



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Chizupo & another v Board of Governors Ortum Secondary School & 2 others  
(Civil Appeal 34 of 2019) [2023] KEHC 17233 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17233 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CIVIL APPEAL 34 OF 2019  
AC MRIMA, J  
MAY 11, 2023**

**BETWEEN**

**ROMANUS CHIZUPO ..... 1<sup>ST</sup> APPELLANT**

**DAVID TEGSHO KILIMANJARO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**THE BOARD OF GOVERNORS ORTUM SECONDARY  
SCHOOL ..... 1<sup>ST</sup> RESPONDENT**

**INSP WALTER ASIYO ..... 2<sup>ND</sup> RESPONDENT**

**HON ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the judgment and decree by Hon. V. W. Wandera, Chief Magistrate  
in Kitale Chief Magistrate's Court Civil Suit No. 95 of 2014 delivered on 31st July, 2019)*

**JUDGMENT**

**Introduction:**

1. The appeal subject of this judgment arose from the dismissal of Kitale Chief Magistrate's Court Civil Suit No. 95 of 2014 Romanus Chizupo & David Teghsho Kilimariono versus The Board of Governors Ortum Secondary School, Insp. Walter Asiyo & The Hon. Attorney General (hereinafter referred to as 'the civil suit').
2. The civil suit inter alia sought damages for false imprisonment and malicious prosecution.
3. Determined to fight their course, the Appellants herein pursued the instant appeal thereby resulting into this judgment.



### **The Appeal:**

4. In a Memorandum of Appeal dated 28<sup>th</sup> August, 2019, the Appellants preferred a total of seven grounds of appeal in contending that the trial Court erred in not allowing the civil suit.
5. By the directions of this Court, the appeal was heard by way of written submissions. All the parties duly complied and filed elaborate submissions. They not only vehemently rooted for their respective positions, but also referred to several decisions thereto.
6. Whereas the Appellants impugned the judgment and urged the Court to allow the appeal, the Respondents supported the judgment and urged this Court to dismiss the appeal with costs.
7. This Court will no doubt consider the rival positions in the analysis in this judgment.

### **Analysis:**

8. The High Court, as the first appellate Court, is enjoined to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of *Selle & Ano. vs. Associated Motor Boat Co. Ltd* (1968) EA 123).
9. This Court, nevertheless, appreciates the settled principle that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni – versus- Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga –versus- Kiruga & Another* (1988) KLR 348).
10. Before delving into the heart of the appeal, the Court will briefly look at the parties’ cases in the civil case.

### **The Appellants’ case (formerly the Plaintiffs):**

11. Prior to his retirement, the 1<sup>st</sup> Appellant worked as the School Principal of Ortum Secondary School (hereinafter referred to as ‘the School’) where he served from 24<sup>th</sup> May, 2001 until 31<sup>st</sup> December, 2006. The 2<sup>nd</sup> Appellant was during that tenure, the School’s Accounts Clerk. He was appointed vide a letter dated 28<sup>th</sup> September, 2004. The 2<sup>nd</sup> Appellant was an assistant to the Accountant one John Wanyama Mutambu and was tasked with financial record keeping and receiving School fees.
12. On 27<sup>th</sup> November, 2006, the 2<sup>nd</sup> Appellant was served with a letter of suspension. He admitted that he was suspended on account of the audit that took place in 2006 where it was reported that funds disappeared between January and September 2006. The 2<sup>nd</sup> Appellant, however, observed that the Audit Report was signed on 25<sup>th</sup> April, 2007.
13. The 1<sup>st</sup> Appellant was arrested on 22<sup>nd</sup> October, 2007 and arraigned before Court on 24<sup>th</sup> October, 2007 in Kapenguria RM Criminal Case No. 793 of 2007. He was charged alongside the 2<sup>nd</sup> Appellant with the offence of stealing by servant the sum of Kshs. 7,164,074/= from the School on the strength of the findings in the Audit Report. The criminal proceedings concluded on 23<sup>rd</sup> October, 2009 where the Appellants were ultimately acquitted under Section 87(a) of the Criminal Procedure Code. The charge sheet and proceedings were produced as exhibits.
14. Upon their discharge, the Appellants were on that very day re-arrested and charged with the same offence of stealing by servant the sum of Kshs. 7,164,074/=. They were escorted to Kapenguria Police Station and detained until 25<sup>th</sup> October, 2009 when they were arraigned in Kitale Chief Magistrates



