



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. E004 OF 2020

SILVIA KAMBURA.....APPELLANT

VERSUS

GEORGE KATHURIMA JAPHET.....1ST RESPONDENT

PETERSON NYACHAE.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

(Being an appeal from the Judgment of the Principal Magistrate's Court at Nkubu in Nkubu CMCC Civil Case No. 41 of 2018 delivered on 9th August, 2020 by Hon. J. Irura, PM)

JUDGMENT

Introduction

1. On 1st August 2013, the Appellant made a report at Nkubu Police Station over malicious damage to her property, being a barbed wire fence valued at Ksh 16,900/=. The Appellant made the complaint against the 1st Respondent, her nephew. This complaint resulted in Nkubu Criminal Case No. 1525 of 2013, wherein the 1st Respondent was charged with the offence of 'Malicious damage to property contrary to Section 339 (1) of the Penal Code.' He was placed on his defence but was ultimately acquitted.

2. By a plaint dated 17th April 2018, the 1st Respondent filed a suit, being Nkubu Civil Case No. 41 of 2018, seeking general damages for wrongful arrest, wrongful confinement and malicious prosecution against the Appellant and the 2nd and 3rd Respondents. Following hearing, the trial Court found in his favour and awarded him Ksh 800,000/= in general damages to be paid jointly and severally by the Appellant and the 2nd and 3rd Respondents.

The Appeal

3. Being aggrieved by the Judgment of the trial Court, the Appellant has proffered the instant appeal. By the memorandum of appeal dated 6th October 2020, she raises the following grounds of appeal: -

i. That the learned trial magistrate erred both in law and facts in failing to find and hold that the Appellant caused prosecution of the Respondent vide Nkubu CR. Case No. 1525 of 2013, on the basis of a sound probable and reasonable cause of malicious damage of her property.

ii. That the learned trial Magistrate erred in both law and facts, in condemning the Appellant to pay the Respondent damages for malicious prosecution, yet she did not make a specific or express finding that there was bias meted against the Respondent, during investigations and/or prosecution.

iii. That the learned trial Magistrate erred both in law and facts, in failing to find and hold that in the said Nkubu CR. Case No. 1525 of 2013, the Respondent was found to have a case to answer and placed on his defence, but he was ultimately acquitted after a full trial, under Section 215 of the Criminal Procedure Code. Cap. 75 of the Laws of Kenya, for insufficiency of evidence, in view the standard of proof of beyond reasonable doubt, applicable in criminal cases.

iv. That the learned trial Magistrate erred both in law and facts, in finding and holding that the prosecution of the

Respondent in the said criminal case was actuated by malice, yet that was not so and she did not state any reason(s) or ground(s) to support such a finding and holding.

v. That the learned trial Magistrate erred both in law and facts, in finding that the controversy in Nkubu Cr. Case No. 1525 of 2013 was a land dispute, yet it was about malicious damage to property.

vi. That the learned trial Magistrate erred both in law and facts, in awarding the Respondent exaggerated and exorbitant general damages for malicious prosecution of Ksh. 800,000/=, without any factual and/or legal basis, yet the Respondent did not deserve such an award or any other at all.

4. She prays for the appeal to be allowed, for the Judgment of the trial Court to be set aside and an order for the dismissal of the 1st Respondent's claim to be made.

5. The appeal was opposed by the 1st Respondent.

Appellant's Submissions

6. The Appeal was canvassed by way of written submissions. The Appellant filed submissions dated 28th June 2021. The Appellant cites the Court of Appeal in *Robert Okeri Ombeka vs Central Bank of Kenya* (2015) eKLR for the four ingredients of malicious prosecution.

7. She urges that it is not in dispute that the prosecution of the 1st Respondent was instituted by her and that it is also not in dispute that the prosecution terminated in the 1st Respondent's favour.

8. She urges that the third and fourth ingredients of malicious prosecution are the ones in dispute. She urges that the 1st Respondent did not prove in the primary suit, that the prosecution against him was instituted without reasonable and probable cause and/or that the said prosecution was actuated by malice. On the duty to prove all the four ingredients of the offence, she cites the Court of Appeal in *Anthony Shiveka Alielo vs Kenya Post Office Savings Bank & Another* [2019] eKLR.

