



**Attorney General v Kogo & another (Civil Appeal 36B of 2021)
[2023] KEHC 21878 (KLR) (1 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 21878 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 36B OF 2021
JRA WANANDA, J
SEPTEMBER 1, 2023**

BETWEEN

HON. ATTORNEY GENERAL APPELLANT

AND

BENJAMIN KOGO 1ST RESPONDENT

MARY JEPKEMBOI BARNGETUNY 2ND RESPONDENT

JUDGMENT

1. This Appeal is against the Judgment delivered in Kapsabet Senior Principal Magistrate's Criminal Court No. 118 of 2013 on 10/06/2019 in which the trial Court awarded the 2nd Respondent damages for malicious prosecution. The award made was for a sum of Kshs. 1,500,000/- in general damages, Kshs. 500,000/- in punitive and exemplary damages and Kshs. 40,000/- in special damages. Costs of the suit and interest were also awarded.
2. In the trial Court suit, the 2nd Respondent was the Plaintiff, the Appellant was the 2nd Defendant and the 1st Respondent was the 1st Defendant.
3. The background of the matter is that by the Plaintiff filed in the said suit on July 25, 2013 through Messrs Chepkwony and Co. Advocates, the 2nd Respondent pleaded that on 9/06/2012 she was arrested and detained in police cells and was later released on bond, she was arraigned in Court on diverse dates until May 21, 2013 when the case was determined, she was made to attend a stressful and long trial process from June 11, 2012 until 21/05/2013 in Kapsabet Criminal Case No. 1254 of 2012 whereupon she was acquitted. She basically accused the Appellant and the 1st Respondent of maliciously prosecuting her and/or causing her prosecution and listed several particulars thereof. She then prayed for Judgment against the Appellant and the 1st Respondent for general damages, special damages, costs of the suit and interest.



4. The Appellant filed his Statement of Defence on 6/11/2013 in which he averred that on 9/06/2012 a complaint was lodged with the police that the 2nd Respondent had committed an offence cognizable in law, acting upon the complaint the police investigated the matter whereupon it revealed a reasonable and probable cause that the 2nd Respondent had committed an offence of maliciously destroying cultivated crops, the completion of the investigations led to the arrest and prosecution of the 2nd Respondent, all the actions he took were in execution of statutory duties bestowed upon him and denied that it was actuated by malice and/or unreasonableness as alleged. He further denied the allegations of suffering of loss or entitlement to damages and stated that the 2nd Respondent's acquittal does not entitle her to a cause of action for malicious prosecution.
5. Although the proceedings of the trial Court indicate that a Statement of Defence was filed on behalf of the 1st Respondent on August 21, 2013 through Messrs Nyachiro Nyagaka & Co. Advocates, I have not found a copy thereof. The Record of Appeal, too, does not contain a copy of such Defence.
6. The matter then proceeded to full hearing. The 2nd Respondent, as the Plaintiff, called 2 witnesses and the Defence called 1 witness.
7. PW1 was the 2nd Respondent. She testified that she was arrested on 9/06/2021 and arraigned in Court 3 days later, the matter proceeded to trial and she was eventually acquitted, the police did not conduct proper investigations, the prosecution was instigated by the 1st Respondent who was the complainant, the 1st Respondent is her neighbour, they have a grudge over land. She accused the police of prosecuting without listening to her own complaints.
8. PW2 was one Richard Keino, the Executive Officer at Kapsabet Law Courts. He produced the criminal case file, Kapsabet Magistrate's Criminal Case No. 1254 of 2012 and confirmed that the 2nd Respondent was charged with the offence of destroying crops and that she was acquitted.
9. On his part, the 1st Respondent, Benjamin Kirui Kogo testified as DW1. He stated that he is a farmer in Nandi, the 1st Respondent is his neighbour, they had a criminal case because the 2nd Respondent's cattle destroyed his crops, he reported the matter to the police who investigated it, he recorded a statement, he was the complainant and he testified. He reiterated that he only reported.
10. At the close of the trial, the Magistrate considered the testimonies and the evidence available and determined the suit in favour of the 2nd Respondent. As aforesaid, the Court awarded to the 2nd Respondent the damages already set out above.
11. Being aggrieved with the Judgement, the Appellant instituted the present Appeal vide the Memorandum of Appeal filed on April 21, 2021. The grounds listed were as follows:
 - i. The learned trial Magistrate erred in law in solely relying on the Respondent's evidence and submissions and failing to consider the Appellant's submissions in arriving at his findings against the Appellant.
 - ii. The learned trial Magistrate erred in law and in fact in holding the Appellant liable without any evidence to that effect.
 - iii. That the learned trial Magistrate erred in fact and law by failing to give a well-reasoned Judgment on each item pleaded and the evidence adduced by the Appellant.
 - iv. The learned trial Magistrate erred in fact and law by failing to dismiss the Respondent's case against the Appellant with costs.



