well as the Director of the Kenya Copyrights Board. He also practiced law under the name and style of Oira & Company Advocates.

2. During his tenure as the Corporation Secretary of KBC, the latter procured free-to-air broadcasting rights for the FIFA 2010 World Cup, and marketed the World Cup broadcasting rights to Radio Africa Ltd and Royal Media Services Ltd, for purposes of generating revenue. According to the Plaintiff, he did not play any role or participate in the marketing of broadcasting rights and was not involved in the execution of the contract subject of his arrest and prosecution.

3. The Plaintiff blames and accuses the Defendants for conspiracy to use the procurement of the FIFA Broadcasting rights of the World Cup as an excuse and subterfuge to maliciously induce his termination of employment contracts and to violation of fundamental his rights and freedoms, allegedly ruining his legal career by claiming that the Plaintiff had committed a criminal offence and charging him with willful failure to comply with procurement laws.

4. He claims to have lost the benefits of the employment contracts in addition to suffering injury in his business and profession. He claims that he was subjected to unwarranted and considerable trouble and inconvenience, loss and damage and that his name has been tainted leading to his inability to secure public jobs as a result of the malicious prosecution. It is for the above reasons that the Plaintiff has filed this suit through a Plaint dated 26th June 2013 against the Defendants, seeking reliefs specified as shown in this Judgment.

The Pleadings.

5. In that Plaint, the Plaintiff, seeks judgment against Ethics and Anti-Corruption Commission and Director of Public Prosecutions (hereafter the 1st and 2nd Defendants respectively) as follows:

    a. Special damages for inducing a breach of contract as particularized in paragraph 14 of the Plaint.

    b. Special damages for malicious prosecution as particularized in paragraph 15 of the plaint.

    c. General damages for inducing a breach of contract.

    d. General damages for malicious prosecution.

    e. General damages for tainting the Plaintiff's name thus making him ineligible to procure a public job.

    f. General damages for violations of fundamental rights and freedoms.

    g. Costs of the suit.

    h. Interest on (a) (b) (c) (d) (e) and (f) at commercial rates of 24% per annum.

    i. Interest on (a) (b) (c) (d) (e) and (f) from the date of filing suit until payment in full.

6. The Plaintiff has anchored his suit on the following causes of action:

    a. Inducement of a breach of contract.

    b. Malicious prosecution and abuse of prosecutorial process.

    c. Defamation.

    d. Violations of the Plaintiff's fundamental rights and freedoms.

7. He has pleaded that he was at all material times an employee of KBC working as a Corporate Secretary and earning a monthly salary of Kshs. 322,335/-. That by virtue of the above job, he held the position of Legal Adviser to the AUB earning a monthly honorarium of Kshs. 100,000/ and also served as a Director of the Kenya Copyrights Board (the Board) earning sitting allowances of Kshs. 80,000/- per month. In addition to the above positions, the Plaintiff operated his private practice as an Advocate of the High Court of Kenya namely Oira & Company Advocates (the law firm) out of which he drew monthly earnings of about Kshs. 300,000/-.

8. It is the Plaintiff's pleadings that on or about the year 2009 KBC procured free-to-air broadcasting rights in respect of the FIFA 2010 World Cup, which rights were obtained without his knowledge or involvement. That as a result, KBC marketed the tournament broadcasting rights to Radio Africa Limited and Royal Media Services Limited respectively, generating revenue exceeding Kshs. 25,000,000/-.

9. It is further pleaded that despite the Plaintiff's lack of involvement, the 1st and 2nd Defendants conspired to use the procurement laws and processes to maliciously induce the termination of the Plaintiff's employment with KBC, in total violation of his constitutional rights and freedoms; that he was subsequently arrested and charged before the Anti-Corruption Court in Anti-Corruption Case No. 18 of 2011 with the offence of failure to comply with procurement laws.

10. The Plaintiff has pleaded that as a result of his arrest and prosecution, he not only lost his employment opportunity and related benefits with KBC, AUB and the Board, but he was also forced to close down the law firm, thereby causing him to suffer grave financial loss, damage and inconvenience and that in addition, the Plaintiff's name and reputation were tainted in the eyes of the general public, thereby impeding his chances of procuring a public job in the future.

11. The Plaintiff has particularized financial loss and damage resulting from the Defendants' alleged inducement to breach of contract and alleged malicious prosecution under paragraphs 15 and 16 of the Plaint as follows:

    a. Total loss and damages resulting from induced breach of contract Kshs 90,420,300/.

    b. Total loss and expenses incurred by the Plaintiff as a result of malicious Prosecution Kshs 60,920,000/.

12. The Plaintiff claims further that, the Defendants, while being at all material times aware that the allegations made against him and resulting in his criminal prosecution were untrue, falsely and maliciously caused to be published on page 6 of the Daily Nation of 21st April 2011, the following defamatory article concerning him:

    > "A former Kenya Broadcasting Corporation Secretary has denied irregular award of broadcast tenders for last year's World Cup finals in South Africa, Mr. Hezekiel Oira yesterday faced three counts of directly procuring contracts with media companies to air live broadcasts in breach of procurement procedures. The anti-corruption court was told that Mr. Oira procured contracts with Federal Internationale de Football Association (Fifa) and Africa Union of Broadcasting (AUB) to Royal Media Services and Radio Africa Ltd without the approval of the Central Tender Committee of KBC...the Court released Mr. Oira on a cash bail of sh. 200,000.00 with an alternative bond of Kshs. 500,000 with a surety in similar amount."

13. He claims that the above words would in their natural and ordinary sense, be taken to infer that he is, inter alia, a corrupt, incompetent, unethical and irresponsible person.

