



**Total Kenya Ltd v Mumaraki & another (Civil Appeal  
81 of 2019) [2025] KEHC 10471 (KLR) (1 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10471 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL 81 OF 2019**

**REA OUGO, J  
JULY 1, 2025**

**BETWEEN**

**TOTAL KENYA LTD ..... APPELLANT**

**AND**

**PIUS WAMALWA MUMARAKI ..... 1<sup>ST</sup> RESPONDENT**

**HON ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

*(An Appeal from the judgment and decree of the SRM's at Bungoma of Hon. G.P. Omondi delivered on January 29th 2019 in Bungoma CMCC No. 624 'A' of 2010)*

**JUDGMENT**

1. On the 19<sup>th</sup> September 2019, Total Kenya Ltd [the appellant] filed an appeal against the 1st and 2nd respondents. The appellant seeks that the appeal be allowed and that the judgment of the Senior Resident Magistrate Court be set aside and the orders allowing the respondent's claim and awarding him damages against the Appellant be substituted with an order dismissing the said suit against the Appellant. The appellant's grounds of appeal are as stated below;
  - i. The learned Trial Magistrate erred in Law and, in fact, in holding that the Appellant was jointly and severally liable for the tort of malicious prosecution, considering that the prosecutorial powers lie with the 2nd Respondent.
  - ii. The learned Trial Magistrate erred in Law and in fact in failing not to take in consideration that before the promulgation of the 2010 constitution the investigative and prosecutorial powers vested with the police and Attorney General [now Police and Director of Public Prosecutions.]
  - iii. The learned Trial Magistrate erred in Law and in fact in failing to find that there was reasonable and probable cause in the prosecution of Criminal case No. 1837 OF 2006 at Principal Magistrate Court at Eldoret.



- iv. That the learned Trial Magistrate erred in law and in fact in failing to find that the Prosecution of Criminal Case No. 1837 OF 2010 at Principal Magistrate's Court at Eldoret was motivated by malice.
  - v. That the learned Trial Magistrate erred in law and, in fact, by shifting the burden of proof in the case of the Appellant.
  - vi. That the learned Trial Magistrate proceeded on demonstrably wrong principles in reaching his decision.
2. The background of this appeal is that the 1<sup>st</sup> respondent sued the appellant and the 2<sup>nd</sup> respondent for general and special damages for malicious arrest, confinement and prosecution. The 1<sup>st</sup> respondent averred in his plaint that he was an employee of the appellant. On 16<sup>th</sup> March 2006, he was arrested by police officers attached to Eldoret, acting on a report made by the Appellant. He was arraigned in Eldoret Court and charged in Criminal Case No. 1837 of 2006 on theft and forgery charges, which he was a total stranger to. The case was heard, and he was acquitted on September 8<sup>th</sup>, 2009, under Section 210 of the *Criminal Procedure Code*. He claimed that his arrest, subsequent incarceration, arraignment in court and the entire prosecution were without any reasonable cause, downright malicious, and a mere frame and public relations exercise drummed up and instigated by the 2<sup>nd</sup> Respondent and or their agents in concert and in breach of his legal rights as guaranteed by law. He pleaded particulars of malice on the part of the Appellant as follows;
- a. Making a false report to the police that the oil products had been received when they had evidence that the documentation had been forged by their own personnel and/or agents.
  - b. Insisting that the 1<sup>st</sup> respondent had a hand in the loss of the said fuel while in transit whilst fully aware that he was neither in the said vehicle nor was he their employee at all.
  - c. Failing to scrutinise their documents and fool proofing their systems leading to loopholes and resulting in victimization of the 1<sup>st</sup> respondent who was totally innocent.
3. The 1<sup>st</sup> respondent also particularised the particulars malice on the part of the 2<sup>nd</sup> respondent. I note that Hon. Mutai heard the case against the 2<sup>nd</sup> Respondent and judgment was entered against the 1<sup>st</sup> Respondent and appellant jointly and severally in the sum of Kshs 150,000/- for general damages for wrongful arrest and Kshs. Kshs . 550,000 for general damages due to malicious prosecution. The appeal before me is not against the judgment dated 17<sup>th</sup> November 2015, but the subsequent judgment delivered by Hon. G.P. Omondi, SRM, delivered on the 29<sup>th</sup> January 2019. At the time the case was heard by Hon. Mutai, an interlocutory had been entered against the Appellant. The said judgment was set aside, and the Appellant was given a chance to have his case heard.
4. Parties canvassed the appeal by way of written submissions. The Appellant raised the following issues for determination: whether the Appellant may be held liable for the tort of malicious prosecution, and whether the 2<sup>nd</sup> respondent established a case against the Appellant for wrongful arrest and malicious prosecution. On the 1<sup>st</sup> issue it was submitted that the decision of whether to prosecute or not lies with the 2<sup>nd</sup> respondent and /or its agent and as such the appellant cannot be held liable for malicious prosecution, for this argument the appellant relied in the case of *Joseph Wamoto Karani v C Dorman Limited & Another* [2018], the court referred to the case of *Douglas Odhiambo Apel & Another v Telekom Kenya Limited Civil Appeal No. 11 of 2006* where the court held that;

