



**Ndiritu v Muigai & 3 others (Civil Appeal E258 of 2023)  
[2024] KEHC 3796 (KLR) (15 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3796 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL APPEAL E258 OF 2023  
DKN MAGARE, J  
APRIL 15, 2024**

**BETWEEN**

**ANTHONY WAMBUGU NDIRITU ..... APPELLANT**

**AND**

**DAVID WANYOIKE MUIGAI ..... 1<sup>ST</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 3<sup>RD</sup> RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. This is an Appeal from the Judgment of the Chief Magistrate [Honorable J. B. Kalo (CM)] dated 25<sup>th</sup> August 2023 in Mombasa CMCC Case Number 1273 of 2018 between David Wanyoike Muigai v Anthony Wambugu Ndiritu, the Honorable Attorney General, the Director of Public Prosecutions, and the Inspector General of Police.
2. The Appellant, Anthony Wambugu Ndiritu who was dissatisfied with the Judgment of the Honorable J. B. Kalo (CM) delivered on 25<sup>th</sup> August 2023 hereby appeals against the said Judgment on the following grounds: -
  - a. The learned magistrate erred in law and in fact by failing to consider the appellants’ evidence as against the 1<sup>st</sup> Respondent.
  - b. The learned magistrate erred in fact and in law by allowing the 1<sup>st</sup> Respondent’s case against the weight of the evidence.
  - c. The learned magistrate erred in law and in fact by holding that the 1<sup>st</sup> Respondent had proved his case against the Appellant on a balance of probabilities.



- d. That the learned magistrate erred in law and in fact by failing to consider as part of the Appellants' evidence, was a statement of admission to the police of the crime complained of by the appellant herein.
  - e. That the learned magistrate erred in law and in fact by holding that the Appellant was culpable of malicious prosecution while at the same time absolving the director of public prosecutions of any wrong doing.
  - f. That the learned magistrate erred in law and in fact by holding that the 1<sup>st</sup> Respondent did prove their case against the appellant on a balance of probability which he did not.
  - g. That the learned magistrate erred in law and in fact by holding that the 1<sup>st</sup> Respondent had met the ingredients for unwarranted arrest and prosecution as against the appellant on a balance of probability who is not the prosecutor or the police and at the same time absolving the prosecutor of any wrong doing.
  - h. That the learned magistrate erred in law and in fact by holding that the 4<sup>th</sup> Respondent who is the prosecutor was innocent on the issue of malicious prosecution while at the same time holding the Appellant liable for malicious prosecution whereas the appellant was just a complainant and not a prosecutor.
3. The Memorandum of Appeal is unnecessarily long. Order 42 Rule 1 of the Civil Procedure Rules provides are Both: -
- Form of appeal –
1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
  2. The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.
  4. The Court of Appeal had this to say about compliance with Rule 86 of the Court of Appeal Rules (which is *pari materia* with Order 42 Rule 1 of the Civil Procedure Rules) in the case of *Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat* [2020] eKLR: -

“We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See *Abdi Ali Dere v Firoz Hussein Tundal & 2 Others* [2013] eKLR) and *Nasri Ibrahim v IEBC & 2 Others* [2018] eKLR. In the latter case, this Court lamented:

“We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs.” The 18 grounds of appeal presented by the



appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19<sup>th</sup> September 2018 raise only two issues...”

5. In the case of Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR, the court of appeal observed that: -

“Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the [Kenya Ports Authority Act](#) ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In *William Koross v Hezekiah Kiptoo Kimue & 4 others*, Civil Appeal No. 223 of 2013, this Court stated:

“The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better.”

6. The main ground is whether the Respondent proved the tort of malicious prosecution. The rest of the grounds are ancillary, repetitive, prolixious and a waste of judicial time. The appellant should be precise on their grounds.
7. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.
8. 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.

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 parol 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 parol evidence, it does in fact apply to all forms of extrinsic evidence.”

9. The trial court and this court will similarly construct documents as there are no witnesses required to know the content of a document. Therefore, where the findings of the trial court are consistent with the evidence generally, this court should not interfere with the same.



10. In the case of Mbogo and Another v Shah [1968] EA 93 where 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.”

11. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another v Associated Motor Board Company and Others [1968] EA 123, where the law looks in their usual gusto, held by 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.”

12. In the case of Peters v Sunday Post Limited [1958] EA 424, 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...”

13. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya v Republic [1957] EA 336 is as follows: -

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

14. There are only 2 questions in this matter:

- a. Whether malicious prosecution was proved
- b. Quantum of damages.

15. The main question that goes to the first issue, is whether, there can be malicious prosecution without the prosecutor. In other words, did the finding that the state was not to blame absolve the Appellant? The court found the Appellant to have maliciously prosecuted the 1<sup>st</sup> Respondent.



