Mash East Africa & another v Kenya Revenue Authority & 3 others (Civil Suit 12 of 2018) [2023] KEHC 3654 (KLR) (24 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3654 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL SUIT 12 OF 2018

JN KAMAU, J

APRIL 24, 2023

BETWEEN

MASH EAST AFRICA ..... 1ST PLAINTIFF

MASH EAST AFRICA ..... 2ND PLAINTIFF

AND

KENYA REVENUE AUTHORITY ..... 1ST DEFENDANT

KENYA REVENUE AUTHORITY ..... 2ND DEFENDANT

HON ATTORNEY GENERAL ..... 3RD DEFENDANT

HON ATTORNEY GENERAL ..... 4TH DEFENDANT

JUDGMENT

1. In its Plaint dated 25th April 2018 and filed on 24th May 2018, the Plaintiff sought for Judgment against the Defendants jointly and severally for:-
    a. General Damages for malicious prosecution
    b. General Damages and exemplary damages for defamation
    c. Special Damages of Kshs 82,266,955.50
    d. Costs and interest
2. On 27th June 2018, the 1st Defendant filed its Statement of Defence dated 25th June 2018. On 30th October 2018, the 2nd Defendant filed his Statement of Defence dated 25th October 2018.

3. The Plaintiff's Written Submissions were dated 16th November 2020 and filed on 1st December 2020. The 1st Defendant's Written Submissions were dated 20th January 2021 and filed on 21st January 2021 while those of the 2nd Defendant were dated 25th January 2021 and filed on 17th November 2022.

4. This matter was heard by Cherere J. She was transferred before she delivered her decision. This Judgment is based on evidence tendered by parties before the said learned judge and the aforesaid Written Submissions which parties relied upon in their entirety.

Legal Analysis

5. The applicable law as to the burden of proof is found in Section 107 (1) of the Evidence Act which states that:

> " 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."

6. Section 108 further provides that:

> " 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."

7. Further, it has since been settled that the standard of proof in civil proceeding is on a balance of probabilities. In the case of Karugi & Another vs Kabiya & 3 Others [1987] KLR 347 the Court of Appeal stated that:-

> " The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim."

8. Having looked at the Pleadings herein, the evidence tendered during trial and the respective parties' Written Submissions, it appeared to this court that the only issue placed before it for determination was whether or not the Plaintiff proved its case on a balance of probabilities as required by law.

9. This court therefore dealt with the said issue under the following distinct and separate heads.

I. Proof of Malicious Prosecution

10. Lennox Kitsao Shelo (hereinafter referred to as "PW 1") testified that he was the manager with the Plaintiff and pointed out that he would rely on his Statement dated 25th April 2018. He stated that the Plaintiff was the registered owner of Motor Vehicle Registration Number KAQ 200G (hereinafter referred to as "the subject motor vehicle") which was unlawfully detained on 27th July 2013 and the Plaintiff's driver Stephen Gitau Kimani (hereinafter referred to as "PW 2") and its turnboy, Kakooza Husseia (hereinafter referred to as "PW 3") were falsely and maliciously prosecuted before Kisumu Law Courts in Criminal Case Number 364 of 2013.

11. It was his testimony that the subject motor vehicle was a parcel bus which was lawfully transporting customers' goods from Kampala to Nairobi and that it was detained by custom officials at Kibuye Market in Kisumu County on account of ferrying game trophy without certificate of ownership contrary to Section 42(i)(b) as read with Section 52 of Wildlife (Conservation and Management) Act Cap 376 Laws of Kenya.

12. He stated that at the time when the subject motor vehicle was detained by the 1st Defendant, Plaintiff had duly paid the custom duty for the good and had thereafter been given permission at the Busia

Border to proceed with the rest of the journey. He pointed out that on 9th August 2013, the National Museums of Kenya authored a letter to the 1st Respondent confirming that the seized horns and bracelets were not ivory, which letter made the Defendants to amend the charge sheet to one of conveying uncustomed goods contrary to Section 199(b) as read together with Section 199(iii) of the East Africa Community Customs Management Act 2005 with a duty value of Kshs 268,400/=.