“The Plaintiff's were arrested and charged by the police. And the prosecution was undertaken by the Attorney- General as Public Prosecutor. Telkom Kenya was merely a complainant.



The decision to charge and prosecute the plaintiff's was taken by the Police and the Attorney General. Telkom as a complainant would not be involved in the process. Once Telkom Kenya had made a complaint to the Police, it was left to the Police to investigate the complaint and decide whether or not to charge the Plaintiffs. That is why in a claim for damages for unlawful arrest, false imprisonment and malicious prosecution, the proper defendant is always the Attorney-General."

5. On the 2<sup>nd</sup> issue, it was submitted that the burden of proof lies with the person who asserts, and the same person must prove that the facts he relies on exist [ see section 107 of the *Evidence Act* Cap 80]. The appellant pointed out the essential ingredients to prove a case of malicious prosecution; that a prosecution was instituted by the defendant or by someone for whose acts he is responsible, that the prosecution terminated in the plaintiff's favour, that the prosecution was instituted without reasonable and /or probable cause and that the prosecution was actuated by malice. It was submitted that, in the pre-2010 constitutional framework, investigative and prosecutorial powers were vested in the Police and the Attorney General, now vested in the police and the Director of Public Prosecutions. There is no dispute that the decision in the Criminal Case was in the 1<sup>st</sup> Respondent's favour as he was acquitted under section 210 of the *Criminal Procedure Code*. On whether the prosecution was instituted without reasonable and/or probable cause, it was submitted that the appellant had sufficient cause to register a complaint with the police since its fuel was stolen. The appellant's role was limited to making the report, upon which it was a duty incumbent on the 2<sup>nd</sup> respondent to determine its merit in proceeding to charge as per its findings from investigations. Reliance was placed on the case of *Murunga v The Attorney General* [1976-1980] KLR 1251. On whether the appellant acted maliciously, it was submitted that the evidence presented during the trial was insufficient to support a finding of liability and wrong arrest on the part of the appellant. The evidence adduced by the 1st respondent demonstrated that the appellant was a victim of theft and forgery, and that it is a trite law that an artificial person cannot have a state of mind that can be translated into malice. The alleged malice must be actuated by a natural person and the 1<sup>st</sup> respondent should have established spite and ill will of the natural persons [ see *Nzoia Sugar Company Ltd v Fungututi* [1988] eKLR] and *Attorney General v Peter Kirimi Mbogo & Another* [2021, where the court held that all the elements apply conjunctively and must all be proven to claim damages for malicious prosecution successfully.
6. The 1<sup>st</sup> respondent too pointed out the essential ingredients a party must prove in a case of malicious prosecution. Reliance was made on the following cases; *Murunga v Attorney General* [ supra ] , *Joseph C. Mumo v the Attorney General & Another* [2008] eKLR where it was held that Malice is defined as "Prosecution for a reason other than vindication of Justice" . It was further submitted that the test for reasonable and /or probable cause was defined in the case *Kagane v Attorney General* 1969 KLR as follows;

"Reasonable and probable cause is not 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 lead to 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".

