Ndaruga v Theuri & 2 others (Civil Appeal E072 of 2021)
[2024] KEHC 14098 (KLR) (14 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14098 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E072 OF 2021

DKN MAGARE, J

NOVEMBER 14, 2024

BETWEEN

PHILIP MURURI NDARUGA ..... APPELLANT

AND

PETERSON NDEGWA THEURI ..... 1ST RESPONDENT

HERMAN NDIRITU KINGORI ..... 2ND RESPONDENT

ATTORNEY GENERAL ..... 3RD RESPONDENT

(Being an appeal from the Judgment and Order of Hon. M. Okuche - PM in Nyeri CMCC No. 304 of 2018 delivered on 29th October, 2021)

Acquittal at the appellate stage does not make one innocent

The appeal was against the dismissal of a claim for malicious prosecution by the trial court. The court held that the suit against the Attorney General was suit against the Government and that under section 3 of the Public Authorities Limitation Act such a suit must be brought within one year. Further, since the suit was filed out of time it was untenable. The court highlighted the elements that must be proved in a tort of malicious prosecution. The court further held that acquittal at the appellate stage did not make one innocent. The court was concerned with errors that made the conviction unsafe. Being given a benefit of doubt, was not the same thing as being innocent. The court also held that it was not bound to address each and every authority referred, the court could glean through and comment generally on principles.

Reported by Kakai Toili

Criminal Law *– criminal appeals – acquittals of accused persons – effect of - whether acquittal at the appellate stage amounted to an accused being innocent.*

Tort Law *– malicious prosecution – elements to be proved - what were the elements that must be proved in a tort of malicious prosecution.*

Civil Practice and Procedure *– suits – institution of suits - institution of suits against the Government - failure to institute the suit within statutory timelines - whether it was fatal to institute a suit against the Attorney General*

after the lapse of the statutory time limit of one year under the Public Authorities Limitation Act - whether it was mandatory for courts to address all authorities referred to by parties in a suit - Public Authorities Limitation Act (cap 39), section 3.

Evidence Law *– standard of proof - standard of proof in criminal cases - proof beyond reasonable doubt - what was the nature of the standard of proof beyond reasonable doubt in criminal cases.*

Brief facts

The appellant filed a suit against the respondents at the trial court. He stated that in the year 2001, the 1st and 2nd respondents were directors of Gatemu Housing Cooperative Society Ltd and initiated Nyeri CMCC 13 of 2002, which they made allegations of misappropriation. They also caused termination of the appellant as a secretary manager of Gatemu Housing Cooperative Society Ltd. On September 13, 2007, the appellant was arrested, detained and prosecuted in in Nyeri CMCR 2743 of 2007.

The prosecution was on two counts of stealing by servant. The appellant was convicted and fined Kshs. 100,000 in count 1 and Kshs. 50,000 in count 2. The appellant then an appeal at the High Court and was acquitted. The suit at the trial court was filed for claiming, *inter alia*, damages for malicious prosecution. A claim for Kshs 65,500 being fees in Nyeri CMCR 2743 of 2007 was laid. The trial court found that the ingredients of malicious prosecution were not proved and that the detention was lawful. Aggrieved, the appellant filed the instant appeal.

Issues

i. Whether acquittal at the appellate stage amounted to an accused being innocent.
ii. What were the elements that must be proved in a tort of malicious prosecution?
iii. Whether it was fatal to institute a suit against the Attorney General after the lapse of the statutory time limit of one year under the Public Authorities Limitation Act.
iv. What was the nature of the standard of proof beyond reasonable doubt in criminal cases.
v. Whether it was mandatory for courts to address all authorities referred to by parties in a suit.

Held

1. Being a first appeal, the court was under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. However, documents spoke for themselves. The observation of documents was the same as the trial court as parties could not read into those documents matters extrinsic to them.
2. By dint of an order given on April 13, 2021, the suit against the 1st respondent was withdrawn since he was deceased. The case against him remained withdrawn. The appeal against the 1st respondent was therefore not tenable, as the case against his was withdrawn. Consequently, the appeal against the 1st respondent was struck out. An appeal had again been filed against the deceased. It was a nonstarter and void *ab initio*. An appeal against a deceased person was void and nothing could be done to salvage the same.
3. The only parties in the trial court were the 2nd respondent and the 3rd respondent, the Attorney General. The acquittal occurred on July 18, 2016. Whether or not it was raised, the suit against the Attorney General was a suit against the Government. Under section 3 of the Public Authorities Limitation Act, cap 39, such a suit must be brought within one year, that was before July 18, 2017. The suit was brought on October 21, 2018 being one year three months and three days out of time. The suit was thus untenable. It was irrelevant whether the issue was raised or not.
4. Jurisdiction was everything. Where a court took it upon itself to exercise a jurisdiction which it did not possess, its decision amounted to nothing. Jurisdiction must be acquired before judgment was given. The court below could not proceed as if the Public Authorities Limitation Act did not exist. Any judgment that could have been obtained against the Attorney General would have been a nullity. Fortunately, none was obtained.

