



REPUBLIC OF KENYA



**Office of the Director of Public Prosecutions v Ngatia (Civil Appeal  
E077 of 2023) [2025] KEHC 6084 (KLR) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6084 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL APPEAL E077 OF 2023  
DKN MAGARE, J  
MAY 15, 2025**

**BETWEEN**

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT**

**AND**

**CHRISTOPHER MAINA NGATIA ..... RESPONDENT**

*(An appeal against the judgment and decree delivered on 28th November,  
2023 by Hon. C.E.K. Munyi in Nyeri CMCC No. E107 of 2020)*

**JUDGMENT**

1. This is an appeal against the judgment and decree delivered on 28th November, 2023 by Hon. C.E.K. Munyi in Nyeri CMCC No. E107 of 2020. The Appellant, who was the Defendant in the lower court, was found liable for unlawful arrest and malicious prosecution. The trial court awarded the Respondent Ksh. 600,000/= as general damages for malicious prosecution and Ksh 80,000/= as special damages.
2. The Appellant filed an appeal on 5.12.2023 and set forth the following grounds of appeal.
  1. That the learned magistrate erred in law in entering judgment against the Appellant with costs.
  2. That the learned magistrate erred in law in making a finding that the Respondent had proved his case on a balance of probabilities against the Appellant.
  3. That the learned magistrate erred having made a finding in her judgment that the Appellant does not make arrests, in proceeding to enter judgment on a claim of malicious arrest, false imprisonment and charging of the Respondent.
  4. That the learned magistrate erred in fact in entering judgment against the Appellant despite the fact that the allegations of malice in making a complaint, arrest and alleged false imprisonment



under paragraphs 7 and 8 of the amended plaint were clearly against the chief and police and not the Appellant.

5. That the learned magistrate did not consider the written submissions of the Appellant in her judgment despite the fact that they were in the file at the time of writing her judgment.
  6. That the learned Judge erred in law and fact in her construction of the evidence adduced and his reliance at extraneous matters which led him arrive at an erroneous finding and decision.
3. Only two issues arise from the 6 grounds of appeal, that is:
- a. Whether the appellant is liable for the Respondent's claim.
  - b. competence of the Respondent's claim.

### **Background and Evidence**

4. Insofar as can be scanned from the evidence, a clear picture arises. The respondent is a landowner with indigenous trees on his private farm. There appears to have been a ban on logging. Some overzealous public administrators went to his home and caused him to be arrested for cutting indigenous trees without a permit.
5. This resulted in the respondent being arraigned in court vide Nyeri CMCR 526 of 2018. He was charged with cutting and removing forest produce contrary to section 64(1) as read with section 65(1) of the *Forest Conservation and Management Act*, No. 34 of 2016. The complaint was attributed to Chief Florence Njuguna, an Assistant Chief.
6. The prosecution called the following witnesses: Florence Njuguna, Assistant Chief of Gatei Sub-location; Elijah Kariuki Gichohi, an Assistant Chief; Cpl. David Ochara of Kahunol Patrol Base; and CFS Robert Tarus, a Sub-County Forester, Nyeri County. After hearing the prosecution's case, the court found that the Respondent had no case to answer and did not place him on his defence. Consequently, the Respondent was discharged under Section 210 of the *Criminal Procedure Code* on 20th February 2019.
7. Following his discharge, the Respondent instituted a civil suit on 14.12.2020 against the Office of the Attorney General. He alleged that the complaint leading to his prosecution was lodged with malice, ill will, and an intent to cause harm. The plaint detailed the particulars of false imprisonment and malicious prosecution. The Attorney General entered appearance on 16th November 2021. Thereafter, the Respondent amended the plaint to substitute the Attorney General with the Office of the Director of Public Prosecutions as the Defendant. Despite the amendment, the particulars of malicious prosecution and false imprisonment remained unchanged.
8. Subsequently, on 28.01.2021, the Attorney General entered appearance on behalf of the Office of the Director of Public Prosecutions. A general defence was filed, asserting that the plaint did not disclose any reasonable cause of action. It was further contended that the claim for false imprisonment could not begin and end with the appellant alone. The defence, somewhat gratuitously, suggested that the Respondent should have joined the arresting officers as parties to the suit in place of the Appellant.



