Mary Njeri Githinji t/a Wamumbi Supermarket v Atonya & another (Civil Appeal 120 of 2018) [2024] KEHC 7023 (KLR) (13 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7023 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL 120 OF 2018

RN NYAKUNDI, J

JUNE 13, 2024

BETWEEN

MARY NJERI GITHINJI T/A WAMUMBI SUPERMARKET ..... APPELLANT

AND

FLORENCE IMALI ATONYA ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

(Being an appeal from the judgment of Hon. C. Obulusta (CM) in Eldoret CMCC No. 862 of 2014 delivered on 21/9/2018)

JUDGMENT

Representation:

Before Justice R. Nyakundi

M/s Tom Mutei Advocates

M/s Mukabane & Kagunza Advocates

1. The genesis leading up to this appeal is that the Appellant made a complaint against the 1st Respondent which resulted in her being charged with the offence of theft contrary to Section 275 of the Penal Code in Eldoret Criminal Case No. 2448 of 2012. After trial, the 1st Respondent was acquitted under Section 215 of the Penal Code and as a result of which, the 1st Respondent then instituted Eldoret Chief Magistrate Civil Case No. 862 of 2014, against the Defendants therein for malicious prosecution. the 1st Respondent prayed for judgment to be entered in her favour against all the Defendants jointly and severally for;

    a. General damages for malicious prosecution and wrongful confinement as well.

b. Special damages of Kshs.50,000/=(read fifty thousand only).

c. Any other remedy the honourable Court may deem fit to grant

d. Costs of the suit plus interest.

2. The case then proceeded for trial and by its Judgment delivered on 21/9/2018, the Court found that the case for malicious prosecution to succeed and further found that the Plaintiff/1st Respondent succeeded in proving her case on a balance of probabilities and hence awarded Kshs.100,000/= (One hundred Thousand) as general damages and Kshs.30,000/= (Thirty Thousand shillings) as special damages respectively.

3. The Appellant being dissatisfied with the whole decision in Eldoret CMCC No.862 of 2014 has now filed the Amended Memorandum of Appeal dated 19/10/2018 citing the following grounds:

1. The Learned Trial Magistrate erred in law and in fact in arriving at a decision that was not supported by the evidence on record.

2. The Learned Trial Magistrate erred in law and fact when he found the Appellant liable for malicious prosecution and defamation when it was not the Appellant who prosecuted the Respondent and all that the Appellant did was to lodge a complaint to the police and left it to the police to investigate and decide whether to prosecute the Respondent or not.

3. That the Learned Trial Magistrate erred in law and fact in failing to appreciate that Eldoret Criminal Case No. 2448 of 2012, the Court found that the Respondent had a prima facie case and put the Respondent on her defence confirming that her prosecution by the state was premised on a reasonable suspicion.

4. The Learned Trial Magistrate erred in law and in fact in finding that the 1st Respondent proved her case on damages both General and Special against the Appellant when there was no evidence in support of the same.

5. The Learned Trial Magistrate misdirected himself on the assessment of quantum of damages awardable to the 1st Respondent which were manifestly excessive.

6. The Learned Trial Magistrate erred in law and in fact in failing to consider the evidence of the Appellant.

4. The appeal was canvassed vide written submissions. The Appellant on 20/1/2023 filed her submissions while the 1st and 2nd Respondents filed their submissions on 8/3/2023 and 27/3/2023 respectively.

The Appellant's Submissions

5. With regard to the issue of malicious prosecution. Counsel for the Appellant cited the case of Mbowa Vs. East Mengo District Administration [1972] EA 352 on the essential requirements that one has to satisfy in order to prove malicious prosecution. Counsel also relied on the case of Murunga Vs. Attorney General and Gischanga V BAT Kenya Limited in that regard. Counsel submitted that it is not in issue that the 1st Respondent was acquitted under Section 215 of the Criminal Procedure Code. Further, that it is not disputed that the Appellant was the complainant in the Criminal Proceedings in Eldoret Criminal Case No. 2448 of 2012.

6. On whether the prosecution of the 1st Respondent was without reasonable and probable cause. Counsel submitted that reasonable and proper cause was defined by Rudd, J. in the case of Kagane Vs. Attorney General [1969] EA 643 where the Court cited the case of Hicks V Faulkner, Herniman Vs.