14. The Plaintiff also accuses the Defendants of publishing on pages 1 and 2 of the Nairobi Star Newspaper, the following defamatory words concerning him:

    > "...So it appears that KBC may have received Sh. 111 million to pay for something costing sh. 33.75 million. It is unclear how the balance of Sh. 77 million was used...the KBC board had convened an emergency session on the same day and suspended Managing Director David Waweru and Corporation Secretary Hezekiel Oira pending investigations..."

15. He claims that the above words would in their natural and ordinary meaning, be taken to infer and allude, inter alia, that the Plaintiff misappropriated funds and is lacking in integrity and morals.

16. In addition, the Plaintiff has pleaded that the Defendants caused to be published in the Nairobi Star Newspaper dated 7th September 2010 the following words concerning him:

> " David Waweru and company Secretary Hezekiel Oira were suspended in June over the World Cup television rights…Radio Africa, which owns KISS, Classic TV and the Star Newspaper paid KBC sh. 26 million for the rights in a 60 to 40 percent advertising arrangement in KBC's favor…after signing exclusive rights with Radio Africa, KBC entered into a second deal to sell radio commentary rights to Royal media Group at sh. 500,000.00. This meant that KBC was unlikely to recover the investment due to sale of rights to another party at throwaway prices, former Information PS Bitange Ndemo then said."

17. He claims that the above words could be taken to mean and actually meant that the Plaintiff is unreliable and incapable of performing his duties as an employee.

18. It is the Plaintiff's case that the foregoing publications were actuated by malice on the part of the Defendants, as particularized under paragraph 27 of the plaint. That as a consequence thereof, the Plaintiff has suffered grave injury to his credit and reputation, as well as mental anguish and ridicule in the view of right-thinking members of society and that he has therefore been unable to procure a public job or any other decent employment.

19. The Plaintiff has further averred that the actions by the Defendants constitute a violation of his fundamental constitutional rights and freedoms, particularly the right to fair administrative action under Article 47 of *the Constitution*; the right to personal liberty under Article 29 of *the Constitution*, and the right to inherent dignity under Article 28 of *the Constitution*.

The Defence.

20. The 1st and 2nd defendants entered appearance and put in their statements of defence separately. The 1st Defendant's statement of defence is dated 26th August 2013. It is the defence of the 1st Defendant that its statutory mandate includes investigating corruption and economic crimes and tendering recommendations to the 2nd Defendant and that upon conducting thorough and professional investigations into the conduct of the Plaintiff and one David Wakaba Waweru, it recommended that the two (2) persons be charged and prosecuted for the relevant charges, on the basis of reasonable grounds.

21. The 1st Defendant denied the claims by the Plaintiff that it conspired with the 2nd Defendant to have the Plaintiff maliciously prosecuted and terminated from employment. The 1st Defendant stated that instead, the Plaintiff's termination from employment resulted from a recommendation for disciplinary action deriving from the Inspectorate of State Corporation, Office of the Prime Minister, which process the 1st Defendant did not, at all, participate in; that the reasons prompting the Plaintiff's termination from employment were clearly set out in a letter dated 6th September 2010 and that at the time of commencement of investigations by the 1st Defendant, the Plaintiff's employment with KBC had already been terminated.

22. The 1st Defendant has denied the particulars of loss and damage set out in the plaint, adding that any loss or damage suffered by the Plaintiff cannot be attributed to it. It further denied the averments made in the plaint, that it caused to be published the alleged defamatory material relating to the Plaintiff, or that the words published could be taken to have the meaning inferred in the plaint. It has further been denied that the Plaintiff suffered injury to his reputation as a result thereof.

23. Further, the 1st Defendant has denied that it violated or otherwise infringed upon any of the Plaintiff's constitutional rights and freedoms alleged in the plaint, adding that the Plaintiff is not entitled to any of the reliefs sought in the plaint. Consequently, the 1st Defendant prays for dismissal with costs of the Plaintiff's suit.

24. The 2nd Defendant's statement of defence is dated 24th September 2013. The 2nd Defendant denied colluding with the 1st Defendant to have the Plaintiff's employment contracts terminated and stated that the Plaintiff's termination of employment preceded the investigation process and criminal proceedings.

25. The 2nd Defendant has further denied any attribution on the loss and damage allegedly suffered by the Plaintiff and has stated that the criminal proceedings lodged against the Plaintiff were lawful and procedural on the basis of reasonable and probable cause as set out under paragraph 11 of the 2nd Defendant's statement of defence.

26. The 2nd Defendant has stated that the Plaintiff was placed in his defence in the criminal case and was merely acquitted on a technicality and consequently, the claim for malicious prosecution is unsustainable. It denied playing any part in the publication of the alleged defamatory words stating that the said publications were made by third parties who were have not been enjoined in these proceedings.

27. Further, the 2nd Defendant has denied violating any of the Plaintiff's constitutional rights and seeks to have the Plaintiff's suit dismissed with costs to the 2nd Defendant.

Plaintiff's evidence.

28. The Plaintiff testified as the sole witness in support of his case. The 1st Defendant called one (1) witness to testify in support of its case and the 2nd Defendant opted to rely on the evidence tendered by the witness for the 1st Defendant.

29. The Plaintiff (PW1), adopted his signed witness statement as his evidence-in-chief. He testified that he is an Advocate of the High Court of Kenya by profession, and a Lecturer of Intellectual Property at the Mount Kenya University. He affirmed and the contents of the plaint on which he relied entirely.