5. There was no case made against the 2nd respondent. That was a report by Gatemu Housing Cooperative Society Ltd. The Cooperative Societies Act provided that upon registration, every society shall become a body corporate by the name under which it was registered, with perpetual succession and a common seal, and with power to hold movable and immovable property of every description, to enter into contracts, to sue and be sued and to do all things necessary for the purpose of, or in accordance with, its by-laws. Gatemu Housing Cooperative Society Ltd was a limited liability entity. It was cavalier to sue directors for actions of the society. Even if the elements of malice had been proved, the suit ought to have been against the society.
6. There were four elements that must be proved in the tort of malicious prosecution. These were that; -
    1. a prosecution was instituted by the defendant or by someone for whose acts he was responsible;
    2. the prosecution terminated in the plaintiff's favour;
    3. the prosecution was instituted without reasonable and/or probable cause; and
    4. that the prosecution was actuated by malice.
7. There was no evidence that the prosecution was initiated by the defendants. The same was initiated by auditors from the Ministry of Cooperatives and by Gatemu Cooperative Society. There was no initiation by the 1st and 2nd respondents.
8. Whether the prosecution terminated in favour of the appellant was debatable. The prosecution terminated in favour of the state. As far as prosecution was concerned, the appellant was first found with a case to answer, thereafter convicted and sentenced. That was termination in favour of the State. The acquittal was at the appellate stage. In that level, there was no allegation of malice in defence of the appeal. The High Court gave the appellant the benefit of doubt. However, it found that the same amount of 371,000/= was missing and could be claimed as a civil debt.
9. Acquittal at the appellate stage did not make one innocent. The court was concerned with errors that made the conviction unsafe. Having a case to answer and having the conviction conclusively answered the third limb. There was a probable and reasonable cause. The appellant admitted having been put to civil jail for the same debt. That was not an idle threat but actual loss of Kshs. 371,000. The loss, though it occurred, did not rise to the definite criminal standard.
10. In criminal cases, the standard of proof was beyond reasonable doubt. Proof beyond reasonable doubt needed not reach certainty, but it must carry a high degree of probability. It did not mean proof beyond a shadow of a doubt.
11. There was a probable cause for reporting the loss. The loss was admitted and was admittedly pursued later and recovered as a civil debt. It was only after offering an explanation that the appellate court was able to acquit. Without an explanation, the conviction and sentence would have remained. Being given a benefit of doubt, was not the same thing as being innocent. The explanation was given in the trial. Therefore, once the primary facts were established, the accused bore the evidential burden to provide a reasonable explanation for the elements of the crime. That burden did not relieve the prosecution from proving its case to the required standard.
12. The issues raised regarding Civil Case No. 13 of 2002 had no bearing in the instant matter. There was no property in an opening address. There was no evidence that there was an address given. Even if the same was not recorded, it did not change the evidential threshold. The case was for dismissal even without defence evidence. It was hopelessly pleaded and unmerited *ab initio*.
13. The lower court was not under duty to review and comment on judgment of a superior court. The question before the court was whether there was malice, and the court correctly answered the same. The lower court was not a copy typist. It was not bound to address each and every authority referred. The court could glean through and comment generally on principles.

Appeal dismissed; appellant to bear costs of the parties.