Smith and Glinski Vs. Mclver which set down the test for reasonable and probable cause. Counsel also cited the case of Simba Vs. Wambari [1987] with regard to what constitutes a reasonable and probable cause.

7. Counsel submitted that the trial Court erred in finding that the 1st Respondent had discharged the burden of proof to the required standard that there was no reasonable and probable cause to prosecute the 1st Respondent. Counsel further submitted that during the criminal trial, it was the Appellant's case that she was the owner of the supermarket trading as Wamumbi Supermarket, it was also her case that the 1st Respondent had stolen several items from her supermarket and which caused her to report the same to the police for investigations, that the police upon conducting its investigations preferred their findings to the prosecutor for further action. Guided by Article 157 (6) of *the Constitution*, the prosecutor exercised his discretion to prosecute upon receiving the police file. Counsel maintained that the evidence tabled before the prosecution was enough for him to charge the 1st Respondent, the Court was privy to the contents of the police file which was produced as DExh2, the said police file demonstrates that upon receiving the complaint from the Appellant, investigations were undertaken including the recording of statements prior to the arraignment of the Is Respondent as mandated under the Police Act.

8. Counsel argued that the Appellant had a good faith basis to prefer a complaint, during testimony in the criminal trial ,the Appellant gave an eye-witness account of the theft by the 1st Respondent where she stated that she saw the 1st Respondent take items for which she did not pay for, the Appellant also had a witness identified as Evah Wangoi who worked at the supermarket who also saw the 1st Respondent put some items in her bag and others in the shopping basket and that during examination of the police officer, it was stated that one of the items had a label of the supermarket.

9. Counsel argued that the prosecution was not malicious as, upon making a complaint to the police and upon thorough investigations being conducted by the police, the prosecution was satisfied that the evidence was enough to bring charges against the 1st Respondent. Counsel cited Justice Momanyi Bwonong'a in his book, Procedures in Criminal Law in Kenva,Page 123, he stated that the book highlights some of the factors that are considered in making a decision whether to prosecute or not, they include, the existence of a prima facie evidence to warrant a prosecution and the gravity of the offence. Counsel further submitted that he discusses that prima facie evidence means that it is that evidence upon which a Court properly directing itself upon law and evidence is likely to convict in the absence of an explanation from the accused, he also discusses that the gravity of the offence entails the circumstances surrounding the commission of the offence in addition to the nature of the offence, he explains further under this head that should the prosecutor assess and see if the case revolves around a personal vendetta seeking to settle a score, they may decline to proceed with prosecution and that the prosecutor is known to play a non-partisan role representing the victim and is interested in knowing the truth about the crime through a fair prosecution in Court.

10. Further, Counsel submitted that the prosecution of the 1st Respondent was not malicious as found by the trial Court, that by placing the 1st Respondent on her defence during the criminal trial and that the trial Court erred in finding that the prosecution of the 1st Respondent was malicious considering the holding of the Court of Appeal in Ramanlal Tranbakhal Bhat Vs. Republic(1937) EA where it was found that a prima facie case is one which would be enough to sustain a conviction. Counsel urged the Court to find that there was reasonable and probable cause to justify prosecution of the 1st Respondent.

11. On whether the prosecution was malicious. Counsel cited the case of Naqvi Syed Qmar v Paramount Bank Limited & another [2015] eKLR and the case of Katerega versus Attorney General (1973) E.A 289 and submitted that there were several eye witness accounts of the 1st Respondent placing certain

items in her bag, the police also testified that there was an item of the supermarket which was found amongst her things when a search was conducted. Counsel argued that these facts coupled with the thorough investigations undertaken by the police as documented in the police file demonstrated that prosecution was not malicious but was one which was founded on evidence which was enough to sway the discretion of the prosecutor in favour of prosecuting. Counsel argued that not every prosecution would result in a conviction and expecting it to, is equivalent to the trial Court expecting the prosecutor to wear two hats that is, that of prosecutor and that of the adjudicator in breach of the law and also not all acquittals demonstrate malicious prosecution. Counsel maintained that each case ought to be judged from its own set of facts and in this instance and that the Appellant has demonstrated that the prosecution was not malicious as found by the trial Court.