7. The Respondent testified on 21.03.2023, he adopted his statement laying out the background as stated above. He also produced documents. He was cross-examined by Mr. Gisemba with military precision. I will set out his evidence in cross-examination in full, as hereunder:

Florence Njeri is the one who made the complaint with the police(sic). The police arrested me. I have sued office of the Director of Public Prosecutions. I cannot tell if the defendant sent police officers to arrest me. That is all.

8. The Appellant closed their case without calling any witnesses.

### **Submissions**

9. The appeal proceeded by way of written submissions. The Appellant submitted that there are four essential elements of a claim for malicious prosecution, of which only one was established—namely, that the prosecution was initiated by the police and terminated in favour of the Respondent. The Appellant emphasized that the police were not joined as parties to the suit, and only the Appellant was sued.
10. It was further submitted that the trial court had expressly found that the Appellant was not responsible for the arrest and detention of the Respondent. The Appellant contended that the trial court erred and went on a "frolic of its own" by failing to find that there was probable cause for the prosecution. To support this position, reliance was placed on *Kagame & Others v Attorney General* (1969) E.A. 643, which addresses the issue of probable cause in malicious prosecution claims.
11. The Appellant further argued that the Respondent was taken through the proper channels of the criminal justice system, and that an acquittal alone does not automatically negate the existence of probable cause. In support of this proposition, the Appellant relied on *Nzoia Sugar Company Ltd v Fungututi* [1988] eKLR, where the Court of Appeal (Platt, Apaloo JJA, and Masime Ag. JA) held that an acquittal does not in itself establish the absence of reasonable and probable cause in a prosecution. The court in the matter observed as follows:

It is trite learning that acquittal, per se, on a criminal case charge is not a 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. The respondent gave no evidence from which it can be reasonably inferred that the Security Officer made this report to the police on account of hatred or spite that he had for him.

12. The appellant further relied on the cases of *James Karuga Kiiru v Joseph Mwamburi & 2 others* [2001] eKLR, where the court of appeal, [Omolo, Lakha & Owuor JJ A] posited as hereunder:
- (B) Malicious Prosecution. To prosecute a person is not prima facie tortious, but to do so dishonestly or unreasonably is. Malicious prosecution thus differs from wrongful arrest and detention, in that the onus of proving that the prosecutor did not act honestly or reasonably, lies on the person prosecuted.

In the present case, the appellant has not unfortunately discharged this onus as there is nothing to show that the prosecutor did not act honestly and reasonably.

It will be evident that we also think that there is no merit in the final and faintly argued submission that there was no reasonable and probable cause for the prosecution. It may well be that the appellant was innocent all the time, but there is no reason in the absence of necessary



evidence for making a police officer liable when he had only done his duty in investigating an offence.

13. The Appellant also relied on the decisions in *Gitau v East African Power & Lighting Co. Ltd* [1986] KLR 365 and *Robert Okeri Ombeka v Central Bank of Kenya* [2015] KECA 464 (KLR). They contended that, as established in those cases, a plaintiff in a malicious prosecution claim cannot rely solely on an acquittal. This, they stated, is so if it is one based on insufficiency of evidence, to prove lack of probable cause. The Appellant maintained that probable cause must be assessed based on the information available to the prosecution when the decision to charge was made.
14. On the issue of special damages, the Appellant argued that the receipts produced in support of the claim were inadmissible as they contravened Sections 19, 86, and 88 of the *Stamp Duty Act*. They contended that special damages must be specifically pleaded and strictly proved. In support of this position, they relied on the decision in *David Bagine v Martin Bundi* [1997] eKLR, which affirmed that unverified or improperly documented claims for special damages cannot be sustained. They urged the court to dismiss the claim.
15. They also prayed that general damages be set aside. They relied on the cases of *Gitobu Imanyara & 2 others v Attorney General* [2016] KECA 557 (KLR) and *Butt v Khan* [1978] eKLR. In the latter decision, the court of Appeal [Madan, Wambuzi & Law JJA] posited as follows:

An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.

16. The Respondent filed submissions dated 07.03.2025, asserting that his arrest and subsequent prosecution were ill-advised and unjustified. He maintained that he had pleaded sufficient particulars to support false imprisonment claims and malicious prosecution. The Respondent further pointed out that the Appellant failed to adduce any evidence at trial, rendering the defence unsubstantiated. While the Appellant relied on the Decision to Charge Guidelines, 2019, the Respondent argued that these were inapplicable, as the prosecution had already commenced in 2018, before the guidelines came into effect.
17. The Respondent also criticized the Appellant for being preoccupied with the non-joinder of the complainant and the arresting officers. He contended that if their participation was necessary, it was the Appellant's responsibility, not his, to join them as parties to the suit. He urged the court to dismiss the appeal.