13. He further testified that prior to the amendment of charges, Hon Lucy Gitari had made an order on 31st July 2013 that the accused be allowed to pursue the release of the subject motor vehicle from the 1st Respondent herein which they complied with. However, despite numerous letters to the 1st Respondent which he produced as exhibits, the 1st Respondent did not release the said motor vehicle. He pointed out that the aforesaid actions of the Defendants were actuated by malice.

14. PW 2 testified that he was the Plaintiff's driver who was arrested with his loader and the subject motor vehicle was taken to the 1st Respondent's yard. He stated that they were charged in Criminal Case No 364 of 2013 in Kisumu and were acquitted. He further testified that he knew that he was carrying goods whose duty was fully paid and that there was no ivory in the bus. He stated that the Trial Court ruled that there was no ivory in the bus.

15. PW 3 testified that he was the Plaintiff's turnboy and also a loader. His evidence corroborated that of PW 1 and PW 2. He confirmed that he was arrested in Kisumu together with PW 2 by 1st Defendants officers.

16. Peter Njoroge Iraki (hereinafter referred to as "DW 1") testified that he was a prosecution witness in the criminal proceedings and that the 1st Defendant made a report to police concerning the criminal case. He stated that the initial charge of possession of trophies was dropped and the issue then was unaccustomed and contraband goods. He testified that the verification was done in Kisumu as it could be done anywhere on the transport route. He stated that the police were involved in assisting KRA to detain the subject motor vehicle.

17. Brian Mwachiro (hereinafter referred to as "DW 2")'s evidence corroborated that of DW 1. He testified that the 1st Defendant and the police conducted joint investigations. He stated that the subject motor vehicle was stopped in Kisumu where it was suspected of carrying unaccustomed goods and that they found some goods whose duty was not paid.

18. The Plaintiff submitted that it had demonstrated that the actions of the Defendants in charging of PW 2 and PW 3 in Kisumu Chief Magistrate Cause No 364 of 2013 was actuated by malice. It asserted that it had listed the particulars of malice in paragraph 17 of its Plaint.

19. In that regard, it placed reliance on the case of Joseph Wamoto Karani vs C. Dorman Limited & Another [2018]eKLR where the court cited the case of Mbowa vs East Mengo District Administration [1972] EA 352 where it was held that the essential ingredients of malicious prosecution include; that the criminal proceedings must have been instituted by the defendant, the defendant must have acted without reasonable or probable cause, the defendant must have acted maliciously and that the criminal proceedings must have terminated in the plaintiff's favour.

20. It was emphatic that it had demonstrated the tort of malicious prosecution by the Defendants by satisfying the four(4) ingredients being that the impugned charges were initiated by police officers under the 2nd Defendant command and the 1st Defendant who oversaw and prosecuted the criminal charges against PW 2 and PW 3, it was confirmed by the National Museums of Kenya on 9th August 2013 that the exhibits and conveyed goods were not ivory and prohibited goods and thus there was no basis of substituting and initiating charges of being in possession of uncustomed goods, its driver and

turnboy were apprehended in Kisumu after the 1st Defendant had granted permission of entry at the Busia border upon payment of the custom duty, the failure to release the subject motor vehicle despite a court order on 31st July 2013 was further a validation of malice on the part of the Defendants and that the determination of the trial court on 5th May 2017 was a confirmation that the case was determined in its favour and that no appeal had been preferred against the said Judgment.

21. It invoked Section 200 of the East African Community Customs and Management Act (EACCM 2005) and argued that it had the locus to plead for damages for malicious prosecution on accord of the wanton arrest and prosecution of its agents. It averred that the 1st Defendant's failure to release the subject motor vehicle was in contempt of the court order issued on 31st July 2013 as it wrote to it vide two (2) letters dated 30th August 2013 and another dated 14th August 2014 but the same was never released until 15th May 2017.

22. It submitted that an amount of Kshs 2,500,000/= for malicious prosecution would be fair compensation taking into account the long-winded trial from the year 2013-2017. In that regard, it relied on the case of Joseph Wamoto Karani v C. Dorman Limited & Another [2018] eKLR and Patrick Njuguna Kariuki vs Del Monte (K) Limited & Another [2020]eKLR where the plaintiff was awarded damages for malicious prosecution in the sum of Kshs 2,500,000/=.