- Criminal Case No. 1035 of 2009. The Appellants were in the end acquitted under Section 202 of the Criminal Procedure Code on 8<sup>th</sup> February, 2011. The charge sheet and proceedings were also produced as exhibits.
15. The 1<sup>st</sup> Appellant retired from his position as Principal where he handed over on 4<sup>th</sup> January, 2007. He stated that the handover took place in the presence of the then District Education Officer and the 1<sup>st</sup> Respondent. He denied that he was ever informed of the offence during the handover process.
  16. Noting that both criminal matters collapsed since they were acquitted, the Appellants accused the Prosecution and the police of malice since no proper investigations were carried out. They accused the 1<sup>st</sup> and 2<sup>nd</sup> Respondents of maliciously lodging a complaint since they never committed the offences that they were charged with. They maintained that no money had been stolen.
  17. The 1<sup>st</sup> Appellant notified the 3<sup>rd</sup> Respondent of his intention to sue vide a letter dated 13<sup>th</sup> December, 2011 to which he responded on 20<sup>th</sup> December, 2011. He also notified the 1<sup>st</sup> Respondent of his intention to sue through his letter dated 13<sup>th</sup> December, 2011.
  18. While acknowledging that the Audit Report, only seen during the hearing of the suit at trial, implicated him and his co-Appellant, the 1<sup>st</sup> Appellant not only denied knowledge of the theft of Kshs. 7,164,074/50 but also distanced himself from committing the offence. He also acceded to the fact that in his statement at the police station, he undertook to refund Kshs. 2.5 million. He, however, stated that it was imposed on him by the District Auditor.
  19. Resulting from the foregoing the Appellants instituted Kitale Chief Magistrates Civil Suit No. 95 of 2014 (Civil suit) seeking the following reliefs: -
    - a. General and Exemplary damages for wrongful and illegal confinement and malicious prosecution.
    - b. Costs.
    - c. Interest.
  20. The civil suit was heard. The Appellants testified and reiterated their cases as pleaded. They called no witnesses.

#### **The Respondents' cases:**

##### **The 1<sup>st</sup> Respondent's case:**

21. The 1<sup>st</sup> Respondent vehemently opposed the suit. It called three witnesses in support of its position. They were Stephen T. Lopus (testified as DW1), the then PTA Chairman of the 1<sup>st</sup> Respondent during the employ of the Appellants' in the School, Jonathan Siwanyang (testified as DW2) who was the current Principal of the School and Samson Nyaundi Omambia (testified as DW3) the then West Pokot County Schools Auditor.
22. It was the 1<sup>st</sup> Respondent's case that during the Appellants' tenure, the School suffered financial difficulties. So much so that Staff members had not received salaries and suppliers had not been paid for months. This promoted the School to undergo an audit under the direction of the Ministry of Education.
23. The audit was conducted by Eliud C. Wepukhulu (the then West Pokot County Schools Auditor) for the period 2004-2006. He prepared an Audit Report dated 08<sup>th</sup> March, 2007 that disclosed financial mismanagement, misappropriation and embezzlement of funds by the Appellants. Following those



actions, the School lost a total sum of Kshs. 7,164,014/50. The report was presented on 30<sup>th</sup> March, 2007 to the 1<sup>st</sup> Respondent as evidence by the minutes. According to the minutes, the Appellants were present in the meeting.

