**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**CIVIL APPEAL NO. 589 OF 2017**

**KENYA AGRICULTURAL RESEARCH INSTITUTE.....APPELLANT**

**VERSUS**

**MORRIS SHIKUVALE MURANGA.....1ST RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2ND RESPONDENT**

***(Being an appeal from the Judgment of the Honourable D. Mbeja delivered***

***on 5th October, 2017 in Nairobi CMCC Civil Case No. 6828 of 2010)***

**JUDGMENT**

**1.** This appeal arises from the Judgment in Milimani CMCC No. 6828 of 2010, delivered on 5th October 2017. The 1st respondent (Morris Shikuvale) who was the plaintiff had sued the appellant (Kenya Agricultural Research Institute (KARI) and the 2nd respondent Attorney General (A.G) vide an amended plaint dated 12th November 2013 for general damages, plus interest and costs. The claim was based on his arrest and prosecution in Kibera Chief Magistrate's Criminal Case No 843 of 2007.

**2.** The learned trial magistrate awarded the 1st respondent Kshs.1,000,000/= as general damages for malicious prosecution. Judgment was against both the appellant and the 2nd respondent.

**3.** The appellant being aggrieved by the Judgment filed this appeal raising the following grounds:

**i.** The learned magistrate erred in law and fact in arriving at a decision that is contrary to the law and facts/evidence before the court.

**ii.** The learned magistrate erred in law and fact by holding that the 1st respondent had established a prima facie case against the appellant on a balance of probabilities when the 1st respondent's evidence had critically been challenged and controverted the appellant's witness.

**iii.** The learned trial magistrate erred in law by failing to adequately provide the reasons for his findings as required by law and practice.

**iv.** The learned trial magistrate erred in law and fact by failing to consider and analyze the entire evidence of the appellant's witnesses and thereby arrived at wrong findings on the issues before the court.

**v.** The learned trial magistrate erred in law and fact by failing to consider the appellants' submissions and the judicial authorities tendered before the court.

**vi.** The learned trial magistrate's decision was against the weight of the evidence and contrary to prevailing jurisprudence/judicial decisions on false imprisonment and malicious prosecution thus the said decision being in law.

**vii.** The learned trial magistrate erred in law and fact by making an award of general damages that was excessive in the circumstances and not in consonance with the prevailing *pari materia* cases.

**viii.** The learned trial magistrate erred in law and fact by failing to find that the 1st appellant had reasonable cause to report to the police on the 1st respondent being suspected of committing an offence after he was caught red handed with a metal and hook attempting to enter into the appellant's building and in the process escaping and after search in the room it was found chemicals worth Kshs. 341,640/= were missing.

**ix.** The learned trial magistrate erred in law and fact by failing to find that the 1st respondent had failed to prove his case and thereby failing to dismiss the case for want of merit.

**x.** The learned trial magistrate erred in law and in holding the appellant liable yet the appellant was not the complainant in the criminal case the complainant having been the Cotton Board of Kenya and the appellant not having been privy to the lower court case.

**4.** The appeal was disposed of by written submissions. The appellants' submissions are dated 9th September 2020 and were filed by Millimo Muthoni and company advocates. Counsel gave brief facts to the effect that a complaint was filed when the 1st respondent was found breaking the grill of a building hired by Cotton Development Authority (CDA). He was arrested by security guards from First Force 911 security firm hired by the Appellant. He was taken to spring valley police station and after investigations he was charged and arraigned in court vide Kibera criminal case No. 843 of 2007. He was eventually acquitted for lack of evidence.

**5.** He subsequently filed Milimani CMCC No 6828 of 2010 the subject of this appeal. Counsel for the appellant argued its appeal on the following grounds:

**a)** Whether the 1st respondent had proved his case to the required standard grounds Nos 1,2,3,4,5,6,8 and 9 of the Memorandum of Appeal

**b)** The learned Magistrate erred in law and fact in holding the appellant liable when the appellant was not the complainant in the criminal case in Kibera law courts; ground No. 10 of the memorandum of appeal.