9. She urges that from the record, there was a reasonable and probable cause to arrest and charge the 1st Respondent with the offence of malicious damage to property. She refers the Court to the following: -

i. Charge sheet charging the 1st Respondent for unlawfully damaging her barbed wire fence, valued at Ksh 16,900/=.

ii. The statement of Mutembei Eustas, her eye witness who saw the 1st Respondent damaging the fence.

iii. The statement of Jane Gacheri, her second eye witness who also saw the 1st Respondent damaging the fence.

iv. The statement of P.C Peterson Nyacheo, a police officer, to whom she reported the damage of her barbed wire fence by the 1st Respondent.

v. The investigation diary, which record the observation and findings after visiting the scene.

vi. Her own (Appellant's) statement wherein she testified that she had come home to find her property damaged and gotten information from her houseboy that the 1st Respondent was the culprit.

10. She urges that the 1st Respondent who was the Accused person in the subject criminal case was found to have a case to answer and placed on his defence. That there was a reasonable and probable cause to arrest, charge and prosecute the 1st Respondent for the offence of malicious damage to property and that is why he was placed on his defence in the criminal case. That in his defence in the criminal case, the 1st Respondent never denied maliciously damaging the Appellant's barbed wire and wooden posts fence, as he was charged. That in cross-examination in the said criminal case, the 1st Respondent admitted that the Appellant owned the subject land. That in her analysis in the criminal case judgment, the court reckoned that indeed, the damage complained of took place.

11. She urges that unfortunately, the prosecution's case in the subject criminal case was closed without the evidence of the investigating officer and the scenes of crime officer, who did not attend court to testify and produce exhibits as expected. That at one point, the prosecution was denied an adjournment, thereby compelling it to close its case without the evidence of the investigating and scene of crime officers. That the fact that the investigating and scene of crime officers did not testify in the subject criminal cases does not mean that there was no reasonable and probable cause to arrest, charge and prosecute the Respondent, in view of the foregoing pieces of evidence quoted from the record. That the only reason why the Respondent was acquitted in the said criminal case is that the court entertained doubt regarding ownership of the land where on the subject malicious damage of property (barbed wire-cum-wooden posts fence) took place. Such doubt, she urges, does not mean that there was no reasonable and probable cause to arrest, charge and prosecute the Respondent. She cites *Robert Okeri Ombeka (supra)*.

12. She urges that the trial Court erred in holding that the prosecution was motivated by malice and there was no reasonable and probable cause to mount the prosecution. She cites a section of the Judgment of the trial Court as follows: -

“It is highly probable that the police officers had been biased in their investigations and they could have preferred charges against the plaintiff to punish him yet clearly this was a land dispute that could not be addressed and determined in a criminal case. I would not hesitate to find that the prosecution motivated by malice and there was no reasonable and probable cause to mount the prosecution.”

13. On the issue of malice, she cites the Black's Law Dictionary, 9th Edition which defines the term malice as, “*the intent, without justification of excuse, to commit a wrongful act; the reckless disregard of the law or of a person's legal rights; ill will wickedness of heart.*”

14. She urges that she has already demonstrated the clear circumstances which led her to cause the arrest, charging and prosecution of the Respondent. That in light of the definitions/meanings of the term malice, she was not actuated by malice in any way, in causing the arrest, charging and prosecution of the Respondent but she was seeking justice after her fence was maliciously damaged by the Respondent and another, which criminal act was seen in broad day light by 2 persons who testified as prosecution witnesses in the subject criminal case. She further urges that even the trial Court did not find malice on her part. She urges that the trial Court erred in entering judgment against her despite not having found malice on her part.

15. She urges that even the Respondent did not attribute malice to her. She urges that the Respondent did not prove in the primary case, the third ingredient of malice against her and so, the trial court fell into error of law and fact in entering judgment for the Respondent against her.

16. She urges that the trial court erred in finding that the dispute in the subject criminal case was about land ownership, yet it was on malicious damage to property.

17. She finally urges that award of Ksh 800,000/= general damages was exaggerated, exorbitant and without any factual basis. She urges that if the Respondent had proved his claim, which he failed to do, the trial court should have awarded a modest Kshs 200,000/=. She cites *Hassan Ogwimba Akibaya vs Attorney General & 2 Others* (2015) eKLR and *Risper Nyomenda vs George Martin Kenyatta* (2021) eKLR.

18. She urges that the Respondent did not prove the indispensable ingredients of ‘reasonable and probable cause’ and ‘malice’ and he was thus not entitled any award on general damages.

