REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 119 OF 2016

TIMOTHY MULILI NGUUTU..APPELANT

VERSUS

COSMAS MUENDO...1ST RESPONDENT

ATTORNEY GENERAL.......................................2ND RESPONDENT

(Appeal from the judgment of the Machakos Principal Magistrate Honourable C. A. Ocharo dated 22nd September, 2016 in civil suit No. 403 of 2009)

BETWEEN

TIMOTHY MULILI NGUUTU...PLAINTIFF

VERSUS

COSMAS MUEDO...1ST RESPODENT

ATTORNEY GENERAL..2ND DEFENDANT

JUDGEMENT

1. The Appellant herein who was the Plaintiff in the lower court, by a plaint dated 2nd April, 2009 filed the same day, sued the Respondents herein, as Defendants for general damages, special damages and interests arising from the torts of unlawful arrest, confinement and malicious prosecution.

2. According to the Plaintiff, on or about 26th December, 1998, the 1st Respondent made a false and malicious report to the Police at Makueni Police Station to the effect that the Appellant had on 25th December, 1998 forcefully detained plot No. Nzaui/Nziu/193 (hereinafter referred to as the suit property) contrary to section 91 of the ***Penal Code***.

3. It was further pleaded that without conducting thorough investigations to establish the truth and validity or otherwise of the said false report, the police wrongfully and unlawfully arrested the plaintiff and charged him with, inter alia, the offence of forcible detained contrary to section 91 of the ***Penal Code*** in the Resident Magistrate's Court, Makueni, and later before the Resident Magistrate's Criminal Case No. 13 of 1999. As a result, the Appellant pleaded that he was held in police cells on the 26th December, 1999 and later released on cash bail whereby he was subjected to rigorous and malicious prosecution and sentenced after conviction. On appeal, this Court in Criminal Appeal No. 158 of 2003 found him innocent and the said conviction was quashed and the said sentence set aside on 3rd April, 2008.

4. According to the Appellant during the said trial, which lasted 10 years, he incurred loss in transport and expenses in seeking legal representation and claimed damages.

5. It was pleaded that the said unlawful arrest, confinement and malicious prosecution were actuated by malice on the part of the Respondents.

6. On 17th July, 2009, interlocutory judgement was entered against the 1st Respondent for failing to appear and file his defence.

7. On his part the 2nd Respondent filed his statement of defence in which he denied the allegations made by the Appellant but contended in the alternative that if the Appellant was arrested and prosecuted, then it was based on reasonable belief that the Appellant had committed an offence and there was sufficient and probable cause hence the 2nd Respondent was not actuated by malice on his part or his agents.

8. It was further pleaded that the suit was bad in law, incurably defective and incompetent as it offended the mandatory provisions of section 13A of the ***Government Proceedings Act***, Cap 40 Laws of Kenya.

9. In his statement which he adopted as part of his examination in chief, the Appellant stated that on 26th December, 1998, the 1st Respondent falsely and maliciously reported to Makueni Police Station that he had forcefully detained the suit property and as a result he was arrested. According to the Appellant he had at no given time detained the said property since he was occupying Plot No. Nzaui/Nziu/195 which was a family land.

10. Upon receipt of the said report the police without conduction thorough investigations to establish the truth and validity or otherwise of the said false report, arrested him and he was subsequently charged with the offence of forcible detainer contrary to section 91 of the ***Penal Code*** in the Resident Magistrate's Court, Makueni, and later before the Machakos Resident Magistrate's Court. He was convicted of the said offence and sentenced to pay fine of Kshs 5,000/- or serve 6 months in prison. While he paid the said fine, he nevertheless appealed against the said decision in Machakos High Court Criminal Appeal No. 158 of 2003. The said Court found him innocent, quashed the conviction and set aside the sentence on 3rd April, 2008.

11. According to the According to the Appellant, all that he went through was due to malice on the part of the Respondents.

12. He lamented that he was subjected to rigorous and malicious prosecution and during the said trial, and incurred loss in both transport when attending court and in seeking legal representation for which he spent a total of Kshs 111,500/-. The 1st Respondent further, in execution of the trial court's judgement, burnt down his house and destroyed his trees on 8th April, 2004 under the supervision of the OCS Makueni.