30. In cross-examination, he stated that his services with the relevant organizations/bodies, as shown in his pleadings, were terminated on 6th September 2010, prior to which, he had been suspended by the Board to pave way for investigations into the allegations made against him. That he came to learn that he was being investigated by the Inspectorate of State Corporations and that he sued his employer, the KBC for wrongful termination and was awarded damages in the aggregate sum of Kshs. 5,700,000/-.

31. The Plaintiff testified that the 1st Defendant induced the termination of his various contracts and that were it not for the actions taken by and on behalf of the 1st Defendant, he would have continued to work with KBC until his retirement.

32. The Plaintiff testified that during his tenure with KBC, he did not and could not practice law, but that he was nevertheless entitled to receive a salary therefrom; that as per his knowledge, the 1st Defendant is mandated to investigate cases of corruption; that during the course of the said investigations, he was given an opportunity to record a statement; that the offence he was subsequently charged with is known in law, but that the 1st Defendant permitted itself to be manipulated to abuse its powers.

33. He testified that in the course of the criminal proceedings, the court found that the prosecution had established a prima facie case against him and that he was consequently put on his defence before eventually being acquitted under Section 215 of the *Criminal Procedure Code*, for lack of evidence.

34. In further cross-examination, the Plaintiff testified that the tort of inducement of a breach of contract, malicious prosecution and defamation all ought to be filed within 12 months, and yet no leave of the court had been sought prior to filing the suit.

35. The Plaintiff further testified that that he earned a monthly income of Kshs. 300,000/- from the law firm, which sum was arrived at through an audit process and that he earned a sitting allowance from the sittings of the Board; that he was not a sole practitioner in the law firm, but it bore his name, which name was tainted following the events giving rise to these proceedings, leading to the law firm's ultimate closure.

36. The Plaintiff admitted that he did not tender any documents to support his pleadings; that he was out of the country when the controversial events relating to the broadcast rights by KBC occurred; that he was not investigated by police officers and that he incurred various expenses in the course of the criminal proceedings.

37. The Plaintiff, further testified in cross-examination, that to his knowledge and understanding, the mandate of the 1st Defendant is to investigate corruption-related matters and recommend prosecution of suspected culprits to the 2nd Defendant, who then examines the alleged offences to ascertains whether they give rise to a known offence in law and that anyone who has no connection with an offence cannot therefore be investigated and/or prosecuted for that offence.

38. The Plaintiff testified that KBC relied on the report made by the Inspectorate of State Corporations and comments by the then Director of the 1st Defendant, in making the decision to terminate the Plaintiff's contract of employmentx; that the 2nd Defendant relied on extraneous material in prosecuting him without demonstrating any professionalism in undertaking the prosecution proceedings and that following the criminal case, the Plaintiff's integrity was brought to question and his name and reputation tainted.

Defendants' evidence.

39. The 1st Defendant called Tom Gerald as DW1. The witness adopted his executed witness statement dated 10th December 2010 as his evidence-in-chief, and produced the 1st Defendant's list and bundle of documents dated 15th October 2015 as D. Exhibits 1 to 18.

40. According to his evidence, he was a Senior Digital Investigator for the 1st Defendant since 2009; that his duties entail undertaking investigations into complaints assigned to him; that prior to joining the 1st Defendant, he worked with the Directorate of Criminal Investigations (DCI) as an Investigator for a period of 12 years; that he investigated the allegations relating to the Plaintiff herein and upon conclusion, forwarded his findings and recommendations to the office of the Attorney General (AG); that he did not know the Plaintiff personally prior to the said investigations, and that there was no malice on his part.

41. On cross-examination, the witness testified that the Plaintiff worked as a Corporation Secretary at KBC at all material times and was therefore involved in all contractual matters concerning KBC; that the offence in question entailed the commitment by KBC to a contract in the absence of the approval of the KBC Board; that the Plaintiff signed the contract in question on behalf of the Managing Director of KBC and that the Plaintiff had offered legal services to AUB, with KBC paying a sum of USD 450,000 in exchange for attaining broadcasting rights for the FIFA World Cup.

42. He testified that, the correct procedure of entering into the said contract was not adhered to; that there was a misrepresentation of the sum payable; that upon forwarding his findings, the AG gave consent

to have the Plaintiff and his counterpart to be charged and prosecuted and that he was a witness in the criminal case.

43. He further testified on cross-examination that, at the time of conducting the investigations into the matter, he was aware that procurement laws in place had been breached; that the primary issue under investigation was the alleged improper procurement of FIFA broadcasting rights by KBC, since a majority of public entities apply the open tendering method, save in instances of single sourcing, where the approval of the Central Tendering Committee (the Committee) ought to be obtained and that in the present instance, there is nothing to indicate that KBC had involved the Committee.

44. The witness testified that upon procuring the broadcasting rights in question, KBC could only give sub-license to another entity upon obtaining the consent of FIFA; that the contractual document was executed by the KBC Chair of the Board, Mr. Charles Muoki and Mr. David Waweru, with the Plaintiff's name appearing on the said document alongside his signature, as legal advisor to the AUB; that in addition, the Plaintiff appended his signature on the sub-license agreements on behalf of KBC and that the Plaintiff could not properly advise AUB while simultaneously serving as Legal Secretary for KBC.

45. The witness denied any knowledge or information as to whether the Plaintiff was truly out of the country at the time of signing the respective agreements and that it was only the Plaintiff and David Waweru were charged in court in relation to the above matter.

46. DW1 testified that under the Public Procurement and Disposal Assets Act, an oversight authority exists to inquire into allegations concerning procurement grievances; that, nevertheless, the 1st Defendant had a duty to carry out investigations and that the charges preferred against the Plaintiff were based on the investigations as well as a report prepared by the Inspectorate of State Corporations.