12. With regard to general damages. Counsel cited the case of Thompson v Comr of Police of the Metropolis, Hsu v Comr of Police of the Metropolis /1997/2 All ER 762, /19981QB 498, where the Court gave guidance as to damages to be awarded to persons claiming damages should the Court find in favour of the Plaintiff. He also cited the case of Peter M. Kariuki v Attorney General |2014| eKLR in that regard.

13. He also cited the case of Daniel Waweru & 17 Others V Attorney General [2015] eKLR, which laid down the guiding principles for awarding damages. Counsel submitted that in the said case the Court awarded the Plaintiff the sum of Kshs.100,000/= as general damages. Counsel reiterated that each case is distinguished depending on their own circumstances. He added that in that case, the Plaintiffs were subjected to the following conditions: they were taken to Mukurweini Police station where they were placed in an overcrowded police cell littered with urine and human waste and poorly ventilated and detained for one night, they were forced to sit on the floor. Counsel argued that no such conditions can be noted in this case. Counsel argued submitted that the award by trial Court of Kshs.200,000/= as general damages for malicious prosecution was excessive. Counsel proposed that Kshs.50,000/= is appropriate.

14. In allowing this appeal, Counsel urged the Court guided by the case of Daniel Niuguna Muchiri v Barclays Bank Of Kenya Ltd & another |2016] eKLR.

The 1st Respondent's Submission

15. Counsel for the 1st Respondent submitted that the proceedings before the lower Court show that the Respondent testified as PW1 on 28/2/2018 where she told the lower Court that: She was a farmer, on 11/12/2014 she wrote a witness statement and wholly relied on it; and that on 1/6/2012 she went to Wamumbi supermarket where she was accused of stealing from the supermarket as ordered by the Appellant, that she was charged vide Eldoret Criminal Case No. 2442/12 and was acquitted. That she had proceedings, charge and notice of intention to sue which were produced in the lower Court as PEXH1,PEXH-1(b) & PEXH-2.That she served the Appellant with demand letter on 12/8/2014 which was produced in Court as PEXH-3 .That she instructed an advocate to represent her in the criminal case where she paid Kshs.30,000/= to her advocate and that she produced the receipt dated 5/9/2012 as PEXH-4.PW-1 in the lower Court prayed for judgment as prayed in the plaint. See page 204 of the record of appeal.

16. Counsel further submitted that the proceedings before the lower Court show that the Appellant testified as DW-1 where she adopted her statement and on cross-examination, the Appellant admitted that Respondent was charged and acquitted and that there was no appeal that was preferred by the Appellant upon acquittal of the Respondent.

17. Counsel argued that the Respondent was maliciously and unlawfully arrested and prosecuted following a baseless and malicious complaint by the Appellant and was acquitted of the charge of stealing under Section 215 of the Criminal Procedure Code Cap 75 laws of Kenya on account of insufficient evidence, that the arrest of the Respondent was actuated by malice since there was no reasonable cause or justification thereof. Counsel further argued that the Court found that there was no evidence to prove that the goods the Respondent was found with belonged to the Appellant given that they did not have any distinct mark to identity them as belonging to the Appellant notwithstanding the fact that the police never availed any CCTV footage. Counsel submitted that the trial Court finding that in the absence of such distinct marks, there was no basis on which the prosecution reasonably believed that the goods that the Respondent was found with belonged to Wamumbi supermarket and not any other supermarket was proper and the trial Court cannot be faulted to that regard which follows that the criminal proceedings against the Respondent were actuated by malice and not honest aspiration to do justice. Counsel argued that had the Appellant acted more prudently by carrying out due diligence and conducting proper investigations and in particular whether there existed any distinct marks on the goods the Respondent was found with and viewing the CCTV footage, the malicious charges would not have been preferred against the Respondent in the first instance. In addition, Counsel submitted that the trial Court cannot be faulted for coming to the conclusion that the Appellant initiated the process that culminated in the arrest and charging of the Respondent at Eldoret Criminal Case No.2442/12. Counsel cited the case of Murunga Vs. Attorney General [1979] eKLR. Counsel urged the Court to take into consideration that it was the Appellant who called the police from Moi's Bridge and thereby set up the Respondent for arrest by the police. Counsel submitted that the decision of the trial Magistrate on liability was proper and urged Court to find so and proceed to dismiss the instant appeal with costs.