13. As a result of the foregoing, the Appellant stated that he suffered loss hence his relief for general damages as well as special damages in the sum of Kshs 111,500/- plus costs and interests.

14. The Appellant also relied on the documents which were filed with his pleadings.

15. In his oral evidence, the Appellant while reiterating the contents of his statement, exhibited the proceedings in the criminal trial, the two judgements of the trail court and the appellate court, the eviction order and the advocate's receipt. He disclosed that the 1st Respondent was his neighbour and that they were sharing a boundary. According to him, the trial took 10 years for charges which were not true and the 1st Respondent had no basis for preferring the said charges. It was his evidence that his plot was no. 195 which was a family land and he exhibited a copy of the title. Pursuant to the said eviction order, police officers from Makueni entered his farm, burnt down his house and cut down 150 trees and banana plantation and he exhibited photographs to prove this fact.

16. The Appellant insisted that the police did not conduct any investigations after receiving the report but hurriedly arrested him and maliciously prosecuted him. He therefore sought compensation for damages for unlawful arrest, detention and malicious prosecution as well as damages for loss of property and legal fees paid to his advocates. He also sought costs of the suit and interests.

17. Since the 2nd defendant was not resent on the day of hearing both the Appellant and the Respondents' cases were closed at that point.

18. In her judgement, the learned trial magistrate noted that the appeal against the Appellant's conviction was allowed solely on the ground that the officer who prosecuted the Appellant, a police constable, had no capacity to do so. In view of the trial magistrate, this finding would not render prosecution of an accused person malicious in any way, or a declaration that his arrest and detention was unlawful.

19. After considering the criminal proceedings before the trial court, the learned trial magistrate found that the Appellant was rightly arrested, prosecuted and convicted save for the competency of the prosecutor. It was her view that there was a reasonable cause for the Appellant to have made a report to the police and it was the duty of the police to do their work by conducting proper investigations to make a finding that there was sufficient cause to charge the Appellant with a criminal offence. In her judgement, proper investigations were conducted and the trial ensued and the Appellant was found guilty and convicted. She therefore did not find any malice on the part of the Respondents. In arriving at her decision, the learned trial magistrate relied on **James Karuga Kiiru vs. Joseph Mwamburi & 3 Others NRB CA No. 171 of 2000** as well as **Murunga vs. AG [1979] KLR 138** and found that the Appellant failed to prove his case on a balance of probabilities. She proceeded to dismiss the claim with costs to the 2nd Respondent. She also set aside the interlocutory judgement against the 1st Respondent.

Appellant's Submissions

20. On behalf of the Appellant, it has been submitted that the 1st respondent acted maliciously by making a false report to the police concerning the appellant knowing such report to be false. He (1st respondent) went further to gather people purporting to be witnesses, giving false testimony and stating that the appellant committed the criminal offences. The 2nd respondent, it was submitted, arrested and detained the appellant in police cells when there was no legal and valid reason to do so and charged the appellant in court without conducting proper and sound investigation into the allegation s/purported report made to the 2nd respondent by the 1st respondent. In support of the submissions, the Appellant relied on the case of **Mbowa vs. East Mengo District Administration [1972] EA 352**,

21. It was submitted that the two respondents were actively instrumental in setting the law in motion and they are accountable for any damage that arose. As regards the acquittal, it was submitted that the favourable termination requirement may be satisfied no matter the route by which the proceedings conclude in the plaintiff's favour, whether it was an acquittal, a discharge at a preliminary hearing, a withdrawal or a stay. In this case since the appellant was acquitted of the offence he had been charged with. This is evidence that the prosecution terminated in the plaintiff's favour.

22. As for malice, it was submitted that the appellant was a beneficiary to the late father's estate and the plot that was alleged to have been fraudulently transferred to him was indeed transferred to him by his late father on 5/9/1992. Therefore, it was submitted that the 1st respondent acted with malice in the making a complaint to the 2nd respondent over the said transfer yet it was well within his knowledge that indeed the plot belonged to the appellant. It was submitted that the 2nd respondent (the Attorney General) did not consider the credibility of the report made to them by the 1st respondent and went ahead and arrested and charged the appellant. In the Appellant's view, the 2nd respondent ought to have acted on reasonable credible information that an ordinary reasonable prudent and cautious man could honestly believe to be substantially true and to afford a strong basis for persecution. It was noted that the second respondent did not tell the court on how the decision to arrest and charge the appellant was arrived at.