24. A further meeting was held on 20<sup>th</sup> January, 2007 as evidenced by the minutes where the 1<sup>st</sup> Appellant acceded to refund the sum of Kshs. 2.5 million. The 2<sup>nd</sup> Appellant did not commit to paying any money. Following, the 1<sup>st</sup> Appellant asked new Principal, one Simon Kachapin, to meet him and DW1 at Makutano to receive the funds. Whereas the Principal turned up as agreed, the 1<sup>st</sup> Appellant never appeared.
25. The said report, implicating the Appellants, informed the 1<sup>st</sup> Respondent to report the matter to Kapenguria Police Station for investigation and appropriate action. Following the conclusion of those investigations, the Appellants were arrested and charged with the offence of stealing by servant of the sum of Kshs. 7,164,014/50.
26. The 1<sup>st</sup> Respondent maintained that the audit report substantiated their complaint that was not malicious as a result. The 1<sup>st</sup> Respondent would later discover that due to the non-attendance of witnesses, the Appellants were acquitted.
27. DW2 further testified upon taking over as the Principal, he observed that the School was undergoing a repayment plan since it was paying huge debts which were eventually cleared in 2013. The debts were informed from the Audit Report dated 8<sup>th</sup> March, 2007.
28. DW3 produced the Audit Report after a protracted legal battle. He confirmed that the Audit Report was authenticated and true.
29. Based on the foregoing, the 1<sup>st</sup> Respondent urged the dismissal of the civil suit.

#### **The 2<sup>nd</sup> & 3<sup>rd</sup> Respondents' cases:**

30. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents called one Pc Milton Otenyo who testified on their behalf. He was DW4.
31. He produced Police File No. 840/327/2007 in evidence and affirmed that the Appellants were discharged at trial under Section 202 of the Criminal Procedure Code.
32. Based on the foregoing evidence, the civil suit suffered a dismissal.
33. Having captured the respective parties' cases, it is imperative to set out the law on the torts of false imprisonment and malicious prosecution.
34. The tort of false imprisonment has a basis in Article 49(1)(f) of *the Constitution* which sets out the timelines within which an arrested person ought to be arraigned before Court if not released. It also hinges on Article 29 of *the Constitution* which guarantees the freedom and security of a person. The tort of malicious prosecution has a bearing in Article 28 of *the Constitution*. That is because it is aimed at affirming the position that every person has inherent dignity which must be respected and protected by all. In a case where the tort is sufficiently proved, it goes a long way to establish that, further to any other loss the person may have suffered, the person's inherent dignity was not spared.
35. Many Courts have variously added their legal voices on the law relating to the said torts.



36. The Court of Appeal in *Egbema vs. West Nile Administration* [1972] EA 60 expressed itself as follows:

False imprisonment and malicious prosecution are separate causes of action; a plaintiff may succeed on one and fail on the other. If he established one cause of action, then he is entitled to an award of damages on that issue...For the purposes proof that the criminal proceedings have been determined in the appellant's favour it is enough that the criminal proceedings have been terminated without being brought to a formal end. The fact that no fresh prosecution has been brought, although five years have elapsed since the appellant was discharged, must be considered equivalent to an acquittal, so as to entitle an appellant to bring a suit for malicious prosecution...There was no finding that the prosecution instituted by Uganda Police was malicious, or brought without reasonable or probable cause. The Uganda Police, unlike Administration Police, are not servants or agents of the respondent...The decision whether or not to prosecute was made by the Uganda Police, who are not servants of the respondents after investigation. There is no evidence of malice on the part of the respondent. The appellant was an obvious suspect as he was responsible for the security of the office from which the cash box disappeared. It cannot be said that there was no reasonable and probable cause for the respondent instigating a prosecution against the appellant. The actual decision to do so was taken by the Uganda Police. As the Judge has made no finding as to whether the instigation of the prosecution was due to malice on the part of the respondent, this Court cannot make its own finding. The circumstances of this case reasonably pointed to the appellant as a suspect and there was not sufficient evidence that in handing the appellant over to the Uganda Police for his case to be investigated and, if necessary, prosecuted, the respondent was actuated by malice.

37. The predecessor of the current Court of Appeal, that is the East African Court of Appeal in *Mbowa vs. East Meno District Administration* [1972] EA 352 stated as follows: -

The action for damages for malicious prosecution is part of the common law of England...The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than for the public benefit. It 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. Sometimes in 1999, the Alberta Court of Queen’s Bench, in *Chopra v. T. Eaton Co.* (240 A.R. 201) adopted these words in relation to the tort of malicious prosecution: -

.... The underlying basis for actions founded on malicious prosecution is the allegation of facts which, if believed, would establish abuse of the judicial process while acting out of malice and without reasonable and probable cause and which judicial process did not result in a finding of guilt of the party alleging the abuse.