23. On its part, the 1st Defendant invoked Section 2 of the EACCMA, Article 209 and 210 of the Constitution of Kenya and submitted that the said provisions were explicit on the importance of taxation and enforcement of revenue laws in Kenya. It asserted that it was empowered under Section 5(1) of the Kenya Revenue Authority Act Cap 469 Laws of Kenya as a Government agency for collection and receipt of all revenues. In this regard, it placed reliance on the cases of Republic v Commissioner of Customs & Excise Ex-parte Abdi Gulet Olus [2014] eKLR and Crywan Enterprises Ltd v KRA Nairobi HC Petition No 322 of 2011(eKLR citation not given) where the common thread was that Section 210 of the EACCMA provides for the goods liable to forfeiture to include uncustomed goods.

24. It pointed out further that under Section 215 of the aforesaid Act, forfeiture was by order of the court upon conviction of any person. It explained that EACCMA deals with the imposition and collection of duty on goods imported into the country and that it controls the movement of imported goods until duty has been paid.

25. It asserted that in order for it to collect the duty payable, it may be necessary to examine and verify the goods and assess them on the basis of the value, character and quantity and that once the goods are out of its reach it may be difficult to collect the duty.

26. It contended that therefore it was an essential feature of the Act to keep the goods within a controlled environment until duty was paid in order to control the manner in which the goods were stored and transported within the country and ensuring that goods did not enter the country without payment of duty. It added that the Act also contained provisions that were aimed at preventing smuggling and evasion of customs duty.

27. It placed reliance on the case of Republic vs Noordin Osman Haji Jama & 3 Others [2016] eKLR where it was held that the applicant was within its mandate to order seizure and detention of the motor vehicles suspected to be ferrying uncustomed goods and submitted that it acted within the law and upon the acquittal of the Plaintiff's employees proceeded to release the motor vehicle.

28. It asserted that the court order for release of the subject motor vehicle that was issued on 19th August 2013 directed that there was no objection for the release of motor vehicle as it was no longer an exhibit

and that the accused was advised to pursue its release from it. It was its contention that it complied with the said court's directions while the Plaintiff's abandoned the process as recommended by court.

29. It invoked Rantal & Dhirajlal in the Law of Torts 22nd Edition, Reprint 1993 on malicious prosecution at page 269 and the case of Mbowa vs East Mengo Administration(Supra) and was emphatic that it did not institute the proceedings of the criminal charge against the Plaintiff's employees as it was only involved in the investigations due to the commission of a customs offence leading up to the criminal charge and was further called as a witness. It pointed out that the role of investigation, arrest and prosecution of criminal allegations lay squarely with the police while prosecution lay with the Attorney General.

30. It further contended that it was not in dispute that the proceedings in the criminal case were terminated in the Plaintiff's favour but that that did not mean that the Plaintiff was innocent. It added that the acquittal was because the prosecution did not prove its case to the required threshold of beyond reasonable doubt.

31. It asserted that the Trial Court found that a prima facie case had been established and the two (2) accused persons and they were put on their defence. In that regard, it relied on the case of Civil Appeal No 29 of 2013 Commissioner of Customs and Excise vs Hasmukh Shamji Halai & 3 Others (eKLR citation not given) where the court held that it would be a dangerous precedent in our criminal justice system if we celebrated the acquittal of an accused person due to the absence of witnesses and documents regardless of the reasons for their absence and equating the acquittal to proof of innocence.

32. It further pointed out that there was reasonable and probable cause for the arrest and prosecution of the Plaintiff's employees. It pointed out that the genesis of the criminal suit was the commission of the offence of being in possession of uncustomed goods in which the police officer and itself had every reason to believe that the Plaintiff employees were conveying uncustomed goods contrary to the provisions of EACCMA.

33. It cited Halsbury's Laws of England Vol. 45 (2) paragraph 472 which defined reasonable and probable cause to mean an honest belief in the guilt of the accused based on a full conviction, founded upon reasonable grounds and the case of Stephen Gachau Githaiga & Another vs Attorney General [2015]eKLR where it was held that if reasonable and probable cause existed at the time the prosecutor commenced or continued the criminal proceeding in question the proceeding must be taken to have been properly instituted.