18. That notwithstanding, Counsel submitted that it was imperative for the Respondent to also show that her arrest was entirely unwarranted in the sense of being without reasonable or probable cause; and the test here is whether an ordinary prudent man would have acted as did the Appellant. Counsel cited the case of Kagame & Others Vs. Attorney General &Another [1969] EA 643) and submitted that a re-appraisal of the evidence presented before the lower Court led to the proper conclusion by the lower Court that that the Appellant was not perfectly entitled to file a complaint with the police, given the prevailing circumstances at the material time and the arrest of the Respondent was unwarranted in the circumstances. The Appellant acted imprudently and was to blame for the malicious prosecution of the Respondent and cannot be absolved from liability.

19. With regard to quantum. Counsel submitted that the guiding principle was restated by the Court of Appeal in Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja Vs. Kiarie Shoe Stores Limited [2015] eKLR. Counsel submitted that the lower Court awarded the Respondent general damages of Kshs.200,000/= and special damages of Kshs.30,000/=; which the Appellant took issue with. Counsel submitted that in the case of Joseph C. Mumo Vs. Attorney General & Another an award of Kshs.300,000/= was made in 2003 for unlawful arrest and false imprisonment for 5 days. Counsel argued that on the basis of the lower Court record, and taking into account the incidence of inflation on the Kenya Shilling, that the criminal case lasted in Court for over three years and that the Respondent was detained for one day at the police station, he urge the honourable Court to find there is in no reason to upset the lower Court's decision and proceed to find the award by the lower Court was not inordinately high and/or proceed to enhance the same upwards. Counsel maintained that there is no justification for this honourable Court to hold that the learned trial magistrate 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, likewise, it has not been demonstrated by the Appellant that, in assessing the damages payable, the learned trial magistrate

took into account an irrelevant factor, or left out of account a relevant one. Counsel urged the Court to find that it is not satisfied that the amount awarded to the Respondent is so inordinately high as to be a wholly erroneous estimate.

20. In the end, Counsel urged the Court to find that the instant appeal hereof is unmerited and proceed to dismiss it with costs to the Respondent and uphold the finding of the trial Court and in support of their submissions, Counsel relied on the case of Chrispine Otieno Caleb Vs. Attorney General [2014] eKLR and Stephen Gachau Githaiga & Another Vs. Attorney General [2015] eKLR

The 2nd Respondent's Submissions

21. Counsel for the 2nd Respondent submitted that the Plaintiff/Appellant's claim arose from the tort of malicious prosecution as out rightly analyzed by the learned Trial Magistrate on the submissions tendered by both parties with regards to precedent set for a case for malicious prosecution. Counsel added that the test for malicious prosecution is the institution of a prosecution without reasonable and probable cause as observed by Cotran, J. in Murunga V. R [1979] KLR 138, following Kagane v Attorney General [1969] EA 643.

22. Counsel further submitted that it is not in dispute that parties herein disagreed on an issue leading to the 1st Defendant/Appellant making a complaint at Moi's Bridge Police Station and the Plaintiff/1st Respondent charged in Eldoret Criminal Case No. 2448 of 2012 where upon the Plaintiff/1st Respondent was acquitted.

23. Counsel cited the case of Attorney General vs Peter Kirimi Mbogo &Another [2021] eKLR, on the five elements that must be present in order to sustain a claim for malicious prosecution. She maintained that the five elements must be present in order to sustain the claim for malicious prosecution. In the instant case, Counsel submitted that the trial magistrate dealt with all the five ingredients before entering the said judgment, in the first limb, Counsel stated that it is clear that the 1st Defendant/Appellant made a complaint to the police who discharged their mandatory and statutory duties as investigative and prosecutorial arm. Counsel cited the case of National Oil Corporation vs John Mwangi Kaguenyu & 2 Others [2019] eKLR in that regard. In the instant case, Counsel argued that no malice was proved by the learned Magistrate on the part of the Defendants neither was it successfully raised by the Plaintiff/1st Respondent herein and the same omission deliberately rendered the evidence of the Plaintiff/1st Respondent a candidature of failure to prove malicious prosecution. Counsel further relied on the case of Mbowa v East Mengo District Administration [1972] EA 352.