47. He confirmed that the Plaintiff was eventually acquitted in the criminal case. In the absence of any re-examination, the 1st Defendant's case was closed.

Plaintiff's submissions.

48. The Plaintiff's submissions are dated 25th October 2024. He has identified five (5) issues for determination as follows:

    a. Whether the Defendants induced breach of the Plaintiff's contracts by his former employers?

    b. Whether the Defendants' actions amount to malicious prosecution?

    c. Whether the Defendants' are liable for defaming the Plaintiff?

    d. Whether the Defendants violated the Plaintiff's fundamental rights and freedoms?

    e. Whether the Plaintiff is entitled to the reliefs sought?

49. In respect of the first issue, the Plaintiff has submitted that sufficient evidence has been tendered to prove the claim for induced breach of his employment contract with KBC, in line with the ingredients set out in the case of Joseph Ochieng & 2 others t/a Acquiline Agencies v First National Bank of Chicago [1990] KECA 58 (KLR) that:

> " It is stated in Bullen and Leak's Precedents of Pleadings, 12th edition, at page 500 under the rubric Right of Action that:
>
> "The essential ingredients of the tort of inducing a breach of contract are (1) that the wrongdoer knew or acquired knowledge of the contract in question and its essential terms,

(2) that he so acted or interfered whether by persuasion, inducement or procurement or other means as to show that he intended to cause a breach of the contract or prevent its performance by one party to the detriment of the other party, (3) that the breach of contract was directly attributable to such act or interference, and (4) that damage was occasioned or was likely to be occasioned to such other party."

50. He submitted that the Defendants knew that the Plaintiff was an employee of KBC, AUB and the Board and that he had a legitimate expectation to work there until achieving retirement age; that the inducement by the Defendants resulted from the malicious prosecution of the Plaintiff which caused the Plaintiff to be suspended and ultimately sacked from his employment, as a result of which the Plaintiff suffered substantial loss and damage and that in the premises, the Defendants ought to be held jointly and severally liable for the inducement of a breach of the Plaintiff's contract.

51. The Plaintiff relied on Harrison Ndungu Mwai & 500 others v Attorney General [2014] KEELRC 1022 (KLR) where it was held that:

> "In making that finding, the court is guided that inducement to breach a contract entails a tortuous interference with contractual relations (see Black's Law Dictionary 9th Edition at page 1627). It entails a 3rd party's intentional inducement of a contracting party to break a contract, causing damage to the relationship between the contracting parties."

52. Regarding whether the Defendants' actions amounted to a malicious prosecution, the Plaintiff has anchored relied on Secretary, Board of Management Lugulu Mixed and Boading Primary School & another v Mutanda [2024] KEHC 5319 (KLR) and the case of Tobias Moinde Kengere v Postal Corporation of Kenya & 2 others [2019] KEHC 9950 (KLR) which set out the threshold to be met in a claim founded on malicious prosecution to succeed and submitted that he has adduced evidence to show that prosecution was instituted by the defendants; that the prosecution terminated in his favour; that the prosecution was instituted without reasonable and/or probable cause and that the prosecution was actuated by malice.

53. On the claim for defamation, he has submitted that he has proved the ingredients pertinent to establishing a claim for defamation. He relied on James Kanyiita Nderitu v Attorney General & another [2019] KECA 1006 (KLR) and Musikari Kombo v Royal Media Services Limited [2018] KECA 801 (KLR) where the respective courts laid out the elements for the tort of defamation, that there was existence of a defamatory statement; that the defendant has published or caused the publication of the defamatory statement and that the publication refers to the claimant.

54. The Plaintiff has argued that the Defendants herein prompted the publication of the defamatory material set out in the plaint, the result of which caused him grave injury to his reputation and for which he is entitled to receive an award of damages.

55. The Plaintiff has urged the court to find that by way of their actions, the Defendants violated his fundamental constitutional rights and freedoms.

56. On whether he is entitled to reliefs, the Plaintiff urged the court to award all the reliefs sought in his Plaint under the respective heads of general and special damages.

1st Defendant's submissions.

57. The 1st Defendant submissions are dated 9th December 2024. Two (2) issues have been identified for determination:

a. Whether the elements of the tort of malicious prosecution have been established?

b. Whether the Plaintiff is entitled to any relief?

58. The 1st Defendant relied on the case of Secretary, Board of Management Lugulu Mixed and Boading Primary School & another v Mutanda (supra), where the Court defined the elements of malicious prosecution as follows:

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

b. That the prosecution terminated in the plaintiff's favour.

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

d. That the prosecution was actuated by malice.

59. The 1st Defendant also cited by the Plaintiff's, and the case of Silvia Kambura v George Kathurima Japhet & 2 others [2021] KEHC 2048 (KLR), where the court held that the elements of malicious prosecution apply conjunctively and must all be proved to successfully claim for damages for malicious prosecution.

60. The 1st Defendant submitted that it is not in dispute that criminal charges were preferred against the Plaintiff and that the criminal proceedings terminated in his favour, the said proceedings were instituted on the basis of reasonable and probable cause since the 1st Defendant is statutorily mandated to carry out investigations on any conduct which in its opinion, is linked with corruption or an economic crime. That in the present instance, the 1st Defendant received a complaint from the Permanent Secretary, Ministry of Information and commenced investigations into the allegations that KBC had irregularly procured broadcasting rights in respect of the FIFA World Cup 2010. That upon conducting thorough investigations into the matter, the 1st Defendant forwarded its findings and recommendations to the Attorney General. That in the circumstances, the element of reasonable and probable cause has been established. The 1st Defendant relied on the case of Kalasinga v Kaikai & another [2024] KEHC 2350 (KLR) where the court held that:

> " 'Reasonable and probable cause' was discussed in Kagane & Others vs Attorney General & Another (ibid);"Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed..."