16. I have read the entire record and *the Constitution* and did not find a situation where a witness is allowed to prosecute. The Appellant did not pursue private prosecution. It was reported that certain things had happened by a third party. The police investigated, the ODPP made a decision on to charge and the court dealt with the case. Who dropped the ball?
17. The parties filed submissions.
18. The Appellant submitted that he sought to overturn the judgment of the lower court in this case where the Respondent sought and was granted damages for malicious prosecution by a judgment of the lower court dated 24<sup>th</sup> August 2023.
19. They addressed the Appeal on 4 issues as doth: -
  - a. Whether the judgment by the Lower court went against the evidence on record?
  - b. Whether elements of malicious prosecution were proved?
  - c. Whether there was an admission by the 1<sup>st</sup> Defendant of house breaking into a shop and committing a felony?
  - d. Whether a complainant can be found culpable of malicious prosecution and the Director of Public Prosecutions absolved of the same?
20. It was their case that the Respondent is the former landlord of the Appellant. On or about 16<sup>th</sup> November 2016 after a tenancy dispute that ended before the Business Premises Rent Tribunal, the 1<sup>st</sup> Respondent took matters into his own hands, broke a padlock and entered the shop of the Appellant and took away goods worth Kshs. 384,292/=.
21. Further, the Business Premises Rent Tribunal on hearing this recommended that the 1<sup>st</sup> Respondent faces criminal and/or civil proceedings in a court of competent jurisdiction since its jurisdiction ended with the abrupt termination of the tenancy. Investigations were conducted by the Kenya Police Service who recommended charges and the office of Director of Public Prosecutions concurred and charges were preferred.
22. He submitted that the charges were then controversially dropped by the ODPP under Section 87 (a) of the Criminal Procedure Code which is not a conclusive section of the law as the 1<sup>st</sup> Respondent who was the accused then, can still be charged with the same offence in future. It was therefore not an acquittal under section 210 or 215 of the Criminal Procedure Code. They set out the said section as doth: -
 

‘Withdrawal from prosecution in trials before subordinate courts

In a trial before a subordinate court a public prosecutor may, with the consent of the court or on the instructions of the Director of Public Prosecutions, at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal—

  - a. if it is made before the accused person is called upon to make his defence, he shall be discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts;’
23. They submitted that the 1<sup>st</sup> Respondent who was the accused person is not out of the woods yet as he can still be charged with the same offence in future all factors held constant. Criminal complaints have no expiry date.



24. It was his case that none of the allegations in the suit seeking damages for malicious prosecution were attributed to the Appellant. The Appellant did not report, arrest, investigate or charge the accused. There is no allegation that the Appellant gave the police false information or any information at all. They wondered how the Appellant was dragged to court.
25. It is important to note at this stage that the complainant was Loise Nyaguthi. It was also agreed that the shop was broken into but both sides has a different explanation.
26. It was the Appellant's case that judgment by the Lower court went against the evidence on record. It was their case that there was no proof of malice as far as the appellant is concerned. The charges were recommended by a competent court/tribunal which recommendation was never challenged or appealed from. The 1<sup>st</sup> Respondent admitted to the allegations of house – breaking and carrying away the appellant's goods and the complaint about malice is unfathomable. The 4 elements of malicious prosecution were never proved and the judgment by the lower court has no place to stand on.
27. They submitted that that the elements of malicious prosecution were not proved as the following ingredients must be available, which were not: -
  - a. That the termination of the criminal case was in his favor.
  - b. That the criminal case was instituted without reasonable/ probable cause.
  - c. That the prosecution was actuated by malice.
  - d. That the prosecution was instituted by the defendant.
28. It was their case that all the 4 elements must be present for malicious prosecution to be proved. First because the prosecution was never determined in the favor of the 1<sup>st</sup> Respondent as the case was merely withdrawn. The 1<sup>st</sup> Respondent can still be charged with the same offence. The letter withdrawing the charges against the 1<sup>st</sup> Respondent confirms the following, that there existed a landlord – tenant relationship between the appellant and the 1<sup>st</sup> Respondent.
29. The 1<sup>st</sup> Respondent actually broke the padlock to the appellant's shop and removed all the stock inside that belonged to the complainant and reclaimed back his shop after the appellant defied the accused person's order to vacate and this is said to have been acknowledged by the Office of the Director of Public Prosecution.
30. They stated that there was an order issued by the Business Premises Rent Tribunal allowing the appellant to pursue criminal and/or civil remedies as against the 1<sup>st</sup> Respondent. The ODPP did not find any fault with that order by the Business Premises Rent Tribunal and in fact acknowledged it; the final recommendation.
31. The termination by the Office of the Director of Public Prosecution was to allow a civil remedy to ensue. Therefore, the termination was just to pave way for an alternative redress and not because there was no probable cause to press charges. The criminal case was instituted without reasonable/probable cause. This dispute was initially a landlord - tenant dispute being handled at the Business Premises Rent Tribunal Mombasa but when the landlord (1st Respondent), broke into and removed the appellant's goods to an unknown destination, then the tribunal made the following orders: -
  - a. The tenant has been unlawfully evicted from the premises and is at liberty to pursue criminal proceedings or file a civil suit in a competent court.
  - b. The Landlord's defence filed on 21.11.2016 is struck out as incompetent as there is no such procedure in the tribunal.