## Analysis

18. As this is a first appeal, this Court bears the duty to re-evaluate and re-assess the evidence on record and arrive at its own independent conclusions. However, the court must be mindful that, unlike the trial court, it did not have the benefit of seeing and hearing the witnesses testify firsthand, and must therefore give due regard to the trial court's findings on credibility. In the case of *Mbogo and Another vs. Shah* [1968] EA 93 the court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to



take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

19. The duty of the first appellate Court was in the locus classicus case of *Selle and another Vs Associated Motor Board Company and Others* [1968]EA 123, where the judges in their usual gusto, held as follows:-

“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

20. The court must bear in mind that it neither saw nor heard the witnesses testify. The trial court had the advantage of observing their demeanour and assessing their credibility. Nonetheless, documentary evidence must be evaluated independently. Documents speak for themselves, and the appellate court is in as good a position as the trial court to interpret them, as parties cannot import extrinsic matters not contained therein into such documents. In *Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd* (2017)eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth:-

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

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

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

22. It is a strong thing for an appellate court to differ from the findings on a question of fact. In the case of *Peters vs Sunday Post Limited* [1958] EA 424, the court therein rendered itself as follows:-

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

23. In discerning the lawfulness of the arrest and malicious prosecution, the elements to be proved in an action for malicious prosecution are well settled. In *Mbowa vs. East Mengo District Administration* [1972] EA 352 (Sir William Duffus P, Lutta and Mustafa JJA), the court summarized the law as follows:

“The action for damages for malicious prosecution is part of the common law of England... The tort of malicious prosecution is committed where there is no legal reason for instituting



criminal proceedings. The purpose of the prosecution should be personal and spite rather than for the public benefit.... It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion of the truth. Its essential ingredients are:

- (1) the criminal proceedings must have been instituted by the defendant,
- (2) the criminal proceedings must have been terminated in the plaintiff's favor,

The plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must "unite" in order to create or establish a cause of action. If the plaintiff does not prove them, he would fail in his action..."

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

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

25. In *Paramount Bank Limited vs. Vaqvi Syed Qamara & another* [2017] eKLR (Makhandia, Ouko and Mínoti JJA), stated:

"The favourable termination requirement of criminal charges may be satisfied in various ways depending on how the proceedings are concluded in favour of the accused person. For instance, by acquittal, a discharge or a withdrawal.

Courts in this jurisdiction have relied, over the years on the following passage from the case of *Egbema v. West Nile Administration* [1972] EA 60 for the foregoing proposition;

"For the purposes proof that the criminal proceedings have been determined in the appellant's favour it is enough that the criminal proceedings have been terminated without being brought to a formal end. The fact that no fresh prosecution has been brought, although five years have elapsed since the appellant was discharged, must be considered equivalent to an acquittal, so as to entitle an appellant to bring a suit for malicious prosecution..."

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



26. The court, in *Bobby Macharia vs. Attorney General & 3 others* [2018] eKLR, expressed similar views. So did the court in *Chrispine Otieno Caleb vs. Attorney General* [2014] eKLR, where it was said:

“...The law is that for the purposes proof that the criminal proceedings have been determined in the appellant’s favour it is enough that the criminal proceedings have been terminated without being brought to a formal end.”

27. It is a well-established principle that a plaintiff in a malicious prosecution claim cannot establish a lack of probable cause solely based on having been acquitted in the earlier criminal proceedings, particularly where the acquittal was based on insufficient evidence. The standard for probable cause is determined by the state of knowledge at the time the prosecution was initiated, not by its eventual outcome. In *Robert Okeri Ombeka v Central Bank of Kenya* (2015)e KLR, it was held as follows:

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

28. Turning to the facts at hand, four overarching themes emerged that the participants seemed to have forgotten, making the proceedings a poisoned chalice. They are:

- a. Jurisdiction
- b. Pleadings
- c. Vicarious liability
- d. Burden of proof

29. The primary criminal case commenced on 2.5.2018 and concluded on 20.2.2019. The original suit against the Attorney General was filed on 14 December 2020, one year and almost ten months after the acquittal. The suit against the Attorney General was withdrawn, and a suit was filed against the appellant on 02.20.2021, years after the cause of action arose. It is clear that the Respondent was evasive on the date of acquittal. The court, however, was under a duty to satisfy itself that it had jurisdiction to hear and determine a stale claim pursuant to Section 3 of the Public Authorities Limitation of Action Act, Cap 39, Laws of Kenya. The said section provides as follows:

1. No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.

30. The wording of the section makes it mandatory to be satisfied that there is a claim that is not time barred. The court should not have entertained a stale claim against government. In the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, the supreme court stated as doth: -

“This Court dealt with the question of jurisdiction extensively in the matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power



upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

31. In *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR, Nyarangi JA, as he then was stated as doth;

“With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority: “By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.