61. It was submitted that malice not been established since it has not been demonstrated that the actions taken by the 1st Defendant were driven by ill-will or improper motive. The 1st Defendant has urged this court to be guided by the case of Nzoia Sugar Company Ltd v Fungututi [1988] KECA 93 (KLR) in which the Court of Appeal rendered itself thus:

> " Acquittal per se on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecutor. The mental element of ill will or improper motive cannot be found in an artificial person like the appellant but there must be evidence of spite in one of its servants that can be attributed to the company."

62. The 1st Defendant submitted that the claim for defamation is time barred by dint of Section 4(2) of the *Limitation of Actions Act* which provides that claims founded on defamation shall not be brought after the end of months from the date on which the defamatory material was made or uttered. The 1st Defendant relied on Patrick Oduma v Regina Sabina Mutuku t/a Figure Eight Health Club & another [2017] KEHC 8558 (KLR) where the court deemed the suit in question to be statute barred for having been brought after the lapse of 12 months.

63. The 1st Defendant submitted that it has no control whatsoever over the material published by media houses and cannot therefore be held liable under this tort, in any event.

64. On the issue of violation of the Plaintiff's fundamental rights and freedoms, the 1st Defendant submitted that the claim for alleged violation of the Plaintiff's fundamental rights and freedoms under *the Constitution* are unsubstantiated and unsupported by any evidence, citing the case of Anarita Karimi Njeru v Republic [1979] KEHC 30 (KLR) where the court reasoned that any person claiming an infringement of a constitutional right or freedom ought to demonstrate the manner of the infringement.

65. The 1st Defendant submitted, further, that it played no role whatsoever in the termination of the Plaintiff's employment contract and hence the claim for inducement of breach of contract ought to fail. The 1st Defendant urged this court to decline to grant any of the reliefs sought in the plaint and consequently to dismiss the Plaintiff's suit with costs.

2nd Defendant's submissions.

66. The 2nd Defendant filed submissions dated 11th February 2025 in which the following issues have been identified for determination:

    a. Whether the 2nd Defendant induced a breach of contract?

    b. Whether the prosecution against the Plaintiff was malicious and whether he is entitled to damages as a result of the same?

    c. Whether there was a violation of the Plaintiff's fundamental rights and freedoms?

    d. Whether the Plaintiff's reputation was injured and whether he is entitled to damages of the same?

    e. Whether the Plaintiff is entitled to special damages?

    f. Who should bear the costs of this suit?

67. In addressing the above issues, the 2nd Defendant cited the ingredients for inducement of breach of contract as stated in the case of Joseph Ochieng & 2 others t/a Acquiline Agencies v First National Bank of Chicago [1990] KECA 58 (KLR), cited above and submitted that Plaintiff has not established that:

    a. The wrongdoer knew or acquired knowledge of the contract in question and its essential terms.

    b. That he so acted or interfered, whether by person, inducement or procurement or other means as to show that he intended to cause a breach of the contract or to prevent its performance by one party to the detriment of the other party.

    c. That the breach of contract was directly attributable to the such act or interference, and,

    d. That damage was occasioned or was likely to be occasioned to the other party.

68. The 2nd Defendant submitted that the Plaintiff's employment contract with KCB was terminated on 6th September 2010 via a letter prior to the investigations in question; that investigations were carried out by the 1st Defendant and criminal charges preferred against the Plaintiff by the 2nd Defendant based on reasonable and probable cause and that the actions of the defendants did not constitute an inducement to breach of contract.

69. The 2nd Defendant relied on the case of Mbowa v East Mengo District Administration [1972] EA 352 on the issue of malicious prosecution, which set out the essential elements that must be proved in a case of malicious prosecution as follows, that:

    a. Criminal proceedings must have been instituted by the defendant.

    b. The defendant must have acted without reasonable or probable cause.

    c. The defendant must have acted maliciously.

    d. The criminal proceedings must have terminated in the plaintiff's favour.

70. The 2nd Defendant submitted that the 1st Defendant had reasonable grounds to believe that the Plaintiff was culpable and as such, recommended that he be charged by the 2nd Defendant accordingly and that the Plaintiff has not demonstrated that either of the Defendants acted with malice or improper motive.

71. In respect to the Plaintiff's claim for infringement of fundamental constitutional rights and freedoms, it is the contention by the 2nd Defendant that the same does not properly lie before this court since the Plaintiff came by way of a plaint rather than a petition, as required under Article 22 (3) of *the Constitution* and Rule 10(1) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules of 2013.

72. It was submitted, further, that in respect of defamation, the ingredients set out in the case of John Ward v Standard Ltd, HCCC 1062 of 2005 that the publication must be false; must have been published by the defendant and refer to the plaintiff; and must be defamatory in nature, have not been established by the Plaintiff and that the Defendants had no control over the nature and extent of the publications made by the respective media houses. Consequently, the 2nd Defendant urged this court to dismiss the suit with costs because the Plaintiff is neither entitled to the reliefs sought in the plaint nor the costs thereon.

Analysis and Determination.

73. This matter was filed in 2013. It is an old matter and can correctly be termed as a backlog in our system. It has been handled by several judges. The record of the court explains the reasons for the delay in concluding this matter.