Orders

i. *The appeal lacked merit and was accordingly dismissed with costs of Kshs. 75,000 to the 2nd respondent and Kshs. 75,000 to the Attorney General.*
ii. *The appeal against the 1st respondent was struck out for being a nullity.*
iii. *30 days stay of execution on costs.*
iv. *The file was closed.*

Citations

Cases

Kenya

1. *Gatimu, Elizabeth Waithiegeni v Republic* Criminal Appeal 50 of 2012; [2015] KEHC 1136 (KLR) - (Explained)
2. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] KESC 8 (KLR) - (Explained)
3. *Malingi v Republic* [1988] KLR 225 - (Explained)
4. *Manyange (Deceased) v TG (Minor suing through her mother and next friend WMG)* Civil Appeal E005 of 2022; [2024] KEHC 1083 (KLR) - (Explained)
5. *Mbevo v Mati & 2 others* Petition of Appeal 22 of 2019; [2021] KESC 74 (KLR) - (Explained)
6. *Muangi, Japhet Nzila v Hamisi Juma Malee* Environment & Land Case 71 of 2016; [2022] KEELC 434 (KLR) - (Explained)
7. *Murunga, George Masinde v Attorney-General* Civil Case 17 of 1978; [1979] KEHC 34 (KLR) - (Followed)
8. *Njoroge, Teresia Wanjiku v Republic* Criminal Appeal 70 of 2013; [2013] KEHC 4998 (KLR) - (Applied)
9. *Ombeka, Robert Okeri v Central Bank of Kenya* Civil Appeal 105 of 2007; [2015] KECA 464 (KLR) - (Applied)
10. *Onyango, Maurice Owino v Music Copyright Society of Kenya* Civil Appeal 20 of 2013; [2015] KEHC 8447 (KLR) - (Followed)
11. *Owners of the Motor Vessel "Lillian S v Caltex Oil (Kenya) Ltd* Civil Appeal 50 of 1989; [1989] KECA 48 (KLR) - (Explained)
12. *Paramount Bank Limited v Vaqvi Syed Qamara & another* Civil Appeal 37 of 2016; [2017] KECA 528 (KLR) - (Explained)
13. *Philip Muiruri Ndaruga v Republic* Criminal Appeal 76 of 2012; [2016] KEHC 4252 (KLR) - (Explained)
14. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2014] KESC 31 (KLR) - (Explained)
15. *Raphael, Moses Nato v Republic* Criminal Appeal 169 of 2014; [2015] KECA 787 (KLR) - (Explained)
16. *Roba, Paul Mwita v Republic* Criminal Appeal 200 of 2008; [2010] KECA 381 (KLR) - (Followed)
17. *Tuwei, Robinson Kiplagat v Felix Kipchoge Limo Langat* Civil Appeal 110 of 2019; [2020] KECA 224 (KLR) - (Followed)

United Kingdom

Macfoy v United Africa Co Ltd [1961] 3 All ER 1169 - (Explained)

Regional Court

1. *Mbogo & another v Shah* [1968] EA 93 - (Explained)
2. *Mbowa v East Mengo District Administration* [1972] EA 352 - (Followed)
3. *Peters v Sunday Post Limited* [1958] EA 424 - (Explained)
4. *Selle & another v Associated Motor Board Company & others* [1968] EA 123 - (Explained)

Statutes

Kenya

1. Civil Procedure Act (cap 21) section 27(1)- (Interpreted)
2. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 42 rule 1 - (Interpreted)
3. Court of Appeal Rules, 2010 (cap 9 Sub Leg) rule 88- (Interpreted)
4. Evidence Act (cap 80) sections 47A, 111- (Interpreted)
5. Public Authorities Limitation Act (cap 39) section 3- (Interpreted)

Advocates

Mr Magua for the respondent

JUDGMENT

1. This is an appeal from the Judgment and decree of the Hon M Okuche, given on October 29, 2021 in Nyeri CMCC 304 of 2018. The appellant was the plaintiff in the lower court.

2. The appellant filed an 8 paragraph memorandum of appeal on November 9, 2021 to the effect that:-

    a. The learned trial magistrate misdirected himself in observing that the plaintiff herein had promised to pay the book shortages of Kshs. 371,853.70 only to refuse to comply later which was not the case.

    b. The learned trial magistrate erred in law and fact in not addressing the allegations of spite on the part of the 2nd respondent which made him to open the criminal prosecution – ie the court order to produce audited reports in concurrent civil case 13/2002.

    c. The learned trial magistrate erred in law and fact in not recording my opening address to the court at the hearing of May 18, 2021, which has greatly vitiated my case on malicious prosecution.

    d. The learned trial magistrate erred in law and fact in not addressing the contents of criminal appeal judgment delivered on July 18, 2016 by Judge John Mativo which among other points observed that admission of shortage cannot form the basis of a criminal conviction and also that trial was fatally defective.

    e. The learned trial magistrate erred in law and fact in not considering that the DPP had also observed that I should have been acquitted on both counts because the offences were not proved.