24. Counsel argued that from the foregoing the Appellant/1st Defendant did not institute the prosecution but merely reported the crime that had been committed to relevant authorities. Counsel urged the Court to find that the 1st Respondent/Plaintiff failed to prove her case on malicious prosecution to the standard of balance of probability required in civil cases and that from the upshot the finding of the trial magistrate was without any shed of doubt the only irresistible conclusion that could be drawn.

25. On whether the arrest was unlawful or unjustified. Counsel submitted that Section 29 of the Criminal Procedure Code gives power to the officer to make an arrest without warrant. Counsel relied on the case of Daniel Waweru Njoroge & 17 Others Vs Attorney General [2015] eKLR and the case of James Kahindi Simba v. Director of Public prosecutor & 2 others [2020] in that regard.

26. Further, Counsel submitted that it is the Appellant who made a complaint to Moi's bridge Police Station which set in motion the arrest of the 1st Respondent in relation to the case of theft having found one of her employees shoplifting from her business premises, the police officers timely and lawfully executed their mandatory and statutory duties of investigating into the matter and forwarded

the matter for prosecution, the suspect was arraigned in Court within reasonable time and accorded all the constitutional rights and it is evident that the findings gave rise to a case to answer in before the trial Court in Eldoret Criminal Case No. 2448 of 2012. Counsel cited the case of James Karuga Kiiru -vs- Joaseph Mwamburi and 3 Others, Nrb C.A No. 171 of 2000.

27. Counsel argued that it is evident that the trial magistrate upon the evidence on record and submissions tendered before Court by both parties found that the arrest was without malice and unlawful justification, as due process of law was followed to the letter. Furthermore, no evidence was adduced in Court to show that there was any unreasonable delay nor denial to bail, torture, fabricated report/s, infringement, violation or deprivation of the 1st Respondent/Plaintiff's constitutional rights.

28. Counsel submitted that the 2nd Respondent is not liable for any act of alleged defamation and or of arrest as the 1st Respondent herein, that the 1st Respondent was granted every legal protection available to her provided under the laws of Kenya. Counsel relied on the case of John Ndeto Kyalo Vs. Kenya Tea Development Authority & Another [2005] eKLR. In the upshot, she urged the Court to find the issue at hand on whether the arrest was unlawful in the negative.

29. On whether the trial magistrate erred in awarding Kshs.100,000/= and Kshs.30,000/= for general and special damages respectively. Counsel relied on the provision in section 99 of the Civil Procedure Code.

30. Counsel further argued that evidence on record confirms that the 2nd Respondent is not liable, the 1st Respondent/Plaintiff failed in the first place to prove all the ingredients of malicious prosecution as against the Defendants/Respondents. On the contrary, Counsel submitted that the Police officers had reasonable cause to arrest, detain charge and prosecute the Plaintiff. In addition, the Plaintiff/1st Respondent is not entitled to damages as she had failed to prove that her prosecution was actuated by malice or that her prosecution was brought without reasonable or probable cause. In any case therefore if liability is to be imputed, the 1st Respondent/Plaintiff is to be held liable.

31. In conclusion, Counsel submitted that general and specific damages be entirely revoked, reviewed and or revises downwards as it was excessive.

Analysis and Determination

32. This being a first appeal, this Court is under a duty to examine matters of both law and facts and subject the whole of the evidence to afresh and exhaustive scrutiny, drawing a conclusion from that analysis bearing in mind that this Court did not have an opportunity to hear the witnesses first hand and test the veracity of their evidence and demeanour. This is captured by section 78 of the *Civil Procedure Act*, Cap 21, Laws of Kenya, which espouses the role of a first appellate Court as to '..... re-evaluate, reassess and re-analyze the extracts of the record and draw its own conclusions.' The principles were buttressed by the Court of Appeal in the case of Peter M. Kariuki vs. Attorney-General [2014] eKLR where Court stated that;

> " We have also, as we are duty bound to do as a first appellate Court, reconsider the evidence adduced before the trial Court and revaluated it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See Ngui v Republic, (1984) KLR 729 and Susan Munyi v Keshar Shiani, Civil Appeal No. 38 of 2002 (unreported)."