- v. The learned trial Magistrate erred in law and fact on failing to find that the Respondent did not prove his case as against the Appellant.
- vi. The learned trial Magistrate erred in law and fact in awarding damages against the Appellant.
- vii. The learned trial Magistrate erred in law and in fact in awarding damages that were inordinately too high in the circumstances and failing to appreciate the evidence by the Appellant thereby leading to a miscarriage of justice.
- viii. The learned trial Magistrate erred in law and in fact in using wrong principles in assessing the damages.
- ix. The learned trial Magistrate erred in law and in fact by failing to find that the Appellants were not in any way liable for unlawful arrest or malicious prosecution and it therefore ought to have dismissed the Respondents' case against the Appellant with costs.

Hearing of the Appeal

- 12. The Appeal was canvassed by way of written submissions. The Appellant filed his Submissions on 7/03/2023 through State Counsel, Ednah Tigoi. The 1st Respondent, acting in person, filed his Submissions on February 21, 2023 and the 2nd Respondent filed her Submissions on January 16, 2023 through Messrs Chepkwony and Co. Advocates.

Appellant's Submissions

- 13. Learned State Counsel appearing for the Appellant submitted that the trial Magistrate erred by failing to give a well-reasoned Judgment on each item pleaded by the Appellant and that the Judgement was silent on the essentials of an award for malicious prosecution. She cited the case of *Murunga v Attorney General* [1979] KLR 138 which laid down the guiding principles, namely, the Plaintiff must show that the prosecution was instituted by the Defendant or by someone for whose acts he is responsible, that the prosecution terminated in his favour, that the prosecution was instituted without reasonable and probable cause and that the prosecution was actuated by malice. Counsel urged that for a malicious prosecution case to be successful the 2nd Respondent should have proved the four principles on a balance of probabilities, it is not enough for one to prove one or two of the principles, it was upon the 2nd Respondent to prove each of the principles and unite them to the circumstances of her case failure of which her cause of action must fail, as was the case in this matter. She also cited the case of *Mbowwa vs. East Mengo District Administration* [1972] EA 352 in which, she submitted, the East African Court of Appeal held that one must prove the four principles along with the damage suffered. Counsel added that the Judgment did not take into account the tenets that must be met by a Plaintiff for an award for malicious prosecution.
- 14. She added that while she concedes that the trial Court found that the 2nd Respondent had proved the 1st and 2nd principles, she wholly failed to show that there was no reasonable and probable cause on the part of the prosecution. She cited the case of *Kagane vs Attorney General* (1969) EA 643 and argued that the mere fact that the Appellant was unable to justify or show that the prosecution was based on any falsehood negates the assumption that the prosecution was unreasonable and without probable cause. Counsel submitted further that for a cause of action of malicious prosecution it was incumbent on the 2nd Respondent to show that the prosecution was actuated by some form of malice on the part of the prosecution, the 2nd Respondent woefully failed to prove this principle as the only attempt she made to prove this limb was by claiming that the testimony of the complaint at the time was false and that the police did not conduct thorough investigations. She cited the case *Gachau Gitthaiga & Another*