    f. The learned trial magistrate erred in law and fact in not addressing the contents of my authority in the quashed conviction of *Teresia Wanjiku Njoroge v Standard Bank of Kenya Ltd & another*, but only paying attention to the authorities provided by the 2nd and 3rd respondents.

    g. The learned trial magistrate erred in law and fact in not considering the fact that the 2nd defendant participated in exparte trial in CMC 12/2002 using conviction in CMC 2743/07 which landed me to civil jail for 6 months which was against *Evidence Act* section 47(A).

    h. The learned trial magistrate concluded that my case against the 3rd defendant does not hold since the documents in Criminal Case No 2743/07 were destroyed officially by fire, while plaintiff herein has filed those documents as part of evidence.

3. The memorandum of appeal is prolixious and lacks summary and conciseness. It may be due to the fact that the appellant was acting in person. However, this does not remove the duty to comply with order 42 rule 1. This is based on a simple truism that *ignorantia juris non excusat,* ignorance of the

law excuses not. The Court of Appeal had this to say about compliance with Rule 88 of the *Court of Appeal Rules* (which is pari materia with order 42 rule 1 of the *Civil Procedure Rules*) in the case of *Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat* [2020] eKLR: -

> "We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the court. (See *Abdi Ali Dere v Firoz Hussein Tundal & 2 others* [2013] eKLR) and *Nasri Ibrahim v IEBC & 2 others* [2018] eKLR. In the latter case, this court lamented:
>
> > We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J) dated September 19, 2018 raise only two issues..."

4. The gamut of the issues raised in the appeal relate to:
    a. Failure to consider specified evidence and authority.
    b. Failure to deal with destruction of documents by fire.
    c. Failure to find malice and spite.

Pleadings

5. The appellant filed suit on October 29, 2018 against the three respondents. He stated that in the year 2001, the 1st and 2nd respondents were directors of Gatemu Housing Cooperative Society Ltd and initiated Nyeri CMCC 13 of 2002, which they made allegations of misappropriation. They also caused termination of the appellant as a Secretary Manager of Gatemu Housing Cooperative Society Ltd.

6. On September 13, 2007, the appellant was arrested, detained and prosecuted. The prosecution was on September 14, 2007 in Nyeri CMCR 2743 of 2007, on two counts of stealing by servant. The appellant was convicted and fined Kshs 100,000/= in count 1 and Kshs 50,000/= in count 2.

7. The appellant filed Nyeri HCCRA 76 of 2012. After hearing he was acquitted vide a judgment delivered on July 18, 2016, by Mativo J, as he was then.

8. The primary suit, being Nyeri CMCC 304 of 2018 was filed for claiming, *inter alia*, damages for malicious prosecution. A claim for 65,500/= being fees in Nyeri CMCR 2743 of 2007 was laid.

Evidence

9. The appellant adopted a witness statement dated October 26, 2018, which had been filed incorporating almost all elements of the plaint. He indicated that he was relying on judgment in Nyeri Criminal

Appeal No 76 of 2012, bundle of receipts in respect of payment of legal fees, demand and statutory notice to the Attorney General.

10. Unfortunately, the appellant did not include the defence document in the record of appeal. It could be on a mistaken basis that the court will be swayed by the side whose documents are on record. I have perused the same from the lower court file.

11. The 1st and 2nd respondents filed a defence dated 12/9/2019. The respondents stated that it was true that the appellant was sued in MCC No 13 of 2012 by Gatemu Housing Cooperative Society Ltd. It was their case that the appellant was charged with stealing by servant, but they denied being the ones who put in motion or prosecuting him.

12. The 3rd defendant also filed a defence dated 15/03/2019 denying all the allegations in the plaint. The respondents also denied the damages, malicious prosecution and loss of reputation. It was their case that the suit was time barred by dint of the Limitation of Actions Act.

13. The respondents filed a preliminary objection that the suit was time barred. The matter proceeded first by a preliminary objection raised by the 1st and 2nd respondents that the claim is time barred and the court had no jurisdiction. The court dismissed the preliminary objection for failure to file submissions. I do not understand what this means. A preliminary objection is not an application to be dismissed for want of prosecution.

14. Later on January 26, 2021 the court was informed that the 1st respondent is deceased. On September 3, 2021 the case against the 1st respondent was marked as closed, abated and withdrawn. The 1st respondent was Peterson Ndegwa Theuri.