33. Having considered the evidence adduced before the trial Court and the grounds of appeal and the submissions by the respective parties Counsels, I find the issues for determination as follows;

i. Whether the elements for the tort of malicious prosecution were established by the 1st Respondent.

ii. Whether the award of Kshs.200,000/= as general damages and Kshs.30,000/= as special damages was manifestly excessive.

Whether the elements for the tort of malicious prosecution were established by the 1st Respondent.

34. The tort of malicious prosecution is an intentional tort that provides redress to a Plaintiff, for losses incurred following unsuccessful and malicious proceedings which are initiated without any lawful reasonable and/or probable cause by the Defendant.

35. While anybody has the right to file a complaint with the Courts and/or other quasi-judicial organisations to seek compensation for wrongs done to them, this right must be used within the bounds of the law and only for legitimate, legal purposes. When a right is used for other purposes, it is referred to as abuse of process, which is wrongdoing and/or a breach that can result in a claim for damages from malicious prosecution.

36. For an action to succeed in malicious prosecution, certain conditions must be demonstrated. The legally acceptable criteria was set out Murunga vs The Attorney General (1976-1980) KLR 1251 (Supra) where Cotran J listed them as follows:

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

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

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

d. That the prosecution was actuated by malice.

37. The following discussion was taken up by Justice G. V. Odunga in the case of Chrispine Otieno Caleb v Attorney General [2014] eKLR in expounding the foregone principles. The Judge referred to several decisions on the issue and in the following manner:

> " 32. "The law surrounding the tort of malicious prosecution is well settled in this country. In Mbowa v East Mengo District Administration [1972] EA 352, the East African Court of Appeal expressed itself as follows:
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> > "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 originated in the medieval writ of conspiracy which was aimed against combinations to abuse legal procedure, that is, it was aimed at the prevention or restraint of improper legal proceedings...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, that is, he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before a judicial

authority who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority; (2) the defendant must have acted without reasonable or probable cause i.e. there must have been no facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified; (3) the defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose; and (4), 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. The damage that is claimed is in respect of reputation but other damages might be claimed, for example, damage to property...The damage to the plaintiff results at the stage in the criminal proceedings when the plaintiff is acquitted or, if there is an appeal, when his conviction is quashed or set aside. In other words, the damage results at a stage when the criminal proceedings came to an end in his favour, whether finally or not. The plaintiff could not possibly succeed without proving that the criminal proceedings terminated in his favour, for proving any or all of the first three essentials of malicious prosecution without the fourth which forms part of the cause of action, would not take him very far. He must prove that the Court has found him not guilty of the offence charged...The law in an action for malicious prosecution has been clearly defined and in so far as the ordinary criminal prosecution is concerned the action does not lie until the plaintiff has been acquitted of the charge. In this case the respondent could have brought his action for malicious prosecution until the prosecution ended in his favour. He could not have maintained his action whilst the prosecution was pending nor could he have maintained an action after he had been convicted. His right to bring the action only accrued when he secured his acquittal of the charge on appeal, and he then had the right to bring this action for damages...Time must begin to run as from the date when the plaintiff could first successfully maintain an action. The cause of action is not complete until such a time, and in this case this was only after he was acquitted on appeal".

38. It must noteworthy to mention that all the elements apply conjunctively and must all be proven in order to successfully claim for damages for malicious prosecution.

Whether the prosecution against the 1st Respondent was instituted by the Appellant or by someone for whose acts she is responsible.

39. It is not in dispute that it is the Appellant who went to make a complaint at Moi's Bridge Police Station concerning theft that had occurred in her Supermarket and that it is from this complaint that the 1st Respondent came to be charged in Eldoret Criminal Case No. 2448 of 2012.

Whether the prosecution was determined in the 1st Respondent's favour?

40. The 1st Respondent was placed on her defence but was however acquitted. The Court took issue with the prosecution for failing to avail the CCTV footage and the items said to have been found with the 1st Respondent had no tags to identify them as being from the Appellant's supermarket. The claim was therefore terminated in the 1st Respondent's favour.

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

41. This issue and the one after it include the main points of the appeal. The reasonable man's criterion is used to determine if any probable and/or reasonable cause existed. In the case of Hicks v Faulkner (1878) 8 Q.B.D 167 at 171, Hawkins J held as follows with respect the meaning of reasonable and probable cause: -

> "An honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead any ordinarily 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."