- v Attorney General* [2015] eKLR and averred that to prosecute one is not per se tortuous but that only in situations where the prosecutor acted dishonestly and unreasonably and this must be proved by the prosecuted. She argued that the onus was on the 2nd Respondent to show during the hearing that the actions taken by the Appellant was actuated by some form of malice to ensure she was arrested and prosecuted, during cross-examination the 2nd Respondent produced no evidence to corroborate her assertions and therefore the Court is left with no option but to view the said statements as mere heresay and as allegations which were unsubstantiated nor brought out in the civil hearing thus the trial Magistrate could not make a determination on the same.
15. On the award of damages, Counsel submitted that although the 2nd Respondent pleaded for special damages, she did not strictly prove the same, it is trite law that with regard to special damages, the party pleading must not only plead the same in his claim but must also strictly prove the same. She cited the case of *Provincial Insurance Co. EA Ltd vs Mordekai Mwanga Nandwa*, KSM CACA 179 of 1995 (UR) and added that burden of proof is placed on he who alleges existence of a fact. She also cited Sections 107, 109 and 110 of the *Evidence Act* and also the case of *Capital Fish Kenya Limited v Kenya Power & Lighting Company Limited* [2016] eKLR.
 16. Counsel further submitted that the 2nd Respondent failed to prove malice on the part of the Appellant and therefore she were not entitled to both general and exemplary damages, damages should be based on the principles that damages should not be inordinately too high or too low, damages should be commensurate to the injury suffered and should not be aimed at enriching the victim but at trying to restore the victim to the position he was in before damage was suffered. She then submitted that there is a distinction between general and punitive damages and cited the case of *Brutus Nandwa wa Ambunya v Inspector General of Police & Another*, High Court Civil Case No. 166 of 2013 [2018] eKLR. She submitted that exemplary damages are not automatically awarded but are only awarded when the general damages are not adequate to compensate the aggrieved party,
 17. Counsel further urged that the amounts awarded in general damages and exemplary damages were inordinately too high and against the established principles, exemplary damages are not automatically awarded but are only awarded when the general damages are not adequate to compensate the aggrieved party, in the instant case the 2nd Respondent was awarded general damages that were too excessive in the first place and hence could not qualify for any exemplary damages.
 18. Further, she submitted that she agreed with the Court's finding that although the 2nd Respondent was arrested, she was arraigned within the stipulated time limits and that she was not eligible for damages arising from wrongful detention.
 19. In conclusion, Counsel submitted that if the Court is inclined to uphold the finding on liability, then an award of Kshs 300,000/- should be adequate for both general and exemplary damages. She cited the cases of *Stephen Gachau Gitbaiga* (supra) and Civil Appeal Case No. 43 of 2016 – *Johnstone Muendo Waita v Odillah Mueni Ngui*.

1st Respondent's Submissions

20. In his Submissions, the 1st Respondent (acting in person) urged that in her own testimony, the 2nd Respondent admitted that she was arrested and arraigned at the instance of a lodging a complaint lodged with the police by the 1st Respondent, the police acted within the law, the arrest was justified in the circumstances, the police had no ill-will or malice against the 2nd Respondent as none was proved. He cited the case of *Nrb CACA No. 171 of 2000 – James Karuga versus Joseph Mwamburi & 2 Others* and added that the pleadings and testimony were silent in demonstrating how the arrest and confinement were unlawful. He also cited the case of *John Ndeto Kyalo vs Kenya Tea*