23. It was therefore submitted that the appellant was clearly entitled to an award of damages for malicious prosecution. According to the Appellant, the defendant was arrested and charged, he was in custody for two days at Makueni Police Station where he was subjected to harsh conditions and treatment for days. However, the trial court in assessing damages did not take into account relevant factors as amounting to malicious prosecution and its finding is not based on evidence.

24. This court was urged to consider the evidence adduced and find the 1st and 2nd respondent to have committed malice in prosecuting the appellant.

2nd Respondent's Submissions

25. On behalf of the 2nd Respondent, it was submitted that following a complaint and information made by the first respondent that the appellant had encroached on his land, after investigations the appellant was arrested and charged. Based on the case of ***Kagane and Others versus the Attorney General (1969) E.A 643*** it was submitted that in this case it is true that the prosecution was instituted by a police officer. However, from the documents filed by the plaintiff, the criminal case was not in favour of the plaintiff as he was found to have a case to answer by the lower court and he was put to his defence and subsequently convicted hence the case was proved beyond reasonable doubt to warrant the court to convict the accused. It was submitted that the appellant was not acquitted the appeal was allowed on a technicality hence at the criminal appeal no proceedings ever took place.

26. According to the 2nd Respondent, this was a boundary dispute, at the lower court experts in the land sector did testify. A land surveyor visited the site twice and confirmed indeed the appellant had crossed onto the land belonging to the 2nd respondent. Further the district land registrar produced in court the original map of the area which clearly showed that the appellant was on the wrong hence the conviction. Four other witnesses testified against the appellant.

27. As regards the issue whether the prosecution was instituted without a reasonable and probable cause, the 2nd Respondent relied on the case of **Kagane versus Attorney General (1969) E.A 643** for the holding that reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, reasonably lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed. According to the 2nd Respondent, if the material known to the prosecutor 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. If a prudent and cautious man would not have been satisfied that there was a proper case put before the Court, then absence of reasonable and probable cause has been established. On the other hand, if a prudent and cautious man would believe that the accused was guilty then the Court has to consider the further question as to whether the prosecutor himself did not believe in the probable guilt of the accused, and this is obviously a matter which is to be judged by a subjective test. However, this subjective test should only be applied where there is some evidence that the prosecutor himself did not honestly believe in the truth of the prosecution.

28. It was therefore submitted that the information relayed to the police officers by the 1st respondent, believing it to be credible was enough to satisfy a prudent and cautious man that the Plaintiff was guilty of the offence and hence the reason he was charged. In support of his submissions, the 2nd Respondent relied on **James Karuga Kiiru vs. Joseph Mwamburi & 2 Others Civil Appeal No. 171 of 2000.**

29. As regards malice, it was submitted that lack of reasonable and probable cause cannot be relied upon by itself to show malice and that the appellant must proof malice in fact in which he has failed to prove. In his view, there is no evidence by the appellant from which malice either by spite or ill-will or by indirect or improper motive has been adduced. To the 2nd Respondent, the prosecution was not motivated by something more than a desire to vindicate justice. He relied on the case of **Katerrega vs. Attorney General (1973) E.A 289.**

30. In this case it was submitted that the police had good intentions and that they were only performing their duties when the 2nd respondent decided to investigate the allegations made against the appellant. The 2nd respondent, it was contended, preferred charges against the appellant because he had reasons to believe that the offence that the Plaintiff had committed was one which could be tried in a Court of law. Notably, the appellant did not adduce any evidence to show that the 2nd respondent in discharging his duties was actuated either by spite or ill-will or by indirect or improper motives. As such, the 2nd respondent submitted that the report made to the police was genuine and that the police while believing it to be true went ahead and charged the Plaintiff. Accordingly, the police were only doing their duties and that they were not actuated by spite or ill-will. In this regard the 2nd Respondent relied on the decision of the Alberta Court of Queen's Bench, in **Chopra vs. T. Eaton Co**. that: -