15. For quite some time the parties were engaged in a reed dance. They were not proceeding for one reason or another. The matter delayed with a myriad of letters flowing in all directions. The court below finally heard parties starting from May 18, 2021. The appellant testified and adopted his statement and produced a list of exhibits. It was his evidence that his prosecution was malicious. He had been convicted in both counts and later acquitted by the appellate court *vide* Nyeri HCCRA 76 of 2012 on 18/7/2016. In that case, reported as *Philip Muiruri Ndaruga v Republic* [2016] eKLR, Mativo J posited as doth:

> To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.[16] In 1997, the Supreme Court of Cananda in *R v Lifchus*[17] suggested the following explanation:-
>
> > The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty. .....the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning.

> A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.
>
> Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt....”

In the present case and after carefully considering the defence and prosecution evidence, I find that there were reasonable basis for creating reasonable doubts as to the guilty of the appellant. It is alleged that the circumstances giving rise to the charges in question arose from some audit queries. From the evidence on record, the possibility of the alleged loss (if any) having been caused by poor book keeping methods cannot be ruled out. The basis of the complaint was that a loss or short fall was discovered after auditing was done.

16. The appellant was cross-examined, and stated that he was prosecuted, arrested and detained by the police. The stated court noted that the witness was elusive (evasive?). He stated that the police looked for him because of the report. It was his evidence that he was only an employee. Further, he stated that there were shortages in books of account.

17. DW1 was Herman King’ori. He adopted his statement and stated that in 2002 he was the Secretary of Gatemu Housing Cooperative Society Ltd. On cross-examination he stated that the appellant was the Society’s Manager. According to the witness, the appellant admitted a shortage of Kshs 371,000/ = from the society’s audited accounts as was to be seen from exhibit 3. His case was that the auditors reported the shortage.

18. Subsequently, the police arrested the plaintiff and the appellant was jailed. He stated that the society was not malicious. He stated that it is the court that gave an order for the appellant’s committal to civil jail for 6 months. It was the witness’s testimony that only the appellant explained the shortage of money from Gatemu Housing Cooperative Society Ltd, since it is the appellant who collected and receipted the money by himself. In a nutshell his evidence was that this was not his battle but that of the auditors and or Gatemu Housing Cooperative Society Ltd.

19. On cross examination, the witness stated that there was a promise from the appellant, but the same was verbal. He stated that they took time to report the matter as they were negotiating. He stated that it is the police who called the auditors to testify in the primary case. In re-examination he stated that they noted difficulties in paying rent for Gatemu Housing Cooperative Society and as a result the governing committee called auditors to look into the accounts.

20. It was his case that all the officials were suspected. However, after Investigations were done, the appellant was found culpable and charged. The committee of Gatemu Housing Cooperative Society had beseeched the appellant to pay the amounts, all in vain.

21. DW2 231178 CIP Raymond Malele of the DCIO Nyeri and who was then working as the Deputy Sub-county Criminal Investigations Officer testified that he had been summoned to produce police file 255/396/2007. The same was destroyed as it had become valueless. A certificate of destruction dated March 29, 2021 was issued. He stated that the appellant was charged and convicted by the lower court.

22. On cross examination, he stated that there was evidence to convict the appellant since, the court could not have convicted him without any evidence. He stated that theft occurred in 2007 while charging was later as aforesaid.

23. After submissions the court delivered its judgment which resulted in this appeal. In the impugned decision, the court found as follows:

    a. The case lacked merit.

    b. Ingredients of malicious prosecution were not proved.

    c. The detention was lawful.

    d. The appellantto bear costs of the case.

Submissions

24. The appellant submitted that the appeal is merited. He reiterated the grounds in the memorandum of appeal and submitted that the appeal should be allowed.

25. On his part, the 2nd respondent submitted that appellant had not satisfied the condition to found malicious prosecution on the part of the respondents. On this, it was submitted that the mere fact that conviction was quashed did not render the prosecution malicious. Reliance was placed among others on the case of *Murunga v Attorney General* [1979] KLR 138 and *Robert Okeri Ombeka v Central Bank of Kenya* [2015] eKLR.

26. For the 3rd respondent, it was submitted that the appellant was lawfully arrested and detained. Therefore, it was submitted that the arrest and prosecution was without malice. Reliance was placed in the case of *Maurice Owino Onyango v Music Copyright Society of Kenya* [2015] eKLR to submit that the appellant had not fulfilled the ingredients for malicious prosecution.