Development Authority & Another (2005) eKLR and stated that the only allegation of malice against the 1st Respondent was that the police arraigned the 2nd Respondent without conducting proper investigations, in other words that the 2nd Respondent was arraigned in the absence of proper evidence linking her to the alleged offence. He submitted that the 2nd Respondent confirmed that the police had witnesses who were identified and made witness statements concerning the complaint, the arraignment in court was based on an honest opinion that the 2nd Respondent was guilty of an offence, the opinion was reached after independent investigations which was conducted between the time that the complaint was made and the time of arraignment in Court, as such the same cannot be construed as shoddy or hurried, in any case, the purpose of a prosecution is not to achieve a conviction but to vindicate justice. The 1st Respondent then recited the already referred to four ingredients required to be established for one to succeed in a malicious prosecution case.

21. The 1st Respondent further submitted that it is him who made the complaint which implicated the 2nd Respondent, it is him who instituted the prosecution and identified the 2nd Respondent to the arresting police, the police took over and performed their statutory duties, the 2nd Respondent did not prove that the prosecution was instituted without probable cause. He cited the case of *Hicks v Faulkner* [1878] 8QB 167 and added that the statements made by him as the complainant and other witnesses demonstrated that there were facts likely to satisfy any ordinary, reasonable, prudent and cautious man that the 2nd Respondent was probably guilty of the offence, he does not think that one should mount a suit for malicious prosecution merely because he was acquitted, an acquittal under Section 210 of the Criminal Procedure Code, Cap. 75 should not be a basis for a suit of malicious prosecution, when an accused person is acquitted under Section 210 there is an irrebuttable presumption that the prosecutor believed that there was a prima facie case for which the accused had to answer to, the burden of proving spite or ill-will rests on the Plaintiff, the 2nd Respondent miserably failed to discharge this burden, although the prosecution ended in his favour, that alone cannot and should not be construed as malicious. He cited the case of Nzoia Sugar Company Limited v Fungututi [2002] KLR 1 and added that the evidence before Court failed to lay any basis to show or identify malice on the part of the prosecution, the 2nd Respondent ought to have proved that the motive for instituting the prosecution was an ulterior motive other than vindication of justice. He cited the case of Hassan Ogwimba Akibaya v Attorney General & 2 Others [2015] eKLR,
22. The 1st Respondent also submitted that although the 2nd Respondent contends that due to the malicious prosecution her reputation was injured and she was defamed, at no time did she bring before the Court any evidence to prove the same. He cited the case of Joash Nyabicha v Kenya Tea Development Authority & 2 Others [2013] eKLR.
23. He further cited the cases of Civil Suit No. 767 of 2016 - Josephine Ireri v Attorney General & Another, Kagane & Others v Attorney General & Another (supra), Samson John Nderitu v The Attorney General [2010] eKLR and Attorney General v Peter Karimi Mbogo & Another, Meru Civil Appeal No. 52 & 60 of 2020 (Consolidated) [2021] eKLR. He also cited Halsbury's Laws of England, 4th Edition, Volume 45(2), Para 472 at page 314 and the case of Stephen Kaburu & 5 Others v Attorney General & Others, Civil Appeal No. 51 of 2016(2018) eKLR.
24. The 1st Respondent then submitted that even if the Court had found that malicious prosecution had been established, still the award of Kshs 2,000,000/- was excessive.
25. The 1st Respondent cited further cases, which he described as *Macharia v Njeru & Another* (2002, Ndolo v Kariuki [1997], Kimathi v Karingi & Another [2000] and Obonyo v Republic.