#### DIVISION - ANALYSIS AND DETERMINATION

7. I have carefully considered the grounds of appeal, the record of appeal, the parties' submissions, the authorities cited, and the law. I identify one main issue for determination: whether the 1st Respondent has established a case of malicious prosecution against the appellant.



8. This being a first appeal, this court is duty-bound to re-evaluate and re-consider the evidence on record and arrive at its own independent conclusion. It has also to bear in mind that unlike the trial court, it did not see nor hear the witnesses. This was stated in the case of *Selle & another v Associated Motor Boat Co. Ltd V others* [1968] E.A 123.
9. There is no dispute that the 1<sup>st</sup> respondent was charged in Criminal Case No. 1837 of 2006 with the offence of Stealing contrary to section 275 of the *Penal Code*. The charge sheet attached to the supplementary record of appeal is very faint on the particulars of the offence. The trial court Ruling shows that the 1<sup>st</sup> respondent was charged with one count of stealing, contrary to Section 275 of the *Penal Code*, and another count of Forgery, contrary to Section 349 of the *Penal Code*.
10. The 1<sup>st</sup> Respondent denied the charge, and the matter proceeded to a full hearing with the prosecution calling three [3] witnesses. Thereafter, the trial court found the prosecution had not established a prima facie case and acquitted the appellant under section 210 of the *Criminal Procedure Code*.
11. After his acquittal, the 1<sup>st</sup> Respondent filed the Civil case No. 624 'A', claiming general and special damages for malicious prosecution. Black's Law Dictionary, tenth edition, at page 1102 defines malicious prosecution as follows: 'the institution of a criminal or civil proceeding for an improper purpose and without probable cause'.
12. The essential ingredients of the tort of malicious prosecution have been discussed in various authorities, including *Murunga v The Attorney General* [supra] where Cotran J listed them as follows:
  - i. That a prosecution was instituted by the defendant or by someone for whose acts he is responsible.
  - ii. That the prosecution terminated in the Plaintiff's favour.
  - iii. That the prosecution was instituted without reasonable and/or probable cause.
  - iv. That the prosecution was actuated by malice.
13. All the above elements apply conjunctively and must all be proven in order to be successful in a claim for damages for malicious prosecution.[see *Attorney General v Peter Kirimi Mbogo & Another, Meru Civil Appeal 52 & 56 of 2020 [Consolidated] [2021] eKLR*].
14. On the first element, it is not in dispute that the appellant, through its representative, made a complaint at the DCIO office in Eldoret concerning theft and forgery, and it is from this complaint that the 1<sup>st</sup> respondent and another were arrested and charged in Criminal Case 1837 of 2006.
15. On whether the prosecution terminated in the 1<sup>st</sup> respondent's favour. In the Ruling dated 08.09.2009, the trial magistrate, after evaluating the evidence, found that no prima facie case was made against the 1st respondent, as there was no direct evidence linking him to the theft. The trial magistrate stated that the 1<sup>st</sup> respondent was arrested on suspicion that he might have committed the offences for which he had been charged. The 1<sup>st</sup> respondent was acquitted under section 210 of the *Criminal Procedure Code*.
16. The last element on whether the prosecution was actuated by malice. The Appellant's representative reported the matter to the police after receiving a report from Nzoia Sugar Company that the fuel had not been delivered. Was malice proved on the part of the appellant?. In his statement before the trial magistrate, the 1st respondent told the court that he was an employee of Nzoia Sugar Company Ltd up to December 2015. He adopted his statement as his evidence. He produced the proceedings in Eldoret Criminal Case No. 1837 of 2006. He informed the court that he was arrested on the 16/03/2006 and taken to Eldoret Police Station. He was in police custody up to 23/03/06 when he was charged. The



case proceeded for three and half years, and he was acquitted on 08/09/2009. He told the court that the complaint against him was malicious and false. His prosecution was malicious. There was no evidence. He could not have been acquitted if the complaint was reasonable and true. He suffered psychological torture and economical loss. His self-esteem was lowered and his integrity. He was charged with stealing and forgery. He was charged with 2 counts.