**c)** Excess award for general damages: Ground No. 7 of the Memorandum of Appeal.

**d)** Upshot

**6.** On issue (a) counsel submits that the criminal case was dismissed because of unavailability of witnesses and not on merit. This had been caused by the long and bureaucratic nature of the criminal Justice system and beyond the control of the witnesses and the complainant. A similar scenario had been experienced in:

**i) Nairobi HCC No. 30 of 2012 Lydia Nyeri Wangondu v Felista Wanjiku & another.**

**ii) Kitale HCC No 6 of 2015 Zadock Makharu Khaemba v The Attorney General**.

In both cases it was held that though the plaintiff had been acquitted that did not demonstrate ill will/motive.

**7.** Counsel submits that the acquittal did not mean that the 1st respondent was innocent, the arrest unlawful and the resultant prosecution malicious. He contends that the trial magistrate in the Civil case well appreciated the ingredients for the tort of malicious prosecution (see page 179 – 180 of the said Judgment). It is his submission that the 1st respondent was caught red handed and arrested for stealing herbicides from the store leased by CDA and a report made. That the 1st respondent never alluded to any malice on the part of the appellant's servants. Further that had the police found insufficient evidence they would not have arrested and charged him.

**8.** Counsel referred to the case of **Daniel Njuguna Muchiri v Barclays Bank of Kenya Ltd and another Nairobi HCCC No 116 of 2003** where the material particulars to be provided for the tort of malicious prosecution were stated. He also referred to the cases of **Mbowa v Mengo District Administration [1972] E.A 352**; **Gitau v Attorney General [1990] KLR 13; James Kanunga Kiimu v Joseph Mwamburi & 3 others Nairobi Civil Appeal No 171 of 2000;** among others. He submits that to succeed in a case of malicious prosecution the plaintiff must first establish that the defendant or agent set the law in motion against him as a criminal charge i.e being instrumental in the arrest and charging of the defendant without reasonable and probable cause.

**9.** He argues that in this case the police never acted maliciously or unreasonably in suspecting the plaintiff. Further that acquittal *per se* does not mean that the defendant's action was malicious in any way. On this he referred to the case of **Nzoia Sugar Company Ltd V Fungututi Civil Appeal No 7 of 1987 [2002] KLR**. Counsel also submitted that once a complaint is registered the police take over the matter. The appellant's duty ended when its servants reported to CDA.

**10.** He argues that the 1st respondent only told the court how he was arrested, charged, prosecuted and discharged. He said nothing more, to explain any ill will or motive. He submits that the trial Magistrate did not comply with Order 21 Rules 4 and 5 of the Civil Procedure Rules, Article 47 of the Constitution, section 4 (3) d of the Fair Administrative Action Act by failing to give reasons for his decision.

**11.** On issue no (b) he submits that PW1 Mary Wairimu Githauga told the court she filed a complaint at Spring valley police station. She worked for CDA which was housed at KARI. The investigating officer (P.C Geoffrey Kinyua) also referred to Mary Githaiga as the complainant. Another witness who recorded a statement was Stanley Karimu Muriithi an assistant firm manager of the appellant. It is therefore his submission that the complainant was the Ministry of Agriculture through the CDA.

**12.** On issue no (c) he submits that the trial court considered irrelevant facts and materials in awarding the 1st respondent Kshs. 1,000,000/=. Further that there was no pleading that the 1st respondent's wife became mentally ill as a result of the criminal case. That the appellant had no role in the 1st respondent's being kept in custody as he had been released on a bond of Kshs. 20,000/= upon arrangement in court. Counsel argues that the circumstances in this case are different from those in the quoted cases of:

**i) Thomas Matsotso Besembe v Commissioner of police HCCC No. 220 of 2011**

**ii) Kenya Power and Lighting Company Ltd v Michael Munene & another Siaya HCCA No. 21 of 2015.**

He therefore urged the court to allow the appeal.

**13.** The 1st respondent's submissions were filed by Khamati Githinji Ashiruma & Chege advocates and are dated 18th November 2020. Counsel submitted that the 1st respondent was arrested for no reason by the appellant's security guards as he passed by certain premises in the appellant's compound. He was detained and accused of breaking into a store and carrying property from therein yet he was not found with any stolen property. The criminal case was dismissed and a civil suit filed and judgment issued in his favour.

**14.** Relying on sections 109 and 112 of the Evidence Act, **Kioko Mwakavi Makali v Attorney General & another [2019] eKLR**, **Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another [2005] I E.A 334**, Counsel submits that the burden of proof lies on he who asserts any fact. Further that an appellate court can only review the record of evidence with a lot of caution.