32. Enough is said of this ground. The next question is pleadings. This applies both ways. The first question is the aspect of the memorandum of appeal. The same raises only the question of liability. The court cannot address the issue of general or special damages. The only problem the court will point out is that had the question of special damages been raised, the court could have allowed the same. All the receipts annexed were issued on a client account. This is a sacrosanct account that advocates hold money for the client. Every payment to the client account does not count as fees.

33. Secondly, there has been development on the law that receipts can only count as receipts if they are electronic receipts or tax invoices. Paper invoices and receipts are worthless in view of section 42 of the VAT Act, 2023.

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

“It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of *Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others* (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002* where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

“.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments



in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

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

As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings .....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

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

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

36. In in this case the pleadings relate to malicious prosecution and false imprisonment. These are distinct torts. The Appellant is incapable of committing false imprisonment. The evidence on the record shows that the complainant was Florence Njurguna. She was not a party to the suit. Only two aspects were raised as against the appellant, that is, charging on nonexistent law and disregarding the fact that the plaintiff was on his land. The other penumbra issue is proceeding to trial knowing that no offense had been committed.



37. All facts regarding arrest cannot be attributed to the appellant. On the other hand, the respondent was acquitted for a defect in the charge sheet. The underlying factors were not denied. The Respondent had cut indigenous trees, he was reported and a statement was collected. The court declared a circular not to be the law. The circular had been issued, and the rank and file followed the same. The same covered the scenario in the circular. Under Section 47(6) of the *Forest Conservation and Management Act*, the Chief Conservator of Forests and relevant county governments shall supervise the implementation and be responsible for managing forests, estates, whether private or public. The section provides as follows:
- (6) The Chief Conservator of Forests and relevant county governments shall supervise the implementation of forest management plans for public forests in the case of the Chief Conservator of Forests and community and private forests in the relevant county in the case of the county government.
38. It is, therefore, not far-fetched for the Chief Conservator of Forests and relevant county governments to be interested in any forest anywhere. Section 42 of the *Forest Conservation and Management Act* provides as follows:
- All indigenous forests and woodlands shall be managed on a sustainable basis for purposes of...
39. The cutting of indigenous forest was thus a probable cause to have the Respondent arrested. It is irrelevant that the indigenous forest was in his land. The question whether he can do so without offence to the *Forest Conservation and Management Act* is a question of law. The respondent was acquitted, not for lack of a probable cause but because the charge sheet was defective. The court cannot punish the appellant for the incompetence. There has to be malice. On incompetence and mistakes by counsel, the court of appeal [Platt, Gachuhi & Apallo JJA] in Philip Keipto Chemwolo & another v Augustine Kubende [1986] eKLR posited as follows:
- “Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits.”
40. The burden of proof was on the Respondent to prove his case. It is true that without defence evidence, the same remains a paper and is no evidence. However, this does not relieve the Respondent as the plaintiff to prove his case. In the case of Samson S. Maitai & Another -vs- African Safari Club Ltd & Another [2010] eKLR, the High Court in trying to define Formal Proof stated thus:
- “..... I have not seen judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand according to Halsbury's Laws of England, Vol. 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption.”
41. This is not a criminal trial. It is a civil trial where the court has to find for one party or another on a balance of probabilities. The question as to what amounts to proof on a balance of probabilities was



discussed by Kimaru, J in *William Kabogo Gitau vs. George Thuo & 2 Others* [2010] 1 KLR 526 as follows:

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

42. This was further enunciated in the case of *Palace Investments Limited v Geoffrey Kariuki Mwenda & Dollar Auctions* [2015] KECA 616 (KLR), where the Court of Appeal [J Karanja, GG Okwengu, CM Kariuki, JJA] stated as follows:

The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. Denning J. in *Miller –vs- Minister of Pensions* [1947] 2 ALL ER 372 discussing the burden of proof had this to say:-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

43. The acquittal was not based on lack of a probable cause but on a defective charge sheet. There was no evidence of malice. Secondly, the appellant is not vicariously liable for the complainant’s actions and the police. The role of the victims in a trial was discussed at length in the case of *Waswa v Republic (Petition 23 of 2019)* [2020] KESC 23 (KLR) (4 September 2020) (Judgment) Joseph Lendrix Waswa v Republic [2020] eKLR Neutral citation: [2020] KESC 23 (KLR). The roles are thus distinct. For malicious prosecution to succeed, it must be shown that the report was maliciously made, and the other actors in the series were reckless, disregarded, actively aided, or furthered the malicious act. This cannot be done without the complainant, the police, and the director of public prosecution.

PARA 44.

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

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

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

The law makes it imperative that the belief in the guilt of the accused be founded upon a decision made after due inquiry into and consideration of the facts presented to the



respondents. But the reasonable belief need not be based on actual existence of a definite cause, but upon reasonable belief held in good faith in the existence of facts as are perceived by the respondents. The converse is that where there is no basis to believe that the accused is guilty of the accusation and the prosecution is all the same set in motion, there is clear evidence of malice.

46. In the case of *Gicheru v Kimwaki & another* (Civil Appeal 346 of 2017) [2023] KECA 1107 (KLR) (22 September 2023) (Judgment), the court of appeal [HM Okwengu, HA Omondi & JM Mativo, JJA] stated as follows:

As it is not disputed that the appellant was the one who made the report that led to the 1st respondent being arraigned in court, and that the 1st respondent was acquitted of the charge of which he was arraigned, what we must consider is whether the appellant made her report without any probable cause and whether she was actuated by an improper and wrongful motive with an intent to use the legal process for some wrongful purpose.

47. In *Mbowa vs East Meno Administration* (supra), Lutta, JA in his leading judgment addressed the issue of malicious prosecution as follows:

“The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose for the prosecution should be personal and spiteful rather than for the public benefit....It occurs as a result of the abuse of the minds of judicial authorities whose responsibility it is to administer criminal justice. It suggests the existence of malice and the distortion of the truth. Its essential ingredients are; 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. 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. Thus there must exist facts which on reasonable grounds the defendant genuinely believes that the criminal proceedings are justified. iii. The defendant must have acted maliciously. In other words, the defendant must have acted in instituting criminal proceedings, with an improper and wrongful motive. That is, he must have had ‘an intent to use the legal process in question for some other than its legal, appointed and appropriate purpose’ *Pike vs Waldrum* [1952] 1 *Lloyds LLP* 431 at P 452; and 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 and that he has been acquitted of the charge....The plaintiff in order to succeed has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must “unite” in order to create or establish a cause of action. If the plaintiff does not prove them, he would fail in his action...”

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

With respect to malice, the law is clear that the mere fact that a person has been acquitted of the criminal charge does not necessarily connote malice on the part of the prosecutor.



49. There was thus no proof of malice on the part of the decision to charge. Without the complainant and investigators, the suit was dead on arrival. It is true that the appellant could join other parties. This is only in cases where they claim indemnity or contribution. This does not apply to malicious prosecution.
50. The end result is that the appeal is allowed. The finding of liability is set aside. In lieu thereof, I substitute with an order dismissing the suit in the lower court.
51. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:
- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
  - (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.
52. The Court of Appeal in the case of *Farah Awad Gullet v CMC Motors Group Limited* [2018] KECA 158 (KLR) had this to say:
- “It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.
53. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -
- (18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.
54. In the circumstances the appeal is allowed. Costs follow the events. The Respondent shall bear the Appellant’s costs of Ksh. 55,000/=.



## **Determination**

55. In the end the court issues the following orders:

- a. The appeal is allowed. The finding on liability is set aside, and in lieu thereof, I substitute an order dismissing the Respondent's suit with costs to the Appellant.
- b. The Appellant shall have costs in the court below payable by the Respondent.
- c. The Appellant shall have costs of the appeal of Ksh. 55,000/= payable by the Respondent.
- d. Right of appeal 14 days.
- e. Stay of execution for 30 days.
- f. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 15<sup>TH</sup> DAY OF MAY, 2025.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of:-

Mr. Cheruyot for the Appellant

Ms. Ngari for the Respondent

Court Assistant – Michael