2nd Respondent's Submissions

26. Counsel for the 2nd Respondent submitted that the 2nd Respondent was awarded special damages of Kshs 40,000/- as this was the amount that was specifically pleaded and was proved by a Receipt. He cited the cases of Hahn v Singh, Civil Appeal No. 42 of 1985 and Sande v Kenya Co-operative Creameries.
27. On the award of punitive damages of Kshs 500,000/-, Counsel cited the case of Brutus Nandwa wa Ambunya v Inspector General of Police (supra) and submitted that the 2nd Respondent was arrested and put in a cell for 3 days before she was released on bond, she also suffered humiliation and her reputation was tainted during the period that the case lasted, the trial Court took in all the considerations while setting the awards which are not highly exaggerated as the Appellant alleges, the tort of malicious prosecution is an intentional tort that seeks to provide redress to a Plaintiff for losses incurred following unsuccessful and malicious proceedings which had been initiated without any lawful, reasonable and/or probable cause, while it is within any person's rights to approach the Courts to seek redress for what they believe was a violation of rights and/or an offence committed, this right must be exercised within the confines and parameters of law and for the genuine and proper reasons the law allows, otherwise such exercise may be tantamount to abuse of process which is in itself a wrong and/or violation attracting a claim for damages for malicious prosecution. He then cited the UK Supreme Court case of Willers v Joyce and Another [2016] UKSC 43 50.
28. Counsel submitted that on the elements of the said tort, authorities have indicated that the Defendant must have been responsible for having caused the claim to be brought, the claim must have been determined in the Plaintiff's favour, the claim must have been brought without reasonable and/or probable cause, the Defendant must have been actuated by malice and the Plaintiff must have suffered damage. He added that the five elements apply conjunctively and all five must be present in order to successfully sustain the claim, in this matter the 2nd Respondent was prosecuted with malice and without reasonable and/or probable cause.
29. On whether the Appellant was responsible for causing the claim, Counsel submitted that it is not in dispute that it is the Appellant's agents who tendered a false report that led to her arrest, on whether the claim was determined in the 2nd Respondent's favour, Counsel submitted that the Court dismissed the prosecution's case and charges against the 2nd Respondent under Section 210 of the Criminal Procedure Act. He cited Winfield & Jolowicz on Tort, at page 681.
30. On whether the claim was brought without reasonable cause, Counsel submitted that the 2nd Defendant was arraigned in Court without delay. On whether the prosecution was actuated by malice, he cited the case of Stephen Kaburu & 5 Others v Attorney General & 7 Others Civil Appeal No. 51 of 2016 (2018) eKLR and submitted that the prosecution did not have a probable cause to warrant a strong case against the 2nd Respondent and that is why the case was dismissed. On whether the 2nd Respondent suffered damage, he contended that it was the 2nd Respondent's testimony that she suffered damage when she was arrested as the maize she had planted was destroyed, she also stated that she incurred damages in seeking legal representation. Counsel therefore submitted that the 2nd Respondent met all the elements of malicious prosecution, thereby justifying the awards given.
31. He quoted the Supreme Court of Canada case of Andrews v Grand & Toy Alberta Ltd [1977] 83 DLR and submitted that the Magistrate entered Judgment based on the evidence provided, the 2nd Respondent proved her case to the required standard and was deserving of the award, the Appellant has not given any persuasive and/or compelling reasons to warrant this Court to interfere with the



award. He therefore prayed that the Appeal be dismissed with costs to the 2nd Respondent both in this Appeal and the lower court.