74. I took over the proceedings in this matter on 5th February 2025, upon my taking over duties as the Presiding Judge at the Civil Division, High Court of Kenya at Milimani after my transfer to that Division. At the time of my taking over the conduct of these proceedings, parties had concluded their respective cases and were awaiting to file submissions. After confirming that all the parties had filed their submissions, I placed the matter down to prepare and deliver judgment.

75. I have taken time to carefully read the court records, all the pleadings, the evidence and submissions of the parties including the authorities they have cited to support their positions. I have identified the following five (5) issues as the key issues requiring my determination, namely:

    a. Whether the claim for defamation is time barred?

b. Whether the defendants, or any of them, induced the breach of contract between the Plaintiff and his employers?

c. Whether the actions of the defendants in investigating and charging the Plaintiff amounted to malicious prosecution?

d. Whether the defendants violated the Plaintiff's fundamental rights and freedoms?

e. Whether the Plaintiff is entitled to any reliefs?

Whether the Plaintiff's claim for defamation is time-barred?

76. The above issue arose during the trial and also in the submissions of parties. It is an issue that cannot be brushed aside. I deem it necessary to address the issue.

77. During the hearing, the Plaintiff stated in cross-examination that no prior leave was sought and obtained in bringing the claim for defamation. The 1st Defendant has echoed this position in its submissions, by arguing that the Plaintiff's claim founded on defamation was brought after the statutory 12-month period. Time within which a claim for defamation can be brought is provided under Section 4(2) of the Limitations of Actions Act (Cap. 22 Laws of Kenya) and Section 20 of the *Defamation Act* (Cap. 36 Laws of Kenya).

78. Section 4(2) of the *Limitation of Actions Act* provides that:

> An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.
>
> Provided that an action for libel or slander may not be brought after the end of twelve months from such date.

79. Section 20 of the *Defamation Act* provides that:

> Subsection (2) of section 4 of the *Limitation of Actions Act* (Cap. 22) is hereby amended by the addition thereto of the following:
>
> Provided that an action for libel or slander may not be brought after the end of twelve months from such date.

80. The Plaintiff claims that the defendants falsely and maliciously caused to be published in the Daily Nation Newspaper of 21st April 2011 and Nairobi Star newspaper of 7th September 2010 defamatory words as pleaded on paragraphs 21, 23 and 25 of the Plaint, against him causing injury to his reputation and standing in society. The record shows that the Plaint was filed on 24th July 2013, way past the 12 months allowed within which to file such a claim. The Plaintiff admitted during cross examination that he did not have leave of the court. It is, without doubt, clear that the claim was filed outside the 12 months provided under section 4(2) of the *Limitation of Actions Act* and section 20 of the *Defamation Act* and is therefore statutorily time barred.

81. I have noted that the defendants did not plead, in their respective defences, this issue. They raised it during cross-examination of the Plaintiff during trial and in their submissions where they stated that the Plaintiff's defamation claim is time barred by dint of section 4(2) of the *Limitation of Actions Act*.

82. I therefore pose the question as to whether this court is within its powers to determine an issue that was not pleaded by the parties but which was raised during the trial in cross-examination and in the submissions?

83. It is trite that parties are bound by their pleadings. In my considered view, a claim that is filed after the time allowed by the law touches on the jurisdiction of the court for the reason that a claim filed outside the time provided under a statutory provision is null and void. Such a matter is dead on arrival. It touches on the jurisdiction of the court to determine such a matter, for a court of law cannot determine a claim that is not in existence. In my view, whether such an issue is raised by any of the parties to the suit is immaterial. The trial court is within its mandate to raise such an issue suo moto and determine it.

84. In Nasra Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2 others [2018] eKLR, the Supreme Court of Kenya was of the view that a court can raise the issue of jurisdiction suo moto. That Court, while citing Odunga J, as he then was, stated thus:

> " A jurisdictional issue is fundamental and can even be raised by the court suo moto, as was persuasively and aptly stated by Odunga J in Political Parties Dispute Tribunal & another v Musalia Mudavadi & 6 others Ex Parte Petronila Were [2014] eKLR. The learned Judge drawing from the Court of Appeal precedent in Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367 stated thus:
>
> 25. "What I understand the Court to have been saying is that it is not mandatory that an issue of jurisdiction must be raised by the parties. The Court on its own motion can take up the issue and make a determination thereon without the same being pleaded..."
>
> Consequently, while the parties have not given the jurisdiction issue the much premium that it deserves, upon evaluation of the matter before us, it is our considered opinion that the issue of jurisdiction of this Court to hear and determine this appeal warrants settlement upfront."

85. In the Court of Appeal decision in Wycliffe A. Swanya v Toyota East Africa and Another [2009] eKLR, that Court lay emphasis on the requirement that a party ought to comply with the strict statutory timelines for filing defamation claims when it held that:

> " "... in cases of libel or slander no action may be filed after the end of 12 months from the date the cause of action accrued"
>
> And we understand this to mean from the date the slanderous remarks are made. (see proviso to section 4 (2) – of the *Limitation of Actions Act* and section 20 of the *Defamation Act*). It would be absurd for slanderous remarks to be made about a person and then he/she waits until he/she feels the effects thereof to file an action in court. If this be the case then there would be no need for any limitation period to be specified. In the appeal before us the slanderous remarks were made on 12th November, 2005 and the latest the suit should have been filed would have been 11th or 12th November, 2006."

86. After considering this issue carefully, I am persuaded that the Plaintiff's claim, founded on the tort of defamation, is statute barred, thereby stripping this court of its jurisdiction to entertain such a claim. Where the court lacks jurisdiction to try a matter, the court downs its tools.