**15.** He further submits that the 1st respondent was acquitted in the criminal case on 3rd November 2009 under section 202 of the Criminal Procedure Code. This meant there was no evidence adduced. That the investigating officer ought to have testified as to what informed his decision to charge the appellant. On this counsel has referred to the case of **Shaneebal Ltd v Machakos [2018] eKLR** among others.

**16.** On proof on balance of probabilities he submits that this means one proving his/her case at 51%. See – **Kioko Mwakavi Makali** (supra). He contends that the appellant's only witness in the original case alleged that property kept in the store was missing without identifying the thief. That the evidence shifted from attempting to break into actual stealing. Counsel referred still to the case of **Shaneebal Ltd** (supra) & **Drapery Empire v Attorney General Nairobi HCC No. 2666 of 1996** and submitted that the 1st respondent proved his case on a balance of probabilities.

**17.** Responding on the **Kioko Mwakavi** case (supra) counsel submits that there was no probable and reasonable cause for the prosecution of the 1st respondent. The case was terminated in his favaour, and the 1st respondent is entitled to general damages for malicious prosecution. The basis being that the appellants did not give a justification for arresting the 1st respondent and the trial court considered all the evidence, submissions and Judicial authorities.

**18.** Counsel also submits that there being no evidence from the prosecution the court had no option but to find that there was no probable or reasonable cause to charge the 1st respondent. The prosecution did not appeal against the order of acquittal and cannot challenge it now. He urges this court to find that the four essentials for proof of malicious prosecution were established.

**19.** He has supported the award of general damages which he says was reasonable. He relied on the cases of **Kioko Mwakavi Makali** (supra); **Shadrack Mwanzia Kivuku** (supra) and **Thomas Mutsotso Bisembe** (supra). On the issue of the 1st respondent being caught red handed he argued that it can't stand since no exhibits were produced during the hearing. He urged the court to dismiss the appeal.

**20.** The 2nd respondent's submissions are dated 7th July 2021 having been filed by Mr. E. Makori Principal state counsel for the Attorney General. Learned counsel submits that the 1st respondent was not entitled to the general damages as he did not prove malicious prosecution. He cited the case of **Katerrega v Attorney General 1973 E.A 289** where the court observed:

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

**21.** He further submits that the award of damages is at the discretion of the court. See **Stephen Gachau Githaiga Margaret Wamkui Weru & another Nyeri High Court Civil Appeal No. 27 of 2014**. He further submits that the 1st respondent did not prove his case on a balance of probabilities.

**22.** Counsel contends that the 2nd respondent only set the law in motion against the 1st respondent and nothing more. Replying on the case of **Isaac N. Okero v Samwel Otieno Onyango [2017] eKLR** he submits that no malice was proved in this case. Further that the learned trial magistrate failed to thoroughly interpret and analyze the evidence produced in court by the interested party hence leaving out substantial evidence in the matter.

**23.** He further submits that the 1st respondent did not prove his case by illustrating how the prosecution was instigated by malice. No evidence was provided to highlight spite or ill-will or direct or indirect motive by the 2nd respondent. He contends that the learned trial magistrate failed to consider the principles in proving malicious prosecution as outlined in the case of **Mbowa v East Mengo Administration** (supra). He referred to the evidence of the appellants' witnesses and the case of **Katerrega v Attorney General** (supra) and submitted that the trial court did not take this evidence into account.

**24.** Counsel submits that the interested party had good intentions as they only performed their statutory duty and there was good reason to

suspect the 1st respondent. In the case of **Socfinaf Kenya Ltd v Peter Guchu Kuria Nairobi HCC A No 595 of 2000** it was noted as follows:

> *"That a suspect was acquitted of a criminal case is not sufficient ground for filing a civil suit to claim damages for malicious prosecution or false imprisonment. Evidence of spite, ill-will, lack of reasonable and probable cause must be established."*

In **Nzoia Sugar Company Ltd v Fungututi [1988] KLR 399** it was held:

> *"Acquittal per se on a criminal charge is not sufficient basis to ground a suit of malicious prostitution. Spite or ill-will must be proved against the prosecutor."*

**25.** He urged the court to find that the 1st respondent did not prove his case on a balance of probabilities and the appeal should be allowed with costs.

**26.** A summary of the evidence before the trial court is that the appellant and 1st respondent each called one witnesses. The 1st respondent testified as PW1. He stated that he was an employee of the appellant from 1989-2007, when he was dismissed after being arrested and charged before Kibera Law courts. He was arrested on 28th January 2007 and charged with stealing.