Analysis

27. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

28. In the case of *Mbogo & another v Shah* [1968] EA 93 the court stated:

> " ...that this court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

29. The duty of the first appellate court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the *locus classicus* case of *Selle & another v Associated Motor Board Company and others* [1968] EA 123, where the court in their usual gusto, held as follows;-

> " .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

30. The court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

31. In the case of *Peters v Sunday Post Limited* [1958] EA 424, court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

32. The matter before me is fairly straight forward and raises only 2 issues:-

i. Whether the appellant proved his case to the required standards.

ii. Whether the appellant's case is tenable.

33. Before proceeding further, I need to put to bed the issue of the 1st respondent. By dint of an order given on April 13, 2021, the suit against the 1st respondent was withdrawn since he was deceased. The case against him remained withdrawn. The appeal against Peterson Ndegwa Theuri (deceased) is therefore not tenable, having withdrawn the case. Consequently the appeal against the 1st respondent is struck out.

34. An appeal has again been filed against the deceased. It is a nonstarter and void *ab initio*. An appeal against a deceased person is void and nothing can be made to salvage the same. This is even more crucial, where there is no judgment in favour of such a party. In *Macfoy v United Africa Co Ltd* [1961] 3 All ER 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

> " If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

35. The courts have had a chance to deal with such proceedings. In *Japhet Nzila Muangi v Hamisi Juma Malee* [2022] eKLR, Sila J posited as doth:

> 4. The issue was comprehensively addressed by Mbogholi Msagha J (as he then was) in the case of *Viktar Maina Ngunjiri & 4 others v Attorney General & 6 others*, High Court at Nairobi, Civil Suit No 21 of 2016 (2018) eKLR where he reviewed various authorities as follows :-
>
> In the Indian case of *C Muttu v Bharath Match Works* AIR 1964 Kant 293 the court observed,
>
> > If he (defendant) dies before the suit and a suit is brought against him in the name in which he carried on business, the suit is against a dead man and it is a nullity from its inception. The suit being a nullity, the writ of summons issued in the suit by whomsoever accepted is also a nullity. Similarly, an order made in the suit allowing amendment of plaint by substituting the legal representative of the deceased as the defendant and allowing the suit to proceed against him is also a nullity. It is immaterial that the suit was brought bona fide and in ignorance of the death of such a person."

In yet another Indian case of *Pratap Chand Mehta v Chrisna Devi Meuta* AIR 1988 Delhi 267 the court citing another decision observed as follows,

> .....if a suit is filed against a dead person then it is a nullity and we cannot join any legal representative; you cannot even join any other party, because, it is just as if no suit had been filed. On the other hand, if a suit has been filed against a number of persons one of whom happens to be dead when the proceedings were instituted, then the proceedings are not null and void but the court has to strike out the name of the party who has been wrongly joined. If the case has been instituted against a dead person and that person happened to be the only person then the proceedings are a nullity and even order 1 rule 10 or order 6 rule 17 cannot be availed of to bring about amendment."

36. Coming back home, in *Manyange (Deceased) v TG (Minor suing through her mother and next friend WMG)* (Civil Appeal E005 of 2022) [2024] KEHC 1083 (KLR) (7 February 2024) (Ruling), this court stated as doth:

> Further, in *Geeta Bharant Shah & 4 others v Omar Said Mwatayari & another* (2009) eKLR, the Court of Appeal while considering an Appeal over a matter in which the suit was filed against a Defendant who was dead at the time of filing suit stated as follows:"We have anxiously considered the appeal. This is a first appeal. We have no doubt whatsoever that the learned judge, in refusing to allow the application as in favour of the deceased against whom a suit was filed after his demise, was plainly wrong. Indeed, in our view, there was no need for the administrators of the deceased's estate to urge the court to do so for once the respondent also admitted he sued a dead person, the court was duly bound to down its tools as it had no jurisdiction to proceed to hear a suit filed against a person who was already dead by the time the suit was filed. In any event, because the person cited in the plaint as the first defendant was already dead by the time the suit was filed meant that the plaintiff (now first respondent) did not tell the truth when he said in his verifying affidavit that he had read the plaint and verified the facts therein for how could he say that against undisputed fact later discovered that by the time he was saying so, the first defendant was long dead...."
>
> 28. Therefore, the suit was fatally instated against a non-existent person and remained so. *Ipso facto*, the suit was nullity ab initio. It could not be resuscitated by amendment. It could not survive to be substituted. It was dead on filing because something could be placed on nothing and be expected to remain there.