42. The test for whether a case was instituted with a reasonable and probable cause was also laid out by the Court of Appeal in Kagane & Other vs The Attorney General & Another [1969] EA 643, (Supra) where Rudd J held as follows: -

> "...the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of an objective test. That is to say, to constitute reasonable and probable cause, the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material consisted of facts discovered by the prosecutor or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty. If and so far as that material is based upon information, the information must be reasonably credible, such that an ordinary reasonable prudent and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for the prosecution."

43. In Samson John Nderitu vs The Attorney General [2010] eKLR, Nambuye J (as she then was) held as follows: -

> "It is trite and this Court, has judicial notice of the fact that before an accused person is taken to Court, and arraigned in Court for criminal prosecution, the prosecuting authority namely the police or whatever unit, whose functions fall under the office of the Defendant, usually carry out investigations, record statements from potential witnesses, analyze the facts

to determine if the facts disclose an offence before arraigning such a person in a Court of law."

44. The test lies on the factors, facts, circumstances and evidence that the Prosecution relied on in charging the accused person 1st Respondent.

45. The 1st Respondent was charged with the offence of stealing contrary to Section 275 of the Penal Code.

46. The Prosecution called a total of 3 witnesses 1 (PW2) of who was an eye witnesses who confirmed that on the material date she was at work when the 1st Respondent came in shopping, she had a bag and a shopping basket, she put somethings in her bag and shopping basket, she paid for some and did not pay for everything and when PW2 asked her for the receipt she realized that she had not paid for everything. She had not paid for slippers, 2 pieces of blue band, set books, bar soaps, sugar 1kg, nice and lovely, bahari fry, kiwi, drinking chocolate and tea leaves.

47. When placed on her defence the 1st Respondent denied the charges levelled against her. She however admitted that she went to buy bread, unga ngano, steel wool from the shop and paid for her things at the counter. She stated that the things in the paper bag were hers which she had bought earlier.

48. From the above, it is clear that there was reason to believe that the 1st Respondent had committed an offence worthy of prosecution. In her defence, the 1st Respondent did not deny going into the Appellant's supermarket. She merely disputed that the other things in her paper bag were items that she had bought earlier before she went shopping in the Appellant's supermarket.

49. The reasons that A. Alengo (PM) gave in acquitting the 1st Respondent were with respect to the tagging of the items of the said supermarket and the issue of the CCTV footage. The Honourable Magistrate observed that there was no distinct difference as to what belongs to the Appellant's supermarket or to any other supermarket. From the 1st Respondent testimony it is clear that she admitted to going to the Appellant's supermarket on that material day, she further admitted that she had other items in her possession upon entering the said premises that were items in my view that could be suspected of having been purchased from the said supermarket. To the police investigating the matter, there existed items that were suspected to have belonged to the Appellant's supermarket. Further, the evidence of PW2 confirmed that on the said date, the 1st Respondent visited the Appellant's supermarket. To my mind this was enough to make them believe in that they could secure a conviction against the 1st Respondent. The Court thus considers that the trial Court erred in finding that there was no reasonable and probable cause to institute the criminal case.

Whether the prosecution was actuated by malice?

50. 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. Actual spite or ill will must be proved. 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."

51. It is insufficient to simply state that the criminal proceedings were motivated by malice. There is a need to establish how the Court's procedure is being abused or exploited, as well as to indicate or show the foundation on which the 1st Respondent's rights were seriously threatened by the criminal prosecution. In the absence of concrete evidence that a criminal prosecution was a "abuse of process," a

"manipulation," "amounts to selective prosecution," or any other process, or even that the respondent did not receive a fair trial as guaranteed by *the Constitution*, it is not mechanical enough to conclude that the existence of an acquittal is sufficient to amount to a fair trial.

52. In the present case, the fact that the Court has found that from the evidence and the facts, there was a reasonable and probable cause to institute the charges against the 1st Respondent, the Court considers that the duty to examine whether or not there was malice was heightened. This Court finds that the circumstances of the case do not reveal the existence of malice. The 1st Respondent does not claim to have been mistreated or mishandled in the process of his arraignment and charging.