**27.** The items he allegedly stole were never produced in evidence and the case was later on dismissed on 3rd November 2019. He stated that his wife was affected and became mad and later died. After being dismissed he was evicted from his house. He produced a bundle of documents (PEXB2).

**28.** In cross examination he said the guards took him to the police station but he had done nothing wrong. The said guards did not testify. He stated that on this date of the incident he had a patient and left his house to got to other quarters to seek for assistance. It was then that he was arrested by the guards and taken to the police station. Prior to this incident he had been taken to Spring valley police station over something else. They went to court and the said case was resolved.

**29.** The appellant called one witness who testified as DW1 – (Stanley Karemi Mureithi). He was an assistant manager and security officer working for KARI. He stated that the 1st respondent worked for KARI as a painter up to 2007. On 28th January 2007 at 6.30 pm he heard a knock at his door and on opening he saw a security guard from First Force 911.

**30.** He reported to him that they had found one of their staff members breaking into a house occupied by CDA. The matter was reported to Spring valley police station. The person arrested was the 1st respondent and he spoke to him asking if he had broken into the store and he responded in the affirmative and asked for forgiveness.

**31.** DW1 reported to the Administration officer of CDA who came. They found cartons which had drugs having been tampered with. He admitted to not having recorded a statement in the Kibera criminal case. His relationship with the 1st respondent has been good all through.

**32.** In cross examination he said he was in the security department at KARI, and he dealt with security issues. After receiving the report, he checked the building and saw a breakage but did not know the instrument used to cause it. An inventory was done the next day by CDA. KARI did not conduct any investigation.

**33.** In re-examination he said after receiving the report from the guards he went to the scene where he found the 1st respondent who admitted to the wrong doing. There was a broken window which was a bit suspicious. It was a sunday and an odd hour.

**34.** The 2nd respondent did not call any witness in the trial court.

**35.** Among the documents annexed by the 1st respondent are the proceedings in Kibera Chief Magistrate's court criminal case no. 843 of 2007 marked "N1" – PEXB2. The proceedings show that two witnesses testified but were never cross examined for several reasons.

**36.** When a new trial Magistrate took over the case on 7th April 2009 he granted a last adjournment on 7th October 2009 to 2nd and 3rd November 2009. Witnesses were still not availed. The prosecution had requested to have the O.C.S Gigiri come and explain why they wanted the matter withdrawn under section 87 (a) of the criminal procedure code. The court could not have any of that and dismissed the charge under section 202 of the criminal procedure code.

**Analysis and determination**

**37.** This is a first appeal and this court has a duty to re-examine and re-evaluate the evidence afresh and come to its own conclusion. It must bear in mind that it did not hear nor see the witnesses and so give an allowance for that. See **Selle v Associated Motor Boat Company and pothers [1968] E.A 123**.

**38.** I have accordingly considered the grounds of appeal, record of appeal, respective submissions by all parties and authorities cited. I find the main issues falling for determination to be as follows:

**i)** Whether the trial court complied with order 21 Rules 4 & 5 of the civil procedure rules.

**ii)** Whether the 1st respondent proved the claim of malicious prosecution against the appellant and 2nd respondent.

**iii)** If issue (ii) is established whether the general damages awarded should be interfered with.

**39.** On the first issue I refer to Order 21 which provides:

**Rule 4**

*"Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision".*

**Rule 5**

*"In suits in which issues have been framed, the court shall state its finding or decision, with the reasons therefor, upon each separate issue."*

**40.** A reading of the judgment shows that the learned trial magistrate identified the issues for determination but never made any reference to them and the evidence adduced. In fact he only set out the evidence of the 1st respondent (plaintiff). He next acknowledged that the appellant (1st defendant) had called one witness (Stanley) Karemi and that he had considered his evidence which he never set out to show what he had considered.

**41.** He next acknowledged the rival submissions and said he had considered them. He nowhere made reference to what had been submitted despite doing a long reference to the case of **Mbona v East Mengo D. Administration** (supra). He did not in any way relate the decision cited to the evidence on record and how he came to the conclusion that a case of malicious prosecution had been proved.