34. It further relied on the case of James Karuga Kiiru v Joseph Mwamburi & 2 Others [2001] eKLR and Kiiru Mwamburi & 2 Others [2001]KLR 46 where it was held that in an action for malicious prosecution the onus of proving that the prosecutor did not act reasonably lies on the person prosecuted. It was its case that the Plaintiff had not discharged this onus.

35. It asserted that the prosecution called seven (7) witnesses whose evidence showed that indeed the Plaintiff's employees were conveying uncustomed goods using the subject motor vehicle contrary to EACCMA. It pointed out that the prosecution was not led by malice but rather was following the law to punish the Plaintiff's employees of the offences which they believed they had committed. It added that nowhere in the Judgment of the Trial Court did the court observed malice on the part of the Prosecution. It was its contention that any imprisonment of the Plaintiff's employees was a consequent of procedure during the criminal proceedings. In this respect, it relied on the cases of Hasmukh Shamji Halai (supra) and Mbowa vs East Mengo Administration (Supra) where the common thread was that 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.

36. On its part, the 2nd Defendant placed reliance on the cases of Gichanga vs Bat Kenya Ltd (1989) eKLR and Chrispine Otieno Caleb vs Attorney General [2014]eKLR where the common thread was that in order for the plaintiff to succeed in a claim of malicious prosecution, he must prove that the prosecution was instituted by the defendant, that the prosecution terminated in the plaintiff's favour, that the prosecution was instituted without reasonable and probable cause and that it was actuated by malice.

37. It contended that the totality of the material within the knowledge of the prosecutor at the time it instituted the prosecution was such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the Plaintiff was probably guilty. It added that the said facts raised reasonable and probable cause to prosecute the Plaintiff. In this regard, it placed reliance on the case of Josphat Macharia Ngare vs Attorney General [2006] eKLR where the court held that the test as to whether the prosecution was instituted without reasonable and probable cause was whether the material known to the prosecutor would have satisfied a prudent and cautious man that the plaintiff was probably guilty of the offence.

38. It further cited the case of Republic vs National Environment Management Authority & Another Ex-parte Philip Kisia & City Council of Nairobi [2013] eKLR where malice was defined as where an attack on the liberty of a person is not grounded on the law, one is tempted to say that the prosecution was based on malice. It also relied on the case of Cripus Karanja Njogu vs Attorney General & Another [2005] eKLR where the court cited the case of Nzioa Sugar Company Ltd vs Fungututi (1988) KLR 399 and held that the mental element of ill-will or improper motive cannot be found in an artificial person but there must be evidence of spite in one of its servants. It was its case that the Plaintiff failed to prove that its servants actuated malice or spite against it and that as result of the prosecution it was exposed to ridicule, public odium and that its reputation was injured.

39. It further relied on the case of Cripus Karanja Njogu vs Attorney General & Another (Supra) where it was held that 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. It was emphatic that the Plaintiff failed to prove that the termination of the criminal case was linked to prosecution's spite or ill will.

40. As can be seen herein, the elements for the offence of malicious prosecution were set out in the cases of George Masinde Murunga vs The Attorney General (1979) KLR 138 and Kagane & Others vs Attorney General & Others [1969] EA 643.

41. It was not disputed that PW 2 and PW 3 were charged in a criminal case and acquitted. There was therefore no need to analyse whether or not the Plaintiff had demonstrated two (2) of the four (4) elements of the offence of malicious prosecution namely, that the prosecution was instituted against its employees and that the criminal proceedings were terminated in its favour as the same was undisputed.

42. Be that as it may, this court assessed, evaluated and analysed the evidence that it adduced to satisfy itself whether or not it had shown that the proceedings at Kisumu Law Courts were instituted without any probable or sufficient cause and that the same were actuated by malice.

43. A perusal of the proceedings showed that PW 1 produced in evidence copies of the criminal proceedings and the Trial Court Judgment. The defence testimony was that duty had been paid at the border but PW 2 and PW 3 were still arrested and charged and the subject motor vehicle detained.

44. This court looked at the criminal proceedings with a view to establishing whether or not there was probable or reasonable cause for the Office of Director of Public Prosecutions (ODPP) to have charged PW 2 and PW 3 herein. According to the Investigating Officer No 232191 CIP George Momanyi (hereinafter referred to as "PW 7"), attached to KRA investigations and enforcement section, stated

that after receiving information of the detained bus, he proceeded to the yard where he found the bus together with the goods.