39. In *Gitau vs. Attorney General* [1990] KLR 13, Trainor, J had the following to say: -

To succeed on a claim for malicious prosecution the plaintiff must first establish that the defendant or his agent set the law in motion against him on a criminal charge. Setting the law in motion” in this context has not the meaning frequently attributed to it of having a police officer take action, such as effecting arrest. It means being actively instrumental in causing a person with some judicial authority to take action that involves the plaintiff in a criminal charge against another before a magistrate. Secondly, he who sets the law in motion must have done so without reasonable and probable cause...The responsibility for setting the law in motion rests entirely on the Officer-in-Charge of the police station. If the said officer believed what the witnesses told him then he was justified in acting as he did, and the court is not satisfied that the plaintiff has established that he did not believe them or alternatively, that he proceeded recklessly and indifferently as to whether there were genuine grounds for prosecuting the plaintiff or not. The Court does not consider that the plaintiff has established animus malus, improper and indirect motives, against the witness.



40. And, in the High Court at Nairobi in Civil Appeal No. 171 of 2000 James Karuga Kiiru –vs- Joseph Mwamburi and 3 Others, the Court held as follows: -

To prosecute a person is not prima facie tortuous, but to do so dishonestly or unreasonably is. And the burden of proving that the prosecutor did not act honestly or reasonably lies on the person prosecuted.

41. The High Court in Kagane –vs- Attorney General (1969) EA 643 set the test for reasonable and probable cause. Citing Hicks vs. Faulkner[1878] 8 QBD 167 at 171 and Herniman vs. Smith[1938] AC 305 and Glinski vs. McIver[1962] AC 726, the Learned Judge, Rudd, J stated thus: -

Reasonable and probable cause is 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 an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed...Excluding cases where the basis for the prosecution is alleged to be wholly fabricated by the prosecutor, in which the sole issue is whether the case for the prosecution was fabricated or not, the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of objective test. That is to say, to constitute reasonable and probable cause the totality of 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 insofar as that material is based on 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...If it is shown to the satisfaction of the judge that a reasonable prudent and cautious man would not have been satisfied that there was a proper case to put before the court, then absence of reasonable and probable cause has been established. If on the other hand the judge considers that prima facie there was enough to justify a belief in an ordinary reasonable prudent and cautious man that the accused was probably guilty then although this would amount to what I call primary reasonable and probable cause the judge may have to consider the further question as to whether the prosecutor himself did not believe in the probable guilt of the accused, and this is obviously a matter which is to be judged by a subjective test. This subjective test should only be applied where there is some evidence that the prosecutor himself did not honestly believe in the truth of the prosecution...Inasmuch as this subjective test only comes into operation when there were circumstances in the knowledge of the prosecutor capable of amounting to reasonable and probable cause, the subjective test does not arise where the reason alleged as showing absence of reasonable and probable cause is merely the flimsiness of the prosecution case or the inherent unreliability of the information on which the case was based, because this is a matter for the judge alone when applying the objective test of the reasonable prudent and cautious man. Consequently the subjective test should only be applied where there is some evidence directly tending to show that the prosecutor did not believe in the truth of his case. Such evidence could be afforded by words or letters or conduct on the part of the prosecutor which tended to show that he did not believe in his case, as for example a failure or reluctance to bring it to trial, a statement that he



did not believe in it and, I think possibly, an unexplained failure to call an essential witness who provided a basic part of the information upon which the prosecution was based.”