17. Sections 107 to 109 of the *Evidence Act* provides as follows:

Section 107- Burden of proof

- i. Whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- ii. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person

Section 108 Incidence of burden

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

Section 109 Proof of particular fact.

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.

18. It is the 1<sup>st</sup> Respondent’s case that the complaint against him was malicious and false, and that his prosecution was malicious, and that he could not have been acquitted if the complaint was reasonable and true. The 1<sup>st</sup> respondent had to prove that the report made by the appellant was actuated with malice. The appellant made a report to the police. It was the duty of the police to investigate the matter and prefer charges against the 1<sup>st</sup> respondent. In his particulars of malice, he claims that the appellant made a false report to the police that the oil products had been received when they had evidence that the documentation had been forged by their personnel and or agents. He also alleged that insisting he had a hand in the loss of the said fuel while in transit whilst fully aware that he was neither in the said vehicle nor was he their employees and the last limb was that the appellant failed to scrutinise their documents and fool proofing their systems leading to loopholes resulting in victimization of the 1<sup>st</sup> respondent who was totally. The trial magistrate stated that there was no direct evidence linking the 1<sup>st</sup> respondent to the charge of theft. The trial magistrate further noted that from the evidence in chief as well as cross-examination of Tom Otieno Obondi [Pw1] , Nzoia Sugar acknowledged having received the oil product. No one from Nzoia Sugar was ever called to enlighten the court on the issue. The trial magistrate pointed out that No.57702 PC Joshua Makawa [ Pw2] cannot be heard to say he concluded that there was a difference in receiving rubber stamps from Nzoia Sugar Company, since the rubber stamp that was phased out and the ones in current use were not produced in evidence. In *Nzoia Sugar Company Ltd v Fungututi* [1988] KLR 399, the Court of Appeal held; “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.”



19. In my view, the trial magistrate took issue with the way the case was investigated. Failure on the part of the police to properly investigate a matter could not be held against the appellant as an act of malice or the complaint being unreasonable. The trial magistrate held that the 1<sup>st</sup> respondent was arrested on suspicion that he might have committed the offences. This statement exonerates the appellant of the allegation of malice
20. Lastly, In the case *Kagane v Attorney General* [1969] E. A 643 Rudd J set the test for reasonable and probable cause as follows;
- “Reasonable and probable cause is not 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 lead to 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”.
21. The trial court stated that the 1st Respondent was arrested on suspicion that he might have committed the offences he had been charged with. The prosecution failed to call any witness from Nzoia Sugar Company to give evidence on the rubber stamps, which we mentioned in evidence, and the handwriting expert to show that the 1st Respondent had forged the rubber stamps. There was no evidence presented that this omission was due to the acts of the appellant. The trial magistrate stated that there was no evidence to suggest that the 1st Respondent received the stolen goods, and therefore, the investigating officer had charged the accused without sufficient evidence. In my view, there was probable cause to institute the suit, as there was an allegation of goods that had been supplied and stolen, but the crucial evidence was not tendered to prove this fact against the 1st Respondent. I find that the trial court erred in holding that the prosecution was initiated without reasonable cause, as the appellant had a complaint that was to be investigated by the 2nd Respondent. It was not proven that the appellant’s complaint was baseless or unmeritorious.
22. Based on the above conclusions, I find merit in the appeal; the lower court Judgment dated 29<sup>th</sup> January 2019 is set aside, and the suit against the appellant is dismissed with costs. The Appeal is allowed with costs.

**DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 1<sup>ST</sup> JULY 2025.**

**R.E.OUGO**

**JUDGE**

In the presence of:

Miss Ouma -For the Appellant

Miss Wakasa h/b for Mr. Murunga - For the 1<sup>st</sup> Respondent

2<sup>nd</sup> Respondent - Absent

Wilkister - C/A