- c. The Landlord shall pay the tenant's cost of the complaint which is allowed.
  - d. Costs to be assessed at Kshs. 10,000/-
  - e. Costs to be paid within 30 days in default execution to issue.
32. To the Appellant, the arrest and prosecution of the criminal offence was recommended by the Business Premises Rent Tribunal for which there was no appeal preferred against the order of the tribunal. It was their case that there was no malice.
33. The Respondent relied on the learned authors, Clerk and Lindsell, on Tbrlt 11<sup>th</sup> Edition (1952) Sweet and Maxwell that to prove malicious prosecution was: -
- a. He was prosecuted by the Defendant, that is, he set in motion against him a criminal charge. The prosecution was determined in his favour. There was no reasonable and probable cause.
  - b. The prosecution was malicious. This is said to have been reiterated in the case of *George Masinde Munya v Attorney General* (1983) KLR 138.
34. He stated that in *Hicks v Faulkner* (1978) QBD, it was stated that reasonable and probable cause is an honest belief in the guilty of the accused based upon a full conviction founded upon reasonable grounds of existence of state of circumstances, which assuming them to be true would reasonably lead an ordinary prudent and caution man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed.
35. The court relied on the decision of *Daniel Toroitich Arap Moi v Mwangi Stephen Murithi and another* [2014] KLR. They relied on a high court decision in *Chrisphine Otieno Caleb v Attorney General* [2014] eKLR.

### **Analysis and Determination**

36. The Respondent stated that the false and malicious allegation were made by the Appellant's wife. This resulted in the 1<sup>st</sup> Respondent being called to record a statement and was arrested and locked in the cells. This are two separate people. The Appellant cannot be held liable by actions of his wife. This disposes the first limb of the Appeal.
37. The impugned report was made by the Appellant's wife and not the Appellant. Consequently, as the 1<sup>st</sup> Respondent eloquently argued in *Clerk and Lindell*, the 4 elements must be present. The Appellant did not let in motion the prosecution. The charge sheet related to theft in his shop. However, it is the wife who reported. The Appellant's shop was locus in quo. It is not the Appellant who reported.
38. Consequently, the appellant cannot be held vicariously liable for a tort allegedly committed by the wife. Secondly, the Respondent abandoned the claim against the state. It is only the state through the Office of the Director of Public Prosecution that can make a decision to charge after establishing reasonable basis to charge.
39. The report and arrest was done by a woman. She is said to be the Appellant's wife. That is as far as the evidence went. On this alone, I will allow the Appeal.
40. The second aspect was whether there was a probable cause. The events complained of are said to have occurred but the 1<sup>st</sup> Respondent was of the view that he had an explanation. Before that explanation took place, the crime complained of was clearly apparent. The police withdrew the matter since the senior officers felt that it should not have occurred before their input.