45. He testified that in the office he was shown a box containing twenty eight (28) pieces of horns and fifty three (53) bracelets and that KWS officers had been already been called as the horns had been suspected to be ivory. He pointed out that he then charged the accused persons but that later a report came and confirmed that the boxes did not contain ivory but contained Ankole cow horns and the charges of being in possession of game trophy were then dropped and the matter proceeded.

46. The Trial Court was satisfied that the Prosecution therein had established a prima facie case and hence placed PW 2 and PW 3 in their defence.

47. It was evident that there was a probable cause for the prosecution to institute the impugned criminal proceedings. Once the 1st Defendant lodged a complaint with PW 7, the matter moved from its hands.

48. Normally, investigations and the decision to charge is undertaken by the Republic through the Kenya Police. After a complaint is made, it is the mandate of ODPP to decide whether it will prosecute or not. The ODPP is not under the control or direction of any person or authority.

49. Indeed, Article 158 (10) of the Constitution of Kenya, 2010 provides that:-

> " The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority."

50. As preferring charges was the mandate of the ODPP, the Plaintiff failed to demonstrate how the ODPP instituted proceedings against its employees without reasonable or probable cause. It seemed to assume that that their acquittal was enough to prove its claim in malicious prosecution.

51. In addition, it was required to prove that the prosecution was actuated by malice. As stated above, the prosecution was carried out by the ODPP. It ought to have led evidence to prove malice on the part of the 1st and the 2nd Defendant. However, it did not do so.

52. Malice cannot automatically be transferred to the prosecutor unless it is proved that there was collusion between the complainant and the prosecutor prosecuting the matter as was held in the case of Music Copyright Society of Kenya vs Tom Odhiambo Ogowl [2014] eKLR. The Plaintiff did not demonstrate that there was any malice on the part of the police and/or the prosecutor. If there was, it did not demonstrate and/or prove the same. This court thus came to the firm conclusion that the Plaintiff had failed to prove its case on a balance of probabilities.

53. Accordingly, having carefully considered the Written Submissions by the respective parties, this court found and held that the Plaintiff failed to prove its case to the required standard, which in civil cases is proof on a balance of probabilities. As this court had found that the Plaintiff did not prove its case for malicious prosecution, consequently its prayer for general damages under this head failed.

II. Proof Of Defamation

54. PW 1's testimony was that on account of the Plaintiff's employees being charged in the impugned criminal case, the company's reputation was tarnished before the society after a publication was carried on 13th August 2013 in the Daily Nation that its employees were in illegal possession of ivory.

55. DW 1 testified that the publication in the newspaper was done by the Daily Nation. He denied being the source of the information supplied to the Daily Nation.

56. The Plaintiff placed reliance on the case of Patrick Njuguna Kariuki v Del Monte (K) Limited & Another [2020] eKLR where it was held that the law of defamation was concerned with protection to reputation and invoked Black's Law Dictionary which defines defamation as the act of harming the reputation of another by making false statement to a third person.

57. It further cited the case of Musikari Kombo v Royal Media Services Limited [2018] eKLR where the court laid down the threshold for proving a claim for defamation by setting out the key elements a claimant must prove to succeed in such a claim as follows; the existence of a defamatory statement, that the defendant has published or caused the publication of the defamatory statement and that the publication refers to the claimant.

58. It submitted that it had satisfied the above three (3) elements in establishing that its reputation was actually injured as a result of the malicious prosecution by the Defendants herein. It pointed out that in its list of documents it exhibited a publication by the Daily Nation dated 13th August 2013 which defamed it as it stated that the police had seized twenty eight (28) pieces of ivory horns worth Kshs 4,650,500/= and fifty three (53) ivory bracelets worth Kshs 530,000/= and that its driver and turn boy had been arraigned in court and charged with illegal possession of ivory.

59. It was its case that the aforesaid publication was defamatory as taking into account the letter from the National Museums of Kenya dated 9th August 2013 which had confirmed that it was not conveying ivory but cattle horn sheaths. It added that save for the malicious prosecution by the Defendants with unsubstantiated charges the aforesaid publication would not have appeared. It urged the court to find that its prayer for defamation as against the Defendants was well founded and merited. It submitted that an amount of Kshs 1,000,000/= was fair compensation for defamation by the Defendants.