**42.** In the case of **Ochieng v Amalgamated Saw Mills [2005] IKLR 151** the court observed this:

*"The trial magistrate abdicated his judicial responsibility in failing to set out the points for determination and the reasons for his decision. A judicial officer may be right or wrong in his final decision, but either way, he is under a duty to state in writing the reasons which made him arrive at a particular decision. In my view, any purported judgment that does not contain the essential ingredients of a judgment as required under Order XX Rule 4 is not a judgment and an appellate court would most likely set it aside. An aggrieved party who has a right of appeal would be disadvantaged by such a judgment if he chose to appeal. An Appellate court should be able to follow the reasoning of a trial magistrate in order to determine if the decision arrived at was proper in law or not."*

**43.** Upon considering the provisions of order 21 Rules 4 and 5 of the civil procedure rules, the above authority cited and the judgment rendered I find that the learned trial Magistrate did not comply with the said mandatory provisions of Order 21 Rules 4 & 5 of the civil procedure rules. He did not consider all the evidence on record. Besides noting that he had considered the evidence and submissions there was nothing to show he had done so. This court being a first appeal court will therefore as required re-consider and re-evaluate the evidence a fresh.

**44.** On the second issue, the 1st respondent's claim was based on the tort of malicious prosecution. The burden to prove this tort lies on the plaintiff. In the case of **Murunga v Attorney General 1979 KLR 138** the elements to be established in a case of malicious prosecution are as follows:

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

***ii)*** *That the prosecution terminates in the plaintiff's favaour.*

***iii)*** *That the prosecution was instituted without reasonable and probable cause.*

***iv)*** *That it was actuated by malice also see – Mbowa v East Mengo District Administration (supra)*

**45.** The above test will apply in this case. There is no dispute that the 1st respondent was charged in Kibera Chief's Magistrate's criminal case No 843 of 2007 with the offence of store breaking and committing a felony contrary to section 306 (a) of the penal code. The same was dismissed on 3rd November 2009 under section 202 of the criminal procedure code for lack of witnesses. It is also true that a complaint was lodged by an officer from the CDA housed on the appellant's compound which was guarded by security guards under the appellant's docket. It is these security guards who raised the alarm and even arrested the 1st respondent. At this point I will not get into the details but I do find that issues no (i) and (ii) above are established.

**46.** The critical issue here is whether the prosecution of the 1st respondent lacked reasonable or probable cause and was actuated by malice. In the amended plaint dated 12th November 2013 the 1st respondent at paragraph 6 gave the particulars of malice as:

**i)** *Prosecuting the plaintiff well knowing that he was innocent and/or when the defendants had no evidence to support the prosecution.*

***ii)*** *Subjecting the plaintiff to prolonged court attendances and requesting for numerous adjournments well knowing there was no evidence against him.*

**47.** The duty to prove the two elements of lack of reasonable and probable cause lay on the plaintiff and in this case the 1st respondent. In his evidence in chief and cross examination the 1st respondent admitted having been arrested on the KARI compound by security guards on 28th January 2007 at 6.30 am. He explains that at the time of his arrest he was inside the compound of KARI (appellant) and was on his way to see one Nicholas for some financial assistance.

**48.** There was no evidence to confirm that there was someone by that name on the said compound. He did not also call the said Nicholas as a witness. His evidence shows he was inside the compound of KARI which was guarded. The time was 6.30 am. Even though he was an employee of KARI he was not residing on that compound. The security guards had every reason to intercept him to find out why he was there at that particular time.

**49.** Upon interception a report was made to his boss who came and together with the guards he was taken to Spring valley police station and a report made. DW1 who was in charge of security testified on how he learnt of the arrest and the reason for the arrest.

**50.** In his evidence the 1st respondent stated that he had been arrested on DW1's instructions. This was never put to DW1 in cross examination which I find abit strange. DW1 told the court that when he received the report from the security guard he went to the scene and satisfied himself of the report.

**51.** In cross examination and re- examination these are some of the answers DW1 gave.

**Page 173 lines 7 -9 of Record of Appeal**

"On this particular day security guard informed me that they had arrested the plaintiff. I checked to see breakage which I saw. I don't know the instrument used."

**Page 173 – lines 12 -14**

"I did not find Morris with any chemicals. My role was to inform the management and it was up to them to act further.

**Page 173 lines 18-21**

"When the guards reported to me I went to the scene of crime and found Morris at the scene of crime and he actually agreed on wrong doing and being a sunday it was a bit suspicious. We referred the matter to Spring Valley police station. There was a broken window and there was Morris in an odd hour and day."