53. The court in Shaaban Bin Hussien and Others v Chong Fook Kam and Another (1970) AC the power of arrest is also an important component to an investigation towards recommending a suspect to be prosecuted by the Director of Public Prosecution under Article 157 (6) & (7) of *the constitution*. Lord Devlin held inter-alia "Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: „I suspect but I cannot prove#. Suspicion arises at or near the starting-point of an investigation of which the obtaining of prima facie proof is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage. It is indeed desirable as a general rule that an arrest should not be made until the case is complete. But if arrest before that were forbidden, it could seriously hamper the police. To give power to arrest on reasonable suspicion does not mean that it is always or even ordinarily to be exercised. It means that there is an executive discretion. In the exercise of it many factors have to be considered besides the strength of the case. The possibility of escape, the prevention of further crime and the obstruction of police inquiries are examples of those factors with which all judges who have had to grant or refuse bail are familiar. There is no serious danger in a large measure of executive discretion in the first instance because in countries where common law principles prevail the discretion is subject indirectly to judicial control.

It emerges that Kenya constitutional organs like the Director of Public prosecution under Article 157 (6) & (7) and the National Police Service in Article 244 of *the constitution* bear an obligation to discharge their mandate in accordance with the terms of *the constitution* and they cannot plead any internal rule or indeed any statutory scheme as a reprieve from that obligation. This court recognises that the fact that *the constitution* vests the authority of arrest and investigation with the National Police Service and thereafter recommend for a prosecution of a suspect by the Right of a Public Prosecution such an authority is presumed to be derived from the people of Kenya. The dictates by the National Police Service has been affirmed in the decision of our Superior court in R vs Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001 the court held that: " A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable.

The members of the National Police Service have since independency charged with the duty of taking the first steps to take cognisance of a crime, take steps to promote the public interest by inquiring into suspected offences with a view to identify the perpetrators of the crime and of obtaining sufficient evidence admissible in a court of law against the persons they suspect of being the perpetrators as would justify recommending them to be charged with relevant offences before the magistrate court. From an overall examination of the evidence before this court it is evident that the malicious prosecution complainant was first initiation during the cause of an investigation which is an important one. This powers coffered by *the constitution* in general terms is not to be taken to authorise the doing of acts

which adversely affect the legal rights of the citizen or the basic principle of which the law of republic of Kenya is based unless the statute conferring the power makes it clear that such was the intention of parliament. Every citizen under *the constitution* and enabling statute has the right to invoke the either of courts on criminal jurisdiction on the enforcement of the criminal law by this procedure. It is a right which nowadays is exercised as it was before by the National Police Service who detect crime and bring those criminals to justice. Precisely this appeal is about reasonable and probable cause and malice. The guidance provided by the law has the following parameters:

a. For a claim to be brought with "reasonable and probable cause, it is enough that there is a proper case to put before the court-which falls short of requiring a belief that the claim will success

b. To establish malice the claimant must prove that the defendant deliberately misused the process of the court. This would for example include where the claimant can prove that the defendant brought proceedings in the knowledge that they were without foundation, but more generally the criminal feature is tht the proceedings "were not a bona fide use of the court's process."

54. The most important consideration is whether it is evident, given the weight of the evidence, that the case was handled improperly and not in the normal course of trying to bring the criminal to justice. In my judgement I am unable to infer malice and the prosecution was founded on improper motive. Given my findings, the Appeal by the Appellant lacks merit and consequently it is dismissed.

55. This Court, therefore, does not find that the 1st Respondent proved all the elements of the tort of malicious prosecution.

Whether the award of Kshs.200,000/= as general damages and Kshs.30,000/= as special damages was manifestly excessive.

56. The Court considers that the Appellant was not liable for malicious prosecution and in the premises, the Court finds that the award of damages was erroneous.

57. In the end, this Court makes the following orders: -

i. The Appellant's Appeal succeeds as the Court finds that the Appellant is not liable for the tort of malicious prosecution with respect to the 1st Respondent's prosecution in Eldoret Criminal Case No. 2448 of 2012.

ii. The trial Court's Judgment against the Appellant is hereby set aside and the 1st Respondent's suit before the trial Court is dismissed.

iii. The Appellant shall have the costs of the appeal.

58. Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 13TH DAY OF JUNE 2024.

In the Presence

Moraa for the Appellant

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R. NYAKUNDI

JUDGE