60. On its part, the 1st Defendant submitted that the test for whether a statement is defamatory is an objective one and that it is not dependent on the intention of the publisher but on what a reasonable person reading the statement would perceive. It cited Halsbury's Laws of England 4th Edition Vol 28 at page 23 where the author opined that in deciding whether or not a statement is defamatory the court must first consider what meaning the words would convey to the ordinary man. It asserted that it was a fact that the criminal proceedings against the Plaintiff's employees were public and that they were arrested and charged on the basis of solid evidence. It therefore submitted that Plaintiff failed to prove its case against it for defamation.

61. On its part, the 2nd Defendant submitted that the Plaintiff did not plead the plea of defamation and that it further failed to bring out the particulars of defamation in its plaint as required during its cross-examination.

62. The courts have held that the following specific ingredients must be satisfied for a party to succeed in his or her claim for defamation as laid out in the case that were relied upon by the Plaintiff herein:-

    i. That the statement must be published by the defendant.

    ii. That the statement must refer to the plaintiff.

    iii. That the statement must be defamatory.

    iv. That the statement must be false.

    v. That the statement must be malicious.

63. Further, in the case of S M W v Z W M [2015] eKLR the Court of Appeal restated in the case of Joseph Njogu Kamunge (Supra) that:-

> " A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right-thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided."

64. The Daily Nation article read as follows:-

> " Mash Poa wants its bus released
>
> .... Owners of a bus that was allegedly found transporting Sh 5 million ivory have asked a Kisumu court to order its release from police custody. Managers of Mash Poa Bus Company yesterday told the court that they were suffering losses due to the continued detention of the vehicle that was seized on July 27. The bus, which was carrying goods from Kampala to Nairobi was seized by Kenya Revenue Authority officers as it offloaded goods at Kisumu's Kibuye market...".

65. Notably, it was clear that it was the Daily Nation that published the said article and not the Defendants herein. DW 1 denied publishing the same on behalf of the 1st Defendant and neither was he the source of information that was supplied to the Daily Nation Newspaper. This court noted that the Plaintiff did not rebut this evidence by DW 1. It seemed to focus on the fact that the actions of the Defendants were what led to the publishing of the said article in the newspaper.

66. Going further, this court had due regard to the case of J. Kudwoli & Another vs Eureka Educational and Training Consultants & 2 others [1993] eKLR where the court therein held that a publication may either be defamatory on its face or upon considering extrinsic circumstances.

67. Courts have held that in order to determine whether a statement or publication is defamatory, one must seek to understand the meaning conveyed by the words in question to an ordinary/reasonable person.

68. This court was not persuaded that the Plaintiff had demonstrated to this court how defamatory the aforesaid publication was to it. It is trite law that he who alleges must prove. It failed to prove that the publication had the tendency to ruin its reputation in the estimation of right-thinking members of the society. It equally failed to establish that it had the potential of causing the right-thinking members of the society to shun it because it was a corrupt company who would be charged in court.

69. In the case of Kagwiria Mutwiri Kioga & Another vs The Standard Ltd & 3 Others [2015] eKLR, the Court of Appeal cited with approval V.W. Rogers, the Learned author of Winfield and Jelokwiz on Tort, of 6th Edition 2002 at pp 404-405 where it was stated as follows:-

> " 12. 2. Defamation is a publication of a statement which reflects on a person's reputation and tends to lower him in the estimation of right thinking members of a society generally or tends to make them shun or avoid him. For historical reasons defamation takes the form of two separate torts, libel and slander, the former being more favourable to the claimant because it is actionable per se and injury to reputation will be presumed...In contrast, in cases of libel (and in some cases of slander) the claimant can recover general damages for injury to his reputation without adducing evidence that it has in fact been harmed,

for the law assumes that some damage will occur in the ordinary course of things..."

70. In the premises, this court was not satisfied that the Plaintiff had shown that the publication was defamatory of it and that the same was published by the Defendants herein. In the circumstances foregoing, it was this court's considered view that it had failed to prove its case on a balance of probability. As it had not proved its action for defamation on a balance of probabilities it was this court's view that it was therefore not entitled to the damages sought.