42. Further, the decision in *Simba vs. Wambari* (1987) KLR 601 defined what constitutes a ‘reasonable and probable cause’ as follows: -

The plaintiff must prove that the setting of the law in motion by the inspector was without reasonable and probable cause....if the inspector believed what the witnesses told him then he was justified in acting as he did and I am satisfied the plaintiff has not established that he did not believe them or alternatively that he proceeded recklessly and indifferently as to whether there were genuine grounds of prosecuting the plaintiff or not”

43. Still the High Court in *Stephen Gachau Githaiga & Another vs. Attorney General* [2015] eKLR discussed the tort of malicious prosecution as under: -

Malicious prosecution is an intentional tort designed to provide redress for losses flowing from an unjustified prosecution. Under the first element of the test for malicious prosecution, the plaintiff must prove that the prosecution at issue was initiated by the defendant. This element identifies the proper target of the suit, as it is only those who were actively instrumental in setting the law in motion that may be held accountable for any damage that results.

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

The third element which must be proven by a plaintiff — absence of reasonable and probable cause to commence or continue the prosecution — further delineates the scope of potential plaintiffs. As a matter of policy, 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, regardless of the fact that it ultimately terminated in favour of the accused.

Finally, the initiation of criminal proceedings in the absence of reasonable and probable grounds does not itself suffice to ground a plaintiff’s case for malicious prosecution, regardless of whether the defendant is a private or public actor. Malicious prosecution, as the label implies, is an intentional tort that requires proof that the defendant’s conduct in setting the criminal process in motion was fueled by malice. The malice requirement is the key to striking the balance that the tort was designed to maintain: between society’s interest in the effective administration of criminal justice and the need to compensate individuals who have been wrongly prosecuted for a primary purpose other than that of carrying the law into effect.



44. On the tort of false imprisonment, Maraga, J. (as he then was) in *John Ndeto Kyalo -vs- Kenya Tea Development Authority and The Hon. Attorney General* [2005] eKLR, before the promulgation of the 2010 Constitution, observed that: -

Claims for false imprisonment (wrongful detention) and malicious prosecution are distinct causes of action, and even though the evidence that may be adduced by a Plaintiff may cover them both, the evidence must prove each of them distinctly, on a balance of probabilities;

As regards a claim for false imprisonment (wrongful detention), the cause of action would arise on the last day of the period of the alleged imprisonment;

By dint of Section 3(1) of the Public Authorities Limitations of Actions Act, a claim for false imprisonment (wrongful detention) would be time barred as against the Attorney General unless instituted within one year of the last day of the period of the alleged imprisonment...

45. In the Ugandan case of *Mugwanya Patrick vs. Attorney General* [High Court Civil Suit No. 154 of 2009 [2012] UGHHC 293] the Court stated that: -

The civil tort of false imprisonment consists of unlawful detention of the plaintiff for any length of time whereby he is deprived of his personal liberty. It must be total restraint... where an arrest is made on a valid warrant it is not false imprisonment; but where the warrant or imprisonment is proved to have been effected in bad faith then it is false imprisonment.

46. With the foregoing exposition on the law on the torts of false imprisonment and malicious prosecution, the Court will now ascertain if the torts were proved in this case.

**Whether the tort of malicious prosecution was proved:**

47. Deriving from the above discussion, the following ingredients constitute the tort of malicious prosecution: -

- i. Whether the criminal proceedings were instituted by the Defendant or by someone for whose acts the Defendant is responsible.
- ii. Whether there was reasonable cause and/or justification to make the complaint to the police.
- iii. Whether the prosecution was actuated by malice.
- iv. Whether the criminal proceedings terminated in the plaintiff's favour.

48. This Court will now deal with each of the above ingredients in seriatim: -

**Whether the criminal proceedings were instituted by the Defendant:**

49. There is no doubt that the criminal proceedings arose following the laying of the complaint to the police by the 1<sup>st</sup> Respondent.

50. As such, the said proceedings were instituted by the 1<sup>st</sup> Respondent in these proceedings.

**Whether there was reasonable cause and/or justification to make the complaint to the police:**

51. Deriving from the various decisions this Court has referred to above, it can be deduced that reasonable and probable cause means the existence of facts, which on reasonable grounds, the Defendant genuinely thought that the criminal proceedings were justified. As was said in *Kagame* case (supra) reasonable and probable cause '...is 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 an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed which the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of objective test...’