37. The only parties in the lower court were Herman Nderitu King'ori and the Honourable Attorney General.

38. The second aspect is the case against the Attorney General. The acquittal occurred on July 18, 2016. Whether or not it was raised, the suit against the 2nd respondent [Attorney General] is suit against government. Under Section 3 of the *Public Authority Limitation Act*, cap. 39, such a suit must be brought within 1 year, that is before July 18, 2017. The suit was brought on October 21, 2018 being 1 year 3 months and 3 days out of time. The suit is thus untenable. It is irrelevant whether the issue was raised or not.

39. Jurisdiction is everything. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given. In *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR the court stated follows: -

> "Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:
>
> > By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given"

40. Further, the court below cannot proceed as if the *Public Authority Limitation Act* does not exist. Any judgment that could have been obtained against the Attorney General was a nullity. Fortunately none was obtained.

41. Addressing the issue of jurisdiction, the Supreme Court in *SK Macharia* posited that the court cannot clothe itself with jurisdiction by craft.

42. Thirdly, there was no case made against Herman King'ori. This was a report by Gatemu Housing Cooperative Society Ltd. The Cooperative Societies Act provides as follows regarding liability of its directors:

> Upon registration, every society shall become a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to hold movable and immovable property of every description, to enter into contracts, to sue and be sued and to do all things necessary for the purpose of, or in accordance with, its by-laws.

43. This is a limited liability entity. It is cavalier to sue directors for actions of the society. Even if the elements of malice had been proved, the suit ought to have been against the society.

44. In discerning the lawfulness of the arrest and malicious prosecution, the elements to be proved in an action for malicious prosecution are well settled. The law guiding the tort of malicious prosecution is

well settled in this country. In *Mbowa v East Mengo District Administration* [1972] EA 352, the East African Court of Appeal expressed itself as follows:

> "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."

45. Further in this regard, proof that the criminal proceedings have been determined in the appellant's favour is enough even where criminal proceedings have been terminated without being brought to a

formal end. In *Paramount Bank Limited v Vaqvi Syed Qamara & another* [2017] eKLR (Makhandia, Ouko and MÍnoti JJA), stated:

> The favourable termination requirement of criminal charges may be satisfied in various ways depending on how the proceedings are concluded in favour of the accused person. For instance, by acquittal, a discharge or a withdrawal.
>
> Courts in this jurisdiction have relied, over the years on the following passage from the case of *Egbema v West Nile Administration* [1972] EA 60 for the foregoing proposition;
>
> > 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..."
>
> Although the withdrawal of a charge under section 87 is technically not on acquittal and does not operate as a bar to subsequent proceedings against an accused person on account of the same facts, guided by the foregoing holding, we note in this appeal that five years after the charges were withdrawn on July 30, 2012, ostensibly pending the arrest of Lawrence Atieno, no fresh charges have been preferred against the 1st respondent. There was no indication whether Lawrence Atieno was ever arrested and charged. The discharge of the respondent, therefore amounted to a termination of the prosecution in his favour.

46. Therefore, it is the state of mind of one commencing the arrest or imprisonment and not the actual fact of the case or the guily or innocence of the accused which is at issue. In *Robert Okeri Ombeka v Central Bank of Kenya* [2015] eKLR it was held as follows:

> ... a malicious prosecution plaintiff cannot establish a lack of probable cause of action based on having obtained in an earlier action an acquittal based on insufficiency of evidence... It is the state of mind of one commencing the arrest or imprisonment and not the actual fact of the case or the guilty or innocence of the accused which is at issue.

47. On merit thus, there are four elements that must be proved in the tort of malicious prosecution. These were set out in the case of *Murunga v Attorney General* (1976-1980) KLR 1251 where Cotran J set them out as follows: -

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

ii. That the prosecution terminated in the plaintiff's favour.

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

iv That the prosecution was actuated by malice.

48. The court found that the appellant proved the first and second limbs. From re-evaluation of evidence, I do not see any evidence that the prosecution was initiated by the defendants. The same was initiated by auditors from the Ministry of Cooperatives and by Gatemu Cooperative Society. There was no initiation by the late Theuri or Herman Ndiritu Kingori.

49. Thirdly, the issue whether the prosecution terminated in favour of the appellant is debatable. The prosecution terminated in favour of the state. As far as prosecution was concerned, the appellant was

first found with a case to answer, thereafter convicted and sentenced. This is termination in favour of the State. The acquittal was at the appellate stage. In that level, there was no allegation of malice in defence of the appeal. The High Court gave the appellant the benefit of doubt. However, it found that the same amount of 371,000/= was missing and could be claimed as a civil debt.