III. Loss of User/special Damages of Kshs 81,369,284.50

71. The Plaintiff submitted that there was loss of user of the subject motor vehicle from 29th July 2013 to 15th May 2017 when the same was released by the 1st Defendant. It asserted that the failure to release the subject motor vehicle was a blatant violation of the court order of 31st July 2013. It added that its claim of Loss of User of Kshs 81,369,284.50 fell under the category of special damages and that its claim of legal fees of Kshs 897,711 was abandoned seeing that no documents was produced to support the claim.

72. It relied on several case among them the case of Richard Okuku Oloo vs South Nyanza Sugar Co Ltd [2013] eKLR quoted in Okulu Gandi vs South Nyanza Sugar Co. Ltd [2018]eKLR where the court held that special damages must be specifically pleaded and proved.

73. It was its case that on 23rd August 2013 it applied for summons to be issued to the DPP and Officer from Revenue Protection Services KRA Western Region due to failure of the Defendant to release the subject motor vehicle as ordered by court and that the trial court made a Ruling on 30th August 2013 directing it to follow the laid down procedure and write to whoever was concerned at KRA to request for the release of the vehicle. It asserted that it complied with the Ruling and severally wrote to the 1st Defendant who failed to release the subject motor vehicle.

74. It demonstrated that the loss of user therefore was calculated as follows; forty five (45) months multiplied by thirty(30) days which amounts to 1350 days then multiplied by a fair estimate of Kshs 60,273.50(the average net amount it earned per day) which equalled to Kshs 81,369284.50. It was its contention that it had proven the same through the consignment notes and loading sheet which were produced in its Bundle of Documents.

75. The Plaintiff placed reliance on the case of Orix Oil (Kenya) Limited vs Paul Kabeu & 2 Others [2014] eKLR where it was held that costs follow events and urged this court to award it costs.

76. Both the 1st and the 2nd Defendant submitted that the Plaintiff was not entitled to damages and/or compensation as it had failed to prove its case on a balance of probabilities.

77. In Ryce Motors Limited & Another v Elias Muroki [1996] eKLR, it was held: -

> "There are umpteen authorities of this court to say that special damages must not only be specifically pleaded but must be strictly proved. Such authorities are now legion. The plaintiff simply gave evidence to the effect that his matatu was bringing him income of Shs. 4,500/= per day. He did not support such claim by any acceptable evidence. There was absolutely no basis on which the learned judge could have awarded the sum of Kshs. 2,830,500/= for special damages and we set aside the award in its entirety".

78. Further, in Shelly Beach Hotel & Another v Kenya Revenue Authority [2019] eKLR, the Court stated that: -

> " Loss of profits or user is a special damage claim the law demands must be specifically pleaded and strictly proved. Indeed, the plaintiff gave particulars of what each truck would have earned per month in gross figures but that was all the plaintiff did. There was nothing more. In business like the one pleaded by the plaintiff there are obvious and necessary incidental expenses and overheads like fuel, levies and operating costs including staff salaries which naturally and obviously affect the net sum deemed profit. Even that profit is then subjected to taxation and it is not enough that the plaintiff would earn the sum quoted in accepted the letter of offer and its acceptance".

79. As the Plaintiff had failed to prove its case on a balance of convenience which is the standard in civil cases, the case for loss of use could not be allowed. In any event, consignment notes and loading sheet were not sufficient proof for the claim for loss of use as the Plaintiff ought to have produced documentation to demonstrate its income flow in respect of the subject motor vehicle. In the circumstances, this court was not persuaded that it was entitled to the damages sought under this head.

Disposition

80. For the foregoing reasons, the upshot of this court's decision was that the Plaintiff's suit that was lodged on 24th May 2018 was not merited and the same be and is hereby dismissed. The court will deviate from the general principle that costs follow the event for the reason that it cannot award costs in favour of the government against its citizen. Each party will therefore bear its own costs of this suit.

81. It is so ordered.

DATED AND SIGNED AT KISUMU THIS 20TH DAY OF APRIL 2023

J. KAMAU

JUDGE

DATED, SIGNED AND DELIVERED AT KISUMU THIS 24TH DAY OF APRIL 2023

M. S. SHARIFF

JUDGE