Analysis & Determination

32. This being a first appellate Court, the obligation bestowed upon it (as was stated in *Okeno v Republic* [1972] EA 32) is to re-examine the evidence presented before the trial Court and evaluate the same in order to determine whether the trial Court erred in law and/or fact as alleged in the Memorandum of Appeal.
33. I note that although the 1st Respondent has filed Submissions supporting this Appeal, this Appeal is exclusively by the Attorney General. The 1st Respondent is neither referred to as a co-Appellant nor did he, to my knowledge, file his own separate Appeal which could perhaps then have been consolidated with the present Appeal.
34. Be that as it may, upon perusing the Record and considering the Memorandum of Appeal and the Submissions by the parties, I find the following to be the issues that arise for determination.
 - a. Whether the trial Court was justified in finding the Appellant liable for the tort of malicious prosecution.
 - b. Whether the trial Court was justified in its award of damages.
35. I now proceed to analyze and answer the said Issues.
 - a. Whether the trial Court was justified in finding the Appellant liable for the tort of malicious prosecution
36. A perusal of the Judgment of the trial Court reveals that although the Magistrate correctly set out the law and principles applicable in cases of malicious prosecution, there is a big omission in the Judgment in that she did not at all carry out any analysis of how those principles applied to the facts of the case before her. There is no attempt at identification of the issues for determination and neither is there any demonstration of how she determined them. From laying out the law, the Magistrate straight away “jumped” to awarding damages without linking the two portions of her Judgment and without revealing her findings on liability. How and on what basis she arrived at the decision to award damages is anybody’s guess.
37. Fortunately, as aforesaid, this being a first appellate Court, I am allowed and in fact obligated to re-evaluate the evidence and reach my own independent findings. I will so do.
38. From their Submissions, it is clear that all the parties herein are in agreement on the elements applicable in establishing the tort of malicious prosecution. On my part, I cite the holding of Hon. Justice J. Mativo in the case of *Stephen Gachau Githaiga & Another v Attorney General* [2015] eKLR where he stated as follows;

“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 fuelled 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."

39. The upshot of the foregoing is that the elements of malicious prosecution that the 2nd Respondent was required to satisfy were the following; That the prosecution was initiated by the Defendants. That the case was finalized in the Plaintiff's favour. That the prosecution or its continuance was actuated by malice on the part of the Appellant and the 1st Respondent. That the prosecution was conducted without reasonable and probable grounds

Whether the prosecution was initiated by the Defendants

40. As aforesaid, the Appellant and the 1st Respondent were the Defendants in the suit before the trial Court. In his testimony, the 1st Respondent admitted that indeed it is him who lodged a report with the police alleging that the 2nd Respondent's cattle had entered the 1st Respondent's farm and destroyed his crops. Admittedly therefore, the 1st Respondent was the complainant. It is not in doubt that without the report, the police and the prosecution would not have pursued the matter. It is as a result of the report that the police arrested, detained and arraigned the 2nd Respondent and the State then conducted the prosecution. The element of initiation of the prosecution by the 1st Respondent and which prosecution was then conducted by the State was therefore satisfied.

Whether the matter was finalized in the 2nd Respondent's favour

41. It is not disputed that the prosecution of the case was finalized and the outcome was that the 2nd Respondent was acquitted under Section 210 of the Criminal Procedure Act. There is therefore no doubt that the case was finalized and/or determined in favour of the 2nd Respondent.

Whether the prosecution was actuated by malice

42. The parties are in agreement that the 1st and the 2nd Respondents were neighbours. It is also agreed that the 1st Respondent made a report to the police alleging that his crops were destroyed by the 2nd



Respondent's cattle and which was allegedly a deliberate act by the 2nd Respondent. The parties also agree that it is after the reporting of this complaint that the 2nd Respondent was arrested, detained in custody, arraigned, charged and prosecuted for the offence of destroying crops of cultivated produce contrary to Section 334(a) of the Penal Code.

43. As has been oft reiterated in a plethora of cases, the element of "malice" is the epitome of malicious prosecution. "Malice" connotes the misuse of the Court process for some other motive other than bringing a person to justice upon a reasonable belief that he is liable or guilty. In Halsbury's Laws of England, Fourth Edition, Volume 45 (2) Para 472 at page 314, the following is stated:

'...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...'

44. From the above statements, it is clear that for the 2nd Respondent to have succeeded at the trial Court, she needed to have proved that there was malice on the part of the 1st Respondent or the police.