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

31. According to the 2nd Respondent, malice is not a matter of general feelings but a hard truth that needs to be proved by facts to support such arguments. Supporting or entertaining all matters of criminal nature where matters have been acquitted by court to be treated as malicious prosecution would be punitive to the police officers and the department as a whole making them shy away from making arrests and detention which in the long run will lead to miscarriage of justice. Since the appellant in this case has failed to show malice on the side of the police officers, the same can only be set as mere allegation without prove. It was therefore submitted that that the police only performed their statutory obligation in arresting and prosecuting the appellant and hence should not be held at ransom for performing their duty.

32. As regards damages, it was submitted that it is trite law that damages must be pleaded and proved. With respect to special damages, it was submitted that the appellant is not entitled to a single Cent in the special damages he has prayed for in the plaint amounting to Kshs. 111,500.00 since there is no proof. Secondly the appellant was found guilty by the lower court ant only was acquitted on a technicality.

33. In support of this submission the 2nd Respondent relied on **H*ahn vs. Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716***, and **Christine Mwigina Akonya vs. Samuel Kairu Chege [2017] eKLR**. Based on the case of **Devram Manji Daltani vs. Danda (1949) 16 EACA 35, *and* Alexander – Tryphon Dembeniotis vs Central Africa Co. Ltd (1967) EA 310** it was submitted that the matter is before the court due to the actions of the appellant and that this matter would have been avoided altogether. The 2nd Respondent urged the Court to dismiss the appeal with costs.

Determination

34. I have considered the issues raised in this appeal. Before dealing with the appeal, in her judgement, the learned trial magistrate, at the tail end of the judgement, purported to have set aside the interlocutory judgement that was entered against the 1st Respondent. There, however, was no application to have the same set aside. The position as regards liability where an interlocutory judgement has been entered is now clear.

35. In **Charles Ogendo Ayieko vs. Enoch Elisha Mwanyumba Mombasa HCCC No. 1035 of 1983**, the Court held that:

> "Where an ex parte interlocutory judgement has already been entered against the defendant the Court does not have to decide on the question of liability."

36. The reason for that, according to the Court of Appeal in **Makala Mailu Mumende vs. Nyali Gulf & Country Club Civil Appeal No. 16 of 1989 [1991] KLR 13** is that that:

> "Judgement in default of appearance presupposes that there is a cause of action…The judge cannot set aside a Judgement without an application before him, as he has no jurisdiction to do so…Justice though must be done to both parties must be done in accordance with the law…Where judgement is entered in default liability is admitted and the Court must proceed to assess damages.

37. This was echoed in **Julius Murungi Murianki vs. Equitorial Services Ltd. & Another Nairobi HCCC No. 2714 of 1988** where it was held that:

> "The defendants herein filed no defence and they are deemed to have admitted the facts complained of under Order 6 rule 9(1) of the Civil Procedure Rules since failure to file a defence operates as an admission of all the allegations in the plaint except damages."

38. That decision was based on the decision in **Cleaver-Hume vs. British Tutorial College (Africa) Ltd [1975] EA 323** to the effect that:

> "The effect of Order 6 rule 9 (which deems to be admitted pleadings not traversed) is to ensure that the parties are ultimately, but definitely, brought to an issue, and that at the close of the pleadings the issues between the parties are clearly and precisely defined. Thus if no defence is served in answer to the statement of claim or no defence to counterclaim is served in answer to the counterclaim, there is no issue between the parties; the allegations of fact made in the statement of claim or counterclaim are deemed to be admitted and the plaintiff or defendant, as the case may be, may enter, or apply for, judgement in default of pleading…A failure to file a defence must now be regarded, save as to damage, as an admission of each of the allegations in the plaint. This is a far-reaching provision which should reduce in some measure the expense and delays in undefended suits."

39. What these decisions state is that once a default judgement is entered, the issue of liability is also determined and the only issue for determination is quantum of damages, if any. The Court cannot either ignore the fact of the said judgement or purport to *suo moto* set it aside after hearing evidence on quantum and then proceed to dismiss the suit against the defaulting party as the learned trial magistrate respectfully did. Accordingly, as far as the 1st Respondent was concerned liability against him was a foregone conclusion.

40. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

> **"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not**

bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

41. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

42. On the power to interfere with factual findings of the trial court, it was therefore held by the then East African Court of Appeal in **Ramjibhai vs. Rattan Singh S/O Nagina Singh [1953] 1 EACA 71** that:

> **"This Court will not disturb a finding of a trial Judge merely because of an irregularity in the format of the judgement if it thinks that the evidence on the record supports the decision."**

43. However, in **Peters vs. Sunday Post Limited [1958] EA 424**, it was held that:

> **"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given…Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question…It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."**

44. It was therefore held by the Court of Appeal in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** that:

> **"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

45 In this case, it is clear that the issue to be resolved is whether the appellant, based on the evidence presented before the Trial Court proved his case. Section 107(1) of the ***Evidence Act***, Cap 80 Laws of Kenya provides that:

> ***Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

46. This is called the legal burden of proof. There is however evidential burden of proof which is captured in sections 109 and 112 of the same Act as follows:

> ***109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.***
>
> ***112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.***

47. The two provisions were dealt with in **Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334,** in which the Court of Appeal held that:

> **"As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden**

that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act."

48. It follows that the initial burden of proof lies on the plaintiff, the appellant in this appeal, but the same may shift to the defendants, the respondents in this case depending on the circumstances of the case.

49. In **Evans Nyakwana vs. Cleophas Bwana Ongaro [2015] eKLR** it was held that:

> **"As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore the evidential burden … is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person…The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side."**

50. The question then is what amounts to proof on a balance of probabilities. **Kimaru, J** in **William Kabogo Gitau vs. George Thuo & 2 Others** [2010] 1 KLR 526 stated that:

> **"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."**

51. Therefore, the Plaintiff, the Appellant in this appeal, had the duty of proving the aforesaid facts even if the Respondents chose to remain silent. In other words, the silence of a defendant does not necessarily boost the Plaintiff's Case and if despite the Defendant's silence, the ingredients necessary to prove the Plaintiff's case are lacking the Court still dismiss the suit. The failure of the defendant to testify only means that the Plaintiff's evidence remains unrebutted hence is deemed to be true but that is not the same thing as saying that that truthfully deemed evidence necessarily satisfied the standard of proof. In **Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR**, the judges of Appeal held that:

> **"Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say;-**
>
> > **"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties…are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."**

52. It was therefore held by **Ringera, J** (as he then was) in **Gandhi Brothers vs. H K Njage T/A H K Enterprises Nairobi (Milimani) HCCC No. 1330 of 2001**, that in those circumstances the Court is constrained to decide the matter on the basis of fundamental rule of evidence, which is codified in section 3 of the ***Evidence Act*** Cap. 80 Laws of Kenya that a fact is not proved if it is neither proved nor disproved. It is therefore not proved.

53. In this case the claim arose from the tort of wrongful arrest, unlawful confinement and malicious prosecution. In such matter the following are the issues that fall for determination in this suit:

1. **Whether the criminal proceedings were instituted by the defendant.**
2. **Whether the said prosecution was actuated by malice.**
3. **Whether there was reasonable cause and/or justification to make the complaint to the police.**
4. **Whether the criminal proceedings terminated in the plaintiff's favour.**
5. **Whether the defendant is liable to compensate the plaintiffs and if so what should be the award of damages.**
6. **Who should bear the costs of the suit?**

54. The law guiding the tort of malicious prosecution is well settled in this country. In **Mbowa vs. 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".

55. In **Egbema vs. West Nile Administration [1972] EA 60**, the same Court held:

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

56. In **Gitau vs. Attorney General [1990] KLR 13**, **Trainor, J** had this to say:

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

57. In **James Karuga Kiiru –vs- Joseph Mwamburi and 3 Others, Nrb C.A No. 171 of 2000,** the court held:

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

58. **Rudd, J** in **Kagane vs. Attorney General (1969) EA 643,** set the test for reasonable and probable cause. Citing **Hicks vs. Faulkner [1878] 8 QBD 167 at 171**, **Herniman vs. Smith [1938] AC 305** and **Glinski vs. McIver [1962] AC 726** the learned judge stated thus:

> **"Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed...Excluding cases where the basis for the prosecution is alleged to be wholly fabricated**

> **by the prosecutor, in which the sole issue is whether the case for the prosecution was fabricated or not, the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of objective test. That is to say, to constitute reasonable and probable cause the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material consisted of facts discovered by the prosecutor or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty. If and insofar as that material is based on information, the information must be reasonably credible, such that an ordinary reasonable prudent and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for the prosecution...If it is shown to the satisfaction of the judge that a reasonable prudent and cautious man would not have been satisfied that there was a proper case to put before the court, then absence of reasonable and probable cause has been established. If on the other hand the judge considers that prima facie there was enough to justify a belief in an ordinary reasonable prudent and cautious man that the accused was probably guilty then although this would amount to what I call primary reasonable and probable cause the judge may have to consider the further question as to whether the prosecutor himself did not believe in the probable guilt of the accused, and this is obviously a matter which is to be judges by a subjective test. This subjective test should only be applied where there is some evidence that the prosecutor himself did not honestly believe in the truth of the prosecution...Inasmuch as this subjective test only comes into operation when there were circumstances in the knowledge of the prosecutor capable of amounting to reasonable and probable cause, the subjective test does not arise where the reason alleged as showing absence of reasonable and probable cause is merely the flimsiness of the prosecution case or the inherent unreliability of the information on which the case was based, because this is a matter for the judge alone when applying the objective test of the reasonable prudent and cautious man. Consequently the subjective test should only be applied where there is some evidence directly tending to show that the prosecutor did not believe in the truth of his case. Such evidence could be afforded by words or letters or conduct on the part of the prosecutor which tended to show that he did not believe in his case, as for example a failure or reluctance to bring it to trial, a statement that he did not believe in it and, I think possibly, an unexplained failure to call an essential witness who provided a basic part of the information upon which the prosecution was based."**

59. As to what constitutes reasonable and probable cause, the law is clearly restated in **Simba vs. Wambari [1987] KLR 601** as follows:

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

60. The foregoing, in my considered view set out the law and the conditions to be satisfied in order for a plaintiff to succeed in his claim.

61. On the first issue whether the criminal proceedings were instituted by the Respondents there is no dispute that the said proceedings were instituted by the 2nd Respondent as a result of a complaint made by the 1st Respondent. Accordingly, there is no question that the 2nd Respondent did prosecute the Appellant.

62. With respect to the second issue whether the making of the said report was malicious, the law is clear that the mere fact that a person has been acquitted of the criminal charge does not necessarily connote malice on the part of the prosecutor. As was held in **James Karuga Kiiru vs. Joseph Mwamburi and 3 Others, Nrb C.A No. 171 of 2000,** to prosecute a person is not *prima facie* tortuous, but to do so dishonestly or unreasonably is, the burden of proving that the prosecutor did not act honestly or reasonably being on the person prosecuted. Malice, however, can either be express or can be gathered from the circumstances surrounding the prosecution. A prosecution can either be mounted based on an offence committed in the presence of law enforcement officers or by way of a complaint lodged by a person to the said officers or agencies.

63. In his evidence the Appellant's case, as regards the 2nd Respondent's liability, is premised on the ground that the police did not conduct thorough investigations to establish the truth and validity or otherwise of the said false report made by the 1st Respondent.

64. The law as I understand it is that the police are expected to be professional in the conduct of their investigations and ought not to be driven by malice or other collateral considerations. However, the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words, the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. I say ordinarily because the mere fact that the version of one of the parties is not considered does not make the subsequent prosecution malicious. However, where the police deliberately decide not to take into account the version of the suspect and acts on a story that eventually turn out to be improbable and which no ordinary prudent and cautious man would have relied upon that failure may constitute lack of reasonable and probable cause for the purposes of malicious prosecution. On the other hand, it would be obviously absurd to make a defendant liable because matters of which he was not aware put a different complexion upon facts, which in themselves appeared a good case for prosecution. But neglect to make a reasonable use of the sources of information available before instituting proceedings would be evidence of want of reasonable and probable cause and also malice.