Whether the defendants, or any of them, induced the breach of contract between the Plaintiff and his employers?

87. The Plaintiff's claims that the actions of the defendants, whether jointly or severally, through investigations and prosecution, induced the breach of the Plaintiff's contract with his employers and

eventually led to the termination of his employment with KBC, since the said termination resulted from his criminal prosecution. The Defendants on their part denied playing any role in the termination process of the Plaintiff's employment. This court finds it established that the Plaintiff was at all material times relevant to this suit, an employee of KBC, serving in the capacity of Corporation Secretary and Secretary to the KBC Board, up until the termination of his employment, vide the letter of termination of service dated 6th September 2010 produced in these proceedings as D. Exhibit 13.

88. From the pleadings and the evidence on record, it is not in dispute that the termination of the Plaintiff's employment was prompted by matters pertaining to KBC's broadcasting rights of the 2010 FIFA World Cup event. The record also shows that the decision to terminate the Plaintiff from employment with KBC was rendered by the KBC Board following a special resolution.

89. I have considered the ingredients of the tort of inducing a breach of contract as laid down by the Court of Appeal in Joseph Ochieng & 2 others t/a Acquiline Agencies v First National Bank of Chicago [1990] KECA 58 (KLR) cited by the Plaintiff and the 2nd Defendant in their submissions as follows:

    a. The wrongdoer knew or acquired knowledge of the contract in question and its essential terms.

    b. The wrongdoer so acted or interfered, whether by persuasion, inducement or procurement or other means, as to show that he intended to cause a breach of the contract or prevent its performance by one party to the detriment of the other party,

    c. The breach of contract was directly attributable to such act or interference, and

    d. Damage was occasioned or was likely to be occasioned to such other party.

90. The burden of proof, as dictated by section 107 of the *Evidence Act*, lies with the Plaintiff to prove that the Defendants, either jointly or individually, met the above threshold. On the first ingredient, upon examination of the evidence before the court, I find no evidence to indicate that the defendants acted or interfered, whether by persuasion, inducement or procurement or other means, in a manner to show that they intended to cause a breach of the contract or prevent its performance by the Plaintiff's employer to the detriment of the Plaintiff or that the breach of was directly attributable to such act or interference.

91. This court is aware that both Defendants had knowledge of the Plaintiff's employment with KBC and there is evidence that the termination of his employment was not due to the investigations by the 1st Defendant or prosecution by the 2nd Defendant. The evidence shows that the Plaintiff sued his employer in the Employment and Labour Relations Court in Hezekiel Oira v Kenya Broadcasting Corporation & another [2013] eKLR, where that court noted, in its judgment dated 4th October 2013, that the Plaintiff was suspended on 23rd June 2010 to pave way for urgent investigations by the Inspector General, State Corporations and that the Plaintiff's employment was terminated through a letter dated 6th September 2010.

92. It is clear from the record that the investigations undertaken by the 1st Defendant into the allegations of economic and related violations on the part of the Plaintiff were conducted independently, upon a request by the Ministry of Information and Communications vide a letter dated 3rd September 2010 produced as D. Exhibit 2. The findings and recommendations of the investigations were handed over to the Attorney General vide a letter dated 16th February 2011 produced as D. Exhibit 5, by which time the Plaintiff's employment had already been terminated.

93. I did not find any evidence of any communication between KBC and the 1st and 2nd Defendants to the support the allegations being made by the Plaintiff in this regard. Consequently, upon considering the totality of the evidence on record, it is my considered view that the Plaintiff has not tendered any

evidence to demonstrate that the Defendants induced the breach of contract resulting in termination of his employment. This claim must fail.

Whether the actions of the defendants in investigating and charging the Plaintiff amounted to malicious prosecution?

94. Malicious prosecution is defined in the case of Stephen Gachau Githaiga & another v Attorney General [2015] eKLR as follows:

> " Malicious prosecution is an action for damages brought by one against whom a civil suit or criminal proceeding has been unsuccessfully commenced without Probable Cause and for a purpose other than that of bringing the alleged offender to justice...Malicious prosecution is an intentional tort designed to provide redress for losses flowing from an unjustified prosecution."

95. Further to that definition, the elements to be established for a claim of malicious prosecution to succeed were articulated in the case of Kagane v Attorney General (1969) EA 643 as cited by the court in Kenya Power & Lighting Co Ltd v Maurice Otieno Odeyo & 2 others [2017] eKLR as hereunder:

> " a) The plaintiff must show that the prosecution was instituted by the defendant; or by someone for whose acts he is responsible;
>
> b) That the prosecution terminated in the plaintiff's favour;
>
> c) That the prosecution was instituted without reasonable and probable cause; and
>
> d) That the prosecution was actuated by malice."

96. The Plaintiff is required to meet the above threshold in order to succeed in his claim under this heading. It is trite that all the above elements apply conjunctively and must all be proved to successfully claim for damages for malicious prosecution (see Silvia Kambura v George Kathurima Japhet & 2 others [2021] eKLR).

97. Basing on the evidence adduced in this matter, it is not in dispute that the Plaintiff was investigated and prosecuted by the 1st and 2nd Defendants, respectively, thereby satisfying the first element. It is also not in dispute that the Plaintiff was acquitted after he was put on his defence and tendered his defence. However, the Plaintiff must prove that the prosecution was instituted without reasonable and probable cause; and that the prosecution was actuated by malice (emphasis mine).

98. The Plaintiff must prove that the Defendants acted maliciously and without reasonable and probable cause. Reasonable and probable cause was defined by the Court in the case of Kagane v Attorney General, cited above,, in the following manner:

> " Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed..."