41. The input does not change the occurrence of a crime. Indeed, the communication from the 1<sup>st</sup> Respondent, his Advocate and the police show that the matter was being diverted to be dealt with as a civil dispute. They did not say that the dispute did not occur. The mere fact that a matter was withdrawn to be dealt with by a civil matter in the contest of alternative justice system does not amount to success on the part of the 1<sup>st</sup> Respondent.
42. The defence given that the goods were always available does not change the first sin, that a crime occurred and the Appellant's wife reported.
43. I agree with the 1<sup>st</sup> Respondent that submissions do not create a case. The complainant was the wife, the Prosecution was by the state and investigations were carried out by the police. The Appellant had no role in all these. It may be well that he was an engine behind it but his fungs were not visible.
44. The decision by the court is indefensible. It cannot be that the police and the Director of Public Prosecutions who started the investigation and found that there was a problem can be innocent of malicious prosecution while their witness was guilty. What was the role of the Appellant in the case? To the best gathering of evidence, he had no role. His house was broken into by the 1<sup>st</sup> Respondent who carted away goods. He then offered the same to the Appellant. There was already another court decision recommending prosecution after the tenancy was terminated. There has been no appeal against the decision of the Business Premises Rent Tribunal. The office of the Director of Public Prosecution withdrew charges to be dealt with as a civil claim.
45. It is in cases where there is no evidence resulting in withdraw that the burden is higher. By diverting this cases to the civil process, the ends of justice were met by dint of Section 159(2) of *the Constitution*, which provides as doth; -
  - (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles— (a) justice shall be done to all, irrespective of status; (b) justice shall not be delayed; (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3)
46. I agree with the Appellant that the commission of the offence by the 1<sup>st</sup> Respondent was admitted. The order of the Business Premises Tribunal was equally acknowledged. The Tribunal of competent jurisdiction found that the appellant was unlawfully evicted and directed that the tenant is at liberty to pursue criminal proceedings or file a civil suit in a competent court.
47. The 1<sup>st</sup> Respondent was to pay costs of Kshs. 10,000/= to the Appellant. It is my finding that though the Appellant did not initiate prosecution, he was at liberty to do so pursuant to a lawful order by the tribunal to do so.
48. It is unclear why the 1<sup>st</sup> Respondent chose to sue the Appellant instead of Loise Nyaguthi, the complainant. The 1<sup>st</sup> Respondent also admitted breaking into a shop and removing all goods from the shop. He actually admitted to breaking in. This is what is known as a probable cause. There was a probable cause to report. It is irrelevant who reported as it is clear there was a probable cause.
49. Absence of any court order authorizing cutting of a padlock, the action amounted, to a break in.
50. In the circumstances, I find that the court went into a frolic of its own and found the Appellant culpable of the offence of malicious prosecution when no such case was proved.
51. In the circumstances I find that the finding of liability was plainly wrong. I set the same aside in total.



52. The quantum is also tied to the liability. It cannot stand on its own. It is consequently set aside. Before I leave, we are bound not have a relook at quantum before leaving the matter as the first appellate court. There are two aspects.
- i. Special damages
  - ii. General damages
53. On special damages, the same must be particularized and specifically proved as was held in *David Bagine v Martin Bundi* [1997] eKLR that: -
- “It has been held time and again by this Court that special damages must be 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 v Hyde Park Hotel Limited* [1948] 64 TLR 177 thus:
- “Plaintiffs 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”
54. The 1<sup>st</sup> Respondent sought for the following orders: -
- a. Damages for illegal, malicious and unwarranted arrest, detention and prosecution, harassment and abuse of his fundamental rights.
  - b. Special damages for hiring a lawyer to defend in Criminal Case No. 1999 of 2017 and HC Civil No ... of 2017 in Mombasa.
55. The court found that the complaint was made by Loise Nyaguthi, on 17.11.2015. The Court believed that the 1<sup>st</sup> Defendant was not a complainant in the police station but ended up as one in the charge sheet. The goods lost were valued at Kshs. 384,292/=.
56. The 1<sup>st</sup> Respondent proceeded to testify on the amounts spent in various cases. The court plucked the special damages from the air. This was not prayed for. The award of Kshs. 170,000/= has no basis in law the same is set aside in toto.
57. There was no basis upon which the court arrived at a figure of Kshs. 800,000/= as General damages. There were no damages shown to have been suffered. The court did not address the basis for award of the said damages.
58. An award of normal damages will have sufficed. A sum of Kshs. 50,000/= could have sufficed had the Appellant lost. I will have to awarded a sum of Kshs. 50,000/= as nominal damages.
59. I am aware that the court does not highly interfere with damages awarded by the court. See *Mbogo and Another v Shah* (1968) EA 93 and *Kemfro Africa T/A Meru Express & Another v A. M. Lubia & Another* (1982 – 88) 1 KAR where it was held as follows: -

“The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in



assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.”

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

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

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

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

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

61. Nevertheless, the appeal is merited and as such I allow the same.

62. Section 27 of the *Civil Procedure Act* allows indication of costs 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.

63. The party to pay costs is decided after event. In this case, it is after the loss of the appeal. 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.

64. Consequently, the Appeal is for allowing with costs.

### **Determination**

65. The upshot of the foregoing is that I make the following orders: -

- a. The Appeal is merited. I set aside judgment both on liability and on quantum as follows: -
- b. The suit in the lower court was baseless. Therefore, I allow the appeal, set aside the decree and judgment, and substitute with an order dismissing the entire suit in the lower court. The Appellant shall have costs of the suit in the lower court.
- c. The appellant shall have cost of Kshs. 175,000/= for the appeal herein payable in 30 days in default, execution do issue.
- d. The file is closed.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA ON THIS 15<sup>TH</sup> DAY OF APRIL, 2024.**

**KIZITO MAGARE**

**JUDGE**

In the presence of:-

Mr. Ambwere for the Respondent

Mr. Muchiri for the Appellant

Court assistant- Brian