65. It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but whether there is a reasonable and probable case for a prosecution. Circumstances may exist in which it is right before charging a man with misconduct to ask for an explanation but no general rule can be laid down. In the present case as already held hereinabove the circumstances from which the court can deduce that the arrest and arraignment of the plaintiff was probably justified have not been disclosed to the court. Was for example the plaintiff's version sought with regard to the complaints, if any, made against him? In my view, adopting an equivocal approach to investigations by deliberately denying a suspect an opportunity to put forward his version before a person is arraigned in court surely amounts to maladministration of justice. Similarly, where exculpatory evidence is presented to the police in the course of investigation and for some reasons unknown to them they deliberately decide to ignore the same one may be justified in concluding that the police are driven by collateral considerations other than genuine vindication of the criminal judicial process. Neglect to

make a reasonable use of the sources of information available before instituting proceedings may therefore be evidence of malice and hence abuse of discretion and power.

66. In this case, it is clear from the criminal proceedings that provoked this litigation that the dispute was a boundary dispute and before the trial court witnesses including expert witnesses were called by the prosecution. According to the 1st Respondent when he found that his boundary with the Appellant, which was placed by the land registrar was uprooted, he reported the matter to the chief and as a result, the Appellant was arrested. He was convicted and fine Kshs 2000/-. However, he once again returned to the said land and started construction a house therein and it was then that the 1st Respondent reported the matter to the police and the Appellant was again arrested.

67. A land surveyor, PW1, visited the site twice and confirmed indeed the appellant had crossed onto the land belonging to the 1st respondent where he had put his structure. It was as a result of this finding that he recorded his statement with the police. Further the district land registrar produced in court the original map of the area which seemed to show that the appellant was on the wrong hence the conviction. Apart from him there were other witnesses who corroborated the 1st Respondent's case.

68. PW5, a police officer, on the other hand testified that a report of interference with demarcated boundary regarding the case was received at Makueni Police Station. Upon receipt of the said report he proceeded in company of the 1st Respondent and other officers to the scene and found the Appellant cultivating on the land on which he had erected a house. They apprehended him and took him to the police station after which he was charged upon further investigations being conducted.

69. The trial court itself visited the locus in quo and noted for itself the position on the ground.

70. The Appellant was not only found to have a case to answer but even after he was given the opportunity to testify, the trial court found that the case against him had been proved beyond reasonable doubt and he was convicted accordingly. His appeal to the High Court was however determined on the single ground that the officer who conducted the prosecution case was not competent to do so. While that was a finding in favour of the Appellant, that is not evidence that the conduct of the police officers was malicious or that there were no reasonable grounds for undertaking the prosecution.

71. Reasonable and probable cause has been defined to mean the existence of facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified. As was said in **Kagame's Case** (supra) reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed which the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of objective test. To constitute reasonable and probable cause therefore the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material consisted of facts discovered by the prosecutor or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty. If and insofar as that material is based on information, the information must be reasonably credible, such that an ordinary reasonable prudent and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for the prosecution.

72. I have considered the evidence adduced before the trial court and based thereon, there is no basis upon which I can find that the action of the police was actuated by malice. The police did undertake investigations secured witnesses both eye witnesses and expert witnesses and based on their statements preferred the charges against the Appellant. The trial court considered the evidence before it and not only placed the Appellant on his defence but eventually convicted him. That conviction was not set aside on its merits but on technicality. As already stated hereinabove the mere fact that an accused is acquitted does not connote malice or lack of reasonable grounds for preferring the criminal charges. In the case of **Katerrega vs. Attorney General (1973) E.A 289** the Court observed that:

> **"It is well established that in a claim for damages for malicious prosecution, malice in fact must be proved showing that the person instituting the proceedings was actuated either by spite or ill-will or by indirect or improper motives."**

73. In the premises I find no merit in the appeal as against the 2nd Respondent which I hereby dismiss. As regards the 1st Respondent, I find that the setting aside of the interlocutory judgement was erroneous. However, nothing turns on that issue in light of the concurrent findings of the trial court and this court.

74. In the result, this appeal fails and is dismissed but with no order as to costs as none of the Respondents adduced any evidence before the trial court.

75. Judgement accordingly.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 19TH DAY OF JULY, 2021

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

CA Geoffrey