**52.** DW1 is the boss who took the 1st respondent to the police station and notified their client Cotton Development Authority for further action. The 1st respondent did not explain any malice or ill- will on the part of DW1. He had received a report and visited the scene and seen for himself. He stated in cross examination that KARI could not conduct investigations and that was why the matter was referred to the police for investigations. The role of the reportee ended at that point. The police could either confirm or dismiss the report depending on their findings.

**53.** In the case of **Kagane v Attorney General E.A 643** as quoted in **Morris Nyamasyo Masika v Nation Media Group Ltd and another [2000] eKLR** the court held thus:

"*The test whether the prosecution was instituted without reasonable and probable cause is whether the material known to the prosecution would have satisfied a prudent and cautious man that the plaintiff was probably guilty of the offence*.'

**54.** Further in the case **of Zablon Mwalumba Kadori v National Cereals and Produce Board [2005] eKLR** Justice D. Maraga (as he then was) stated thus:

"*Reasonable and probable cause is an honest belief in the guilt of the accused based "upon reasonable grounds of the existence of a state of circumstances, which assuming to be true would reasonably lead an ordinary prudent and cautious man- placed in the position of the accused to the conclusion that the person charged was probably guilty of the crime imputed."*

**55.** The two witnesses who testified in the criminal case though not cross- examined told the court what they knew about the charge against the 1st respondent. Their evidence is part of what the police gathered during their investigations before charging the 1st respondent. Could this be considered "idle" material on which a prudent and cautious man would not believe that the accused was guilty? This goes for the investigator and the prosecutor. My answer would be in the negative. It was not idle material.

**56.** The 1st respondent was in the criminal case acquitted under section 202 of the criminal procedure code which provides:

"*If, in a case which a subordinate court has jurisdiction to hear and determine, the accused person appears in obedience to the summons served upon him at the time and place appointed in the summons for the hearing of the case, or is brought before the court*

*under arrest, then, if the complainant, having had notice of the time and place appointed for the hearing of the charge, does not appear, the court shall thereupon acquit the accused, unless for some reason it thinks it proper to adjourn the hearing of the case until some other date, upon such terms as it thinks fit, in which event it may, pending the adjourned hearing, either admit the accused to bail or remand him to prison, or take security for his appearance as the court thinks fit."*

**57.** He was therefore acquitted on a technicality since it was not on merit as no evidence had been considered for the court to arrive at the decision it did. Be it as it may, the mere fact of an acquittal is not evidence of a malicious prosecution. In the case of **Nzoia Sugar Company Limited v Fungututi [1985] KLR 399** the court of Appeal held:

*"Acquittal per se on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecutor. The mental element of ill – will or improper motive cannot be found in an artificial person like the appellant but there must be evidence of spite in one of its servants that can be attributed to the company."*

**58.** Before the trial court was the evidence of the 1st respondent and DW1 explaining what had transpired on 28th January 2007. The learned trial Magistrate simply believed the 1st respondent without analyzing the totality of the evidence of both witnesses. He never said he had dismissed DW1's evidence as being untruthful. All he said was that he had considered it without even setting out what it was all about. He wholly relied on the fact of the 1st respondent's acquittal in the criminal case which was an error.

**59.** After doing the above analysis I find that the 1st respondent did not demonstrate that he had been maliciously prosecuted.

**60.** On the 3rd issue on the award of damages I find that in assessing damages the trial court considered one element which was never pleaded. That was the issue of the 1st respondent's wife ill health and her death. Had the 1st respondent proved his case I would have awarded a figure of between Kshs. 800,000/= - 1,000,000/= as damages.

**61.** The result is that the appeal succeeds and I set aside the Judgment of the lower court with all the consequential orders and substitute it with an order dismissing the entire suit.

**62.** I have noted that the 1st respondent was allowed by the court to file the plaint without paying the requisite court fees vide an order issued on 2nd November 2010 by Hon. D.K ole Keiwa (Mr.) Senior Resident Magistrate. I therefore make no order as to costs.

**DELIVERED ONLINE, SIGNED AND DATED THIS 7TH DAY OF OCTOBER, 2021 IN OPEN COURT AT MILIMANI NAIROBI.**

**H. I. ONG'UDI**

**JUDGE**