99. Further, in Hicks v Fawkers (1878) 8 Q. B. D. 167 at Pg 171, reasonable and probable cause was defined as:

> " Reasonable and probable cause is an honest belief in the guilt of the Accused base upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charge was probably guilty of the crime imputed."

100. I have reviewed the evidence adduced before the court, I have noted that the decision to arrest and charge the Plaintiff and his counterpart was arrived at by the 2nd Defendant, upon receipt of the recommendations and findings forwarded by the 1st Defendant vide a letter dated 16th February 2011 (D. Exhibit 5). The investigation report was based on the allegations that KBC had irregularly procured television and radio broadcasting rights in respect of the 2010 FIFA World Cup event through single-sourcing without the requisite approval of the KBC Board. That the investigations concluded that the Plaintiff and his counterpart had violated various provisions of the Public Procurement and Disposal Act 2005 as well as provisions of the *Anti-Corruption and Economic Crimes Act*.

101. Upon further examination of the evidence tendered, it is also clear that the decision by the 1st Defendant to investigate the foregoing allegations derived from the Office of the Permanent Secretary-Ministry of Information and Communications, vide a letter dated 3rd September 2010 (D. Exhibit 2)., which letter was accompanied by Audit Reports prepared by the Inspectorate of State Corporation and the Ad Hoc Board Committee dated June 2010 (D. Exhibit 3) which detailed the subject of investigations, the findings thereon, the conclusion and recommendations resulting therefrom.

102. It is clear to me that the investigations undertaken by the 1st Defendant and which resulted in the arrest and prosecution of the Plaintiff and his counterpart by the 2nd Defendant, were prompted by the specific government officers as shown in evidence. Section 23 of the *Anti-Corruption and Economic Crimes Act* Cap. 65 Laws of Kenya, mandates the 1st Defendant to carry out investigations into allegations of offences relating to corruption and economic crimes; and to subsequently tender an investigation report to the 2nd Defendant, under Section 35 of the same Act, which report shall include any recommendation for the prosecution of a person, in relation to corruption or an economic crime. As such, the 1st Defendant was acting within its legal mandate.

103. Without any evidence to demonstrate malice, or lack of reasonable and probable cause, on the part of the Defendants, I am persuaded that the defendants did not act maliciously or without reasonable and probable cause. Although the Plaintiff was acquitted after full trial, this does not lead to a cause of action for damages resulting from malicious prosecution (see Robert Okeri Ombeka v Central Bank of Kenya (Civil Appela No. 105 of 2007)).

104. In view of all the foregoing analysis, it is my finding that the claim for malicious prosecution has not been proved and cannot therefore stand.

Whether the defendants violated the Plaintiff's fundamental rights and freedoms?

105. The Plaintiff claims that his fundamental rights to dignity, personal liberty and fair administrative action under Articles 28, 29 and 47 of *the Constitution* have been infringed by the Defendants, owing to the institution of the criminal proceedings against him and his termination from office. The Defendants have refuted those claims.

106. From the analysis of the pleadings and evidence presented before this court, I am satisfied that the material on record demonstrates that the investigations, arrest and prosecution of the Plaintiff were conducted fairly and on the basis of reasonable and probable cause. Moreover, the record shows that in the course of conducting its investigations, the 1st Defendant granted the Plaintiff an opportunity to record a statement, which he did. The same was tendered as D. Exhibit 7. In the same manner, during the criminal trial, the Plaintiff was granted an opportunity to testify in his defence.

107. The Court, in Anarita Karimi Njeru v The Republic (No.1) [1976-80] 1 KLR, found as follows in respect to a claim citing violation of *the constitution*:

> " ....We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case), that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed..."

108. The Plaintiff does not meet the threshold set out in the Anarita Karimi case cited above. I find no credible evidence tendered to support the Plaintiff's claim that his fundamental rights and freedoms were violated by the Defendants, given that this court has already settle the issue that the Defendants had reasonable and probable cause to investigate and prosecute the Plaintiff and that there was no malice involved. This claim must also fail.

Whether the Plaintiff is entitled to any reliefs?

109. From the analysis of the issues arising from this case, the Plaintiff has failed to prove his case under the four headings of the causes of action he relied on. However, before concluding this judgment, I wish to state that the Plaintiff tabulated the damages he claims against the Defendants. However, in respect of special damages, the Plaintiff was only able to avail travel related receipts totaling a sum of Kshs. 220,000/- and a receipt dated 22nd March 2012 being advocate legal fees, for a sum of Kshs. 6,000,000/.

110. It is trite that special damages must be specifically pleaded and strictly proved. In David Bageine v Martin Bundi [1997] eKLR the Court stated that:

> " It has been held time and again by this Court that special damages must be specifically 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 Part Hotel Limited [1948] 64 TLR 177 thus;
>
> "Plaintiff 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."

111. In conclusion, after careful analysis of all the evidence tendered in support of the Plaintiff's claim and in opposition to the same, it is my finding, and I so hold, that the Plaintiff has failed to prove his case to

the required standard, prove on a balance of probabilities. Consequently, the Plaintiff's claim through a Plaint dated 26th June 2013 must fail and is hereby dismissed with costs to the Defendants.

112. Orders to issue accordingly.

DATED, SIGNED AND DELIVERED THIS 22ND MAY 2025.

S. N. MUTUKU

JUDGE

In the presence of:

Ms Adunga for the Plaintiff

Ms Olga holding brief for Mr. Ochola for the 1st Defendant.

No appearance for the 2nd Defendant.