45. In *Bethwel Omondi Okal vs. Attorney General & another* [2018] eKLR, Hon. Justice E. Mwita stated the following:

" 22. From the above principles, it is therefore the law that a party who claims that he was unlawfully arrested falsely imprisoned and or maliciously prosecuted, bears the responsibility of proving that the arrest had no basis in law at all. It will not be enough for him to merely state that the arrest was unlawful. In the present case, the 2nd respondent's duty was to report that the accused was illegally connected to electric energy. The responsibility of investigating, charging and conducting prosecution was that of the police and the 1st respondent.

23. In this petition, it is true that the petitioner's wife was arrested, charged in Court and prosecuted. It is also true that the prosecution ended in her favour because she was acquitted of the charge. Even with these, there was a duty to prove that there was malice in making the report that led to the arrest and prosecution. Acquittal alone cannot amount to proof of malice. There must be something more than just acquittal. In the case of *Nzoia Sugar Company Limited v Fungutuli* [1988]eKLR, the Court of Appeal observed;

"It is trite learning that acquittal, per se, on a criminal case 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."

.....

25. And in the case of *Robert Okeri Ombaka v Central Bank of Kenya* [2015]) eKLR, the Court of Appeal observed;

"In this appeal there is no evidence that the respondent made a "false" report or that the it was actuated by "malice", or that his prosecution was brought "without reasonable or probable cause". That a suspect was acquitted of a criminal case is not a ground for



filling a civil suit to claim damages for malicious prosecution or false imprisonment. Evidence of spite, ill will, lack of reasonable and probable cause must be established.”

26. A party who suspects that there has been a violation of the law, has an obligation to report the matter to the police who carry out investigations and decide whether or not to charge and prosecute the person depending on the strength of the evidence. The fact that an accused person, though charged and prosecuted, was acquitted is not proof of malice. There must be proof of existence of malice in making the report. In other words, the petitioner must prove that there was no reasonable basis for making the report. The decisions referred to above are clear that there must be unreasonable basis for reporting a complaint to the police and that the report was actuated with malice. In the present petition the petitioner did not even show that the complaint was false and that it was full of spite or malice

46. I find the scenario set out above to be “on all fours” with the situation in this instant case. Having considered the whole matter, my finding is that there was no evidence whatsoever, whether direct or circumstantial, before the trial Court to demonstrate that the 1st Respondent and/or the police had any motive to spite, frustrate or punish the 2nd Respondent by maliciously subjecting her through the criminal Court process. The 2nd Respondent does not allege to have been mistreated or mishandled in the process of her arraignment and charging. There is also no evidence to point towards any suspicion that the prosecution was initiated for some other skewed reason other than the ordinary pursuit of bringing a suspected offender to justice..

47. The 2nd Respondent having failed to allege any motive or reason for the 1st Respondent and the police to maliciously prosecute her, I fail to understand on what basis the trial Magistrate arrived at the finding that malicious prosecution had been proved. I therefore find that the trial Court erred in its findings since there was no evidence whatsoever to prove that the prosecution was actuated by malice.

Whether the prosecution was instituted without any reasonable or probable cause

48. In determining whether there was any probable and/or reasonable cause, the “reasonable man’s standard” is what is applied. In the case of *Hicks v Faulkner* (1878) 8 Q.B.D 167 at 171, Hawkins J defined “probable and/or reasonable cause” as follows:

“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.”

49. 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 & Others v The Attorney General & Another* [1969] EA 643, 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.”

50. Further, in *Samson John Nderitu v The Attorney General* [2010] eKLR, Hon. Lady Justice R. Nambuye (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.”