52. To constitute reasonable and probable cause, therefore, the totality of the material within the knowledge of the prosecutor at the time of instituting the prosecution, whether that material consisted of facts discovered by the prosecutor or information which has come to him/her 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 insofar as that material is based on 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.
53. Applying the said yardstick to this case, it is on record that the genesis of the woes that befell the Appellants was the Audit Report for Ortum Secondary School dated 8<sup>th</sup> March, 2007. The report was prepared by one Eliud C. Wepukhulu who was the then District Schools Auditor for West Pokot District.
54. After a protracted battle, the report was eventually produced in evidence as an exhibit. The report revealed that the Appellants had misappropriated the sums of Kshs. 7,164,014/50 which was the property of the School.
55. There is further evidence that the report was discussed by the 1<sup>st</sup> Respondent in a meeting which was attended by the Appellants and in which meeting the 1<sup>st</sup> Appellant undertook to refund some of the money, but later changed heart.
56. The fact that the Appellants were made aware of the report is not disputed. They were well aware of the report which was averse to them and that is why they vehemently opposed its production during the trial. Surprisingly, even with such knowledge, none of the Appellants challenged the report in any way whatsoever.
57. Article 35(2) of *the Constitution* grants a right to any person to pursue the correction or deletion of untrue or misleading information that affects that person. Since the Appellants have never challenged the report in any way, then the contents of the report remain correct.
58. With such a state of affairs, and since the 1<sup>st</sup> Respondent had been directed to recover the monies in issue, there was, therefore, a reasonable cause for lodging a complaint with the police. The decision was not far-fetched, callous or unreasonable. The 1<sup>st</sup> Respondent acted in the most prudent manner possible in filing the complaint to the police.
59. Having said so, this Court finds and hold that there was justification on the part of the 1<sup>st</sup> Respondent in lodging the complaint with the police.

#### **Whether the prosecution was actuated by malice:**

60. In *Silvia Kambura v George Kathurima Japhet & 2 others* [2021] eKLR, the Court elaborately discussed the aspect of malice as follows: -
  54. The element of malice is the epitome of malicious prosecution. Malice connotes the use of justice for some other motive other than bringing the Plaintiff to justice upon a reasonable belief that he is guilty.



- 55 In Halsbury's Laws of England, Fourth Edition, Volume 45 (2) Para 472 at page 314, the following was established: -
- '...Although malice may be inferred from want of reasonable and probable cause, want of reasonable and probable cause is not to be inferred from malice...'
- See also *Stephen Kaburu & 5 Others v Attorney General & Others*, Civil Appeal No. 51 of 2016 (2018) eKLR.
56. This Court agrees as much because the probability that a prosecution was actuated by malice may be direct as much as it may be circumstantial and may be inferred from the fact that there was no reasonable and probable cause to institute the proceedings. On the other hand, the probability that a party caused malicious damage to property remains the same however much the complainant or police officers who initiated the prosecution disliked the said accused.
57. The trial Court, in allowing the claim for malicious prosecution held that since there was no evidence of ownership, it is highly probable that the police officers had been biased and they could have preferred the charges to punish the 1st Respondent.
58. Notably, in its Judgment, the trial Court did not distinguish the discussion on want of probable and reasonable cause and the discussion on malice. This Court has however found that there was indeed a reasonable and probable cause.
59. The Court also considers that the trial Court found malice on the part of the police officer and not on the Appellant. In the circumstances, the trial Court's judgment against the Appellant was faulty. Even on the finding of the malice on the part of the police officers, this Court considers that there was no evidence, whether direct or circumstantial to show that the police officers had any reason to want to punish the 1<sup>st</sup> Respondent and/or that they acted maliciously.
60. 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 1<sup>st</sup> 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 1<sup>st</sup> Respondent does not claim to have been mistreated or mishandled in the process of his arraignment and charging.
61. The ultimate question is whether it can be seen, on a balance of probabilities, that the case was being used for some other skewed reason other than the ordinary pursuit of bringing the offender to justice. This Court finds in the negative. Even if the alleged succession dispute was taken to be a probable cause of malice, this Court considers that the 1st Respondent was not a direct beneficiary of his grandfather's property. There is therefore no direct nexus between the 1st Respondent's prosecution and the succession case.
62. This Court, therefore, does not find that the 1<sup>st</sup> Respondent proved all the elements of the tort of malicious prosecution.
61. In this case, having established that the lodging of the criminal complaint with the police was justified, it behooved the Appellants to prove that the police, on conclusion of their investigations, acted in manner contrary to reasonably bringing the suspects to book.
62. The police file was produced in evidence. It showed the steps taken by the police in the course of the investigations. Several statements were recorded that depicted the culpability of the Appellants. Based on the outcome of the investigations, the police then charged the Appellants.