50. Acquittal at the appellate stage does not make one innocent. The court is concerned with errors that make the conviction unsafe. It must then be remembered that having the case to answer and having the conviction conclusively answered the third limb. There was a probable and reasonable cause. The Appellant admitted having been put to civil jail for the same debt. This was not an idle threat but actual loss of Kshs 371,000/=. This court in its wisdom found that the loss, though it occurred, did not arise to the definite criminal standard.

51. In criminal cases, the standard of proof is beyond reasonable doubt and it was due to this that Mativo, J (as he then was) in *Elizabeth Waithiegeni Gatimu v Republic* [2015] eKLR expressed himself as hereunder:

> "To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty...Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favorite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge."

52. Proof beyond reasonable doubt need not reach certainty, but it must carry a high degree of probability. Also, it does not mean proof beyond the shadow of a doubt. The Court of Appeal in *Moses Nato Raphael v Republic* [2015] eKLR stated as doth:

> "What then amounts to "reasonable doubt"? This issue was addressed by Lord Denning in *Miller v Ministry of Pensions*, [1947] 2 All ER 372 where he stated:-'That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.'"

53. Nevertheless, there was a probable cause for reporting the loss. This loss is admitted and was admittedly pursued later and recovered as a civil debt. It is only after offering an explanation that the appellate court was able to acquit. Without explanation, the conviction and sentence would have remained. Being given a benefit of doubt, is not the same thing as being innocent. The explanation was given in the trial.

54. Therefore, once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for the elements of the crime. This burden is evidential only and does not relieve the prosecution from proving its case to the required standard. That explanation need only be plausible. In *Malingi v Republic* [1988] KLR 225. In *Paul Mwita Robi v Republic* KSM Criminal Appeal No 200 of 2008, the Court of Appeal observed that;

> Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is (sic) especially within the knowledge of the accused and pursuant to the provisions of section 111 of the *Evidence Act* Chapter 80, the accused has to discharge that burden.

55. Turning to the appeal, the issues raised regarding Civil Case No 13 of 2002 have no bearing in this matter. There is no property in an opening address. There is no evidence that there was given an address. Even if the same was not recorded, it does not change the evidential threshold, which in this case is scanty. The case was for dismissal even without defence evidence. It was hopelessly pleaded and unmerited ab initio.

56. The lower court was not under duty to review and comment on judgment of a superior court. The question before the court was whether there was malice, and the court correctly answered the same.

57. The lower court is not a copy typist. It is not bound to address each and every authority referred. The court can glean through and comment generally on principles. In any case the case of *Teresiah Wanjiku Njoroge v AG* is not *pari materia* with the case herein.

58. The case against the respondents was totally weak. I have to save the same from the ignominy of its own incompetence and patent lack of merit. There is nothing raised in the entire appeal. This appeal calls for and is entitled to be dismissed as it lacks merit and in any case is unfounded.

59. Costs follow the event. Section 27(1) of the *Civil Procedure Act* provides as doth:

> Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:
>
> > Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
> >
> > (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

60. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, SC Petition No 4 of 2012; [2014] eKLR, as follows: -

(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this court in other cases.

61. In this case, the appellant filed a totally unnecessary appeal. The appeal against the Attorney General was time barred. The appeal against Herman Ndiritu Ndegwa had no basis, since the dispute was with Gatemu Housing Cooperative Society Ltd. It follows that the appellant should bear costs of the parties.

62. The Supreme Court recently posited that even a split margin victory is victory. It stated as follows in *Baridi Felix Mbevo v Musee Mati*, Petition of Appeal No 22 of 2019 [Mwilu; DCJ & VP, Ibrahim, Wanjala, Njoki, & Lenaola, SCJJ]

> Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this court in other cases.

63. In the circumstance, costs of Kshs 75,000/= for Herman Ndiritu King'ori and 75,000/= for the Hon Attorney General shall suffice.

Determination

a. The appeal herein lacks merit and is accordingly dismissed with costs of Kshs 75,000/= to Herman Ndiritu King'ori and Kshs 75,000/= to the Hon Attorney General.

b. The appeal against Peterson Ndegwa Theuri (deceased) is struck out for being a nullity.

c. 30 days stay of execution on costs.

d. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 14TH DAY OF NOVEMBER, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance the appellant

Mr. Magua for the respondent

Court Assistant – Jedidah

M. D. KIZITO, J.