51. To determine whether there was probable or reasonable cause to charge the 2nd Respondent, consideration has to be taken of the facts, circumstances and evidence that the prosecution relied on in charging her. In this instant case, apart from making bare allegations, the 2nd Respondent did not in any way demonstrate or prove her allegations that there was failure to conduct thorough investigations. She did not also allege or demonstrate that there were no statements taken from potential witnesses or that the facts alleged against her did not disclose an offence cognizable in law. In short, she did not demonstrate nor prove that there was no reason to honestly believe that she had committed an offence worthy of prosecution. The 2nd Defendant was not discharged nor was the case terminated due for reasons such as of lack of witnesses and neither was it withdrawn. On the contrary, her acquittal was under Section 210 of the Criminal Procedure Act which portends that witnesses testified but the trial Court reached the verdict that the evidence adduced was insufficient to put the 2nd Respondent to her defence.
52. It is therefore my considered view that the 2nd Defendant wholly failed to demonstrate that there was absence of probable or reasonable cause for her prosecution.

b. Whether the trial Court was justified in its award of damages

53. Having found that the 2nd Respondent only proved two out of the four elements of the tort of malicious prosecution, it follows that my further finding is that the trial Court had no basis to find any liability against the Appellant and the 1st Respondent to award damages. In the circumstances, I do not need to belabour or determine this issue.
54. However, suffice to say that had I upheld the finding of the trial Court on the issue of liability, then in the absence of proof or demonstration of any exceptional circumstances in respect to the 2nd Respondent, I would have awarded a sum of Kshs 300,000/- in general damages. I find that the award of Kshs 1,500,000/- assessed and awarded by the trial Magistrate to be inordinately too high so as to amount to an erroneous estimate.
55. In arriving at the said figure, I have considered various previous authorities. For instance, in *Silvia Kambura v George Kathurima Japhet & 2 Others* [2021] eKLR, while overturning an award of damages for Kshs 800,000/- for malicious prosecution, Hon. Justice E. Muriithi stated that had he upheld the lower Court’s finding on liability, he would have reduced the award to Kshs 250,000/-.



56. In *Risper Nyomenda v George Martin Kenyatta* [2021] eKLR, in dismissing an Appeal, Hon. Lady Justice E. Maina upheld the trial Court's award of Kshs 200,000/- for malicious prosecution.
57. In *Stephen Gachau Githaiga & another v Attorney General* [2015] eKLR, on Appeal, Hon. Justice J. Mativo (as he then was) upheld the trial Court's award of Kshs 300,000/-
58. Regarding the award for exemplary and punitive damages, I would have still set them aside since such damages are only awarded when general damages are not adequate to compensate the Plaintiff. It therefore does not always follow that a Court will award both damages. The Court is primarily concerned on whether the amount awarded serves the justice of the case. Further, punitive or exemplary damages are awardable only in limited circumstances, for instance, where there is oppressive, arbitrary or unconstitutional action by servants of the government and where the Defendant's action was calculated to procure him some benefit, not necessarily financial, at the expense of the Plaintiff. (See the Court of Appeal decision in *Obongo & Another v Municipal Council of Kisumu* [1971] EA 91). Looking at the record of the trial Court, I am not satisfied that the 2nd Respondent met the threshold for award of exemplary and/or punitive damages. In any case, these two heads of damages were not even pleaded in the Plaintiff. The assessment and award by the trial Court were therefore not based on any evidence or prayer.
59. Regarding the award of Kshs 40,000/- as special damages, I would have upheld the same since the 2nd Respondent produced a Receipt demonstrating that she paid that sum to her Lawyers for legal representation in the criminal case.

Final Orders

60. From the foregoing, it is my finding that the 2nd Respondent only satisfied two of the four elements of the tort of malicious prosecution. To succeed, she needed to satisfy all four ingredients. Due to the failure to satisfy all the four elements, I find that the trial Magistrate erred in entering Judgment in favour of the 2nd Respondent and finding the Appellant liable.
61. The upshot of my findings is that this Appeal is merited and succeeds. Accordingly, I order as follows:
- i. The Judgment entered in Kapsabet Principal Magistrate's Court Civil Case No. 118 of 2013 on 10/06/2019 is hereby set aside in its entirety.
 - ii. The Appellant is awarded costs of this Appeal and of the trial Court.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 1ST DAY OF SEPTEMBER 2023

WANANDA J.R. ANURO

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