63. The Appellants did not establish any iota of evidence to suggest that either the police or the 1<sup>st</sup> Respondent acted maliciously. There is no suggestion that the Appellants were charged for any other reason other than on the basis of the complaint laid and the evidence gathered.
64. On a careful scrutiny of the evidence in this matter, it is the finding and holding of this Court that malice was not proved.

**Whether the criminal proceedings terminated in the plaintiff's favour:**

65. This issue needs no much ado. The criminal proceedings were terminated in favour of the Appellants.
66. It is, however, the position in law that an acquittal per se on a criminal charge is not sufficient ground for a suit for malicious prosecution. Spite or ill-will must be proved against the prosecution.
67. Having considered the ingredients of the tort of malicious prosecution in the foregoing, this Court returns the verdict that the tort was not proved.

**Whether the tort of false imprisonment was proved:**

68. The gist of the Appellants claim on this tort is that they were arrested on 22<sup>nd</sup> October, 2007 and were arraigned in Court on 24<sup>th</sup> October, 2007.
69. Article 49(1)(f) of the 2010 Constitution provides for the timelines within which an arrested person ought to be arraigned before Court if not released. Since the 2010 Constitution had not yet been promulgated in 2007, this Court finds that the instant provision cannot apply in favour of the Appellants.
70. The then applicable Constitution (which now stands repealed by the promulgation of the 2010 Constitution) had like provision on the rights of an arrested person. In Section 72(2), the Repealed Constitution provided that an arrested person be arraigned before Court within 24 hours of arrest if not released or as soon as reasonably possible.
71. In this case, the Appellants were arrested on 22<sup>nd</sup> October, 2007. That was on a Monday. They were subsequently arraigned in Court on 24<sup>th</sup> October, 2007 being the Wednesday that followed. The Appellants did not give the exact times they were arrested. Be that as it may, if for instance they were arrested after the official Court hours on 22<sup>nd</sup> October, 2007 then 24 hours would lapse at a time when the Court would be closed on 23<sup>rd</sup> October, 2007. Therefore, the arraignment before Court on 24<sup>th</sup> October, 2007 would be within the law since the 24 hours would have ended outside the ordinary Court hours on 23<sup>rd</sup> October, 2007.
72. Without even going further, there is sufficient ground to find and hold that the tort of false imprisonment was also not proved.

**Disposition:**

73. As none of the torts were successfully proved, this Court, therefore, affirms the judgment of the trial Court. This Court must say that the 1<sup>st</sup> Respondent is still duty bound to ensure that the recovery of the public monies is achieved, if not yet.
74. As this Court comes to the end of this judgment, it hereby apologizes for the late delivery of this decision. The delay has been caused by heavy workload precipitated by the fact that the undersigned is handling matters from the Constitutional and Human Rights Division in Nairobi and is the sole Judge at the High Court of Kenya at Kitale. The Judge only visits this Court station for one week in a month.



75. Having said so and drawing from the foregoing, this Court hereby makes the following final orders in this appeal: -

- a. The appeal is wholly disallowed. It is hereby dismissed.
- b. The Appellants shall jointly and severally shoulder the costs in the lower Court case as well as on appeal.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 11<sup>TH</sup> DAY OF MAY, 2023.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered virtually in the presence of:**

**Miss. Munialo**, Learned Counsel for the Appellant.

**No appearance** for Learned Counsel for the 1<sup>st</sup> Respondent.

**No appearance** for Learned Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

**Regina/Chemutai** – Court Assistants.