19. She urges for the Court to dismiss the primary case, and award her costs both in the primary case and this appeal.

1st Respondent's Submissions

20. The 1st Respondent filed submissions dated 22nd July 2021. He urges that his claim in the trial Court was based on the fact that the Appellant, without any reasonable or probable cause made unfounded, unsupported, false and malicious report/complaint to Nkubu Police Station against him. That based on that report, the 2nd Respondent overzealously proceeded to wrongfully arrest him on 1st August 2013 and detained him for two days before releasing him the 3rd August 2013. That he was again re-arrested on 17th August 2013 and charged with a trumped up offence of causing malicious damage to property contrary to Section 339 (1) of the Penal Code in Nkubu Criminal Case No. 1525 of 2013 on 19th August 2013.

21. He urges that after undergoing a rigorous and emotionally draining trial, he was acquitted by the court on 3rd July 2017 as it was found that the complainant had failed to prove ownership of the land she was complaining about.

22. He urges that the acts of making a false report, arrest, unlawful confinement and the subsequent prosecution were actuated by malice and without any reasonable and/or probable cause and was an attempt to settle family scores through the police. That as a result of the arrest, unlawful detainment and prosecution on a trumped up charge, he suffered unjustifiable mental anguish, pain and suffering and as a result he suffered loss and damages. That the 2nd and 3rd Respondents entered their general statement of defence on the 4 October, 2018 but failed to file any documents or evidence in support of their defence or participate in the trial of the primary suit. That the trial Court aptly held that pleadings such as the defence are not evidence and therefore the 2nd and 3rd Respondent's denial of liability remained a mere denial. That upon conclusion of the trial, the trial Court rightfully found that the 1st Respondent had proved his case on a balance of probabilities and awarded general damages of Ksh 800,000.

23. He urges that the issues for determination in this appeal is whether he was maliciously prosecuted and whether the Appellant is entitled to the prayers sought in the appeal.

24. He cites *James Karuga Kiiru vs Joseph Mwamburi & 3 Others* (2001) eKLR, for the proposition that to prosecute a person is not prima facie tortious, but to do so dishonestly or unreasonably is. He cites *Mbowa vs East Mengo District Administration* (1972) EA 352, for the proposition that the tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings and that the purpose of the prosecution should be personal and spite rather than for the public benefit. He also cites *Murunga vs The Attorney General* (1979) KIR 138 for the ingredients of malicious prosecution.

25. He urges that on the 1st ingredient, the Appellant readily admits that she is the one who made the complaint that led to his arrest and prosecution. He cites *Samson John Nderitu vs The Attorney General* (2010) eKLR wherein the other case of *Zablon Mwauma Kadori vs National Cereals and Produce Board*, Mombasa HCCC No. 152 of 1997 was cited for the proposition that proof of the Appellant set the law in motion is enough to satisfy the 1st ingredient.

26. He urges that the 2nd ingredient was also proved as he was acquitted. He urges that he had entered a plea of not guilty contrary to what the Appellant has submitted.

27. On the 3rd ingredient, citing *Samson John Nderitu v The Attorney General* (2010) eKIR on the role of the police in carrying out investigations, he urges that during the trial of the criminal case, the Appellant did not prove that the land which was fenced belonged to her. He urges that any well meaning and discerning officer would have inquired and gotten conclusive details as to the ownership before instituting such a serious charge which the 2nd Respondent failed to. That any honest complainant would have provided the police with any proof of ownership and all the surrounding factors such as the succession case that had pitted the Appellant against his father over the same land. He urges that the charge was about destroying a fence worth Ksh 16,900/= yet no receipts were produced in court as to the worth of the said fence or even production of the alleged destroyed barbed wire in court.

28. He urges that the charges were unreasonable and ought not to have been instituted in the first place and that the charge was for personal spite and not for personal benefit.

29. On the 4th ingredient, he urges that at Page 17 of the record of appeal, the Appellant states that she did not suspect he had damaged the fence, and that she only made a report that the fence has been damaged for the police to investigate. He urges that this was in sharp contrast to what the Appellant told the court during the criminal trial i.e that she went to the chief's camp and found the chief who referred her to the police station and that the two people who destroyed her fence are her father in law's sons, including the 1st Respondent. The other contrast he urges is depicted by the statement of the 2nd Respondent wherein he stated that the complainant (the Appellant) came and said that the accused maliciously cut down her barbed wire.

30. The 1st Respondent urges that during the trial of the primary suit, the Appellant said that she did not specifically report the 1st Respondent so as to fit her narrative that she is not the one who set the law in motion on the 1st Respondent. That when the Appellant was called upon to testify during the criminal trial, she indicated that she is the one who reported in order to fortify her position and evidence as the complainant but that the investigating officer, the 2nd Respondent herein recorded the statement and stated that the Appellant complained that the 1st Respondent had damaged her property. He urges that the Appellant's evidence changes depending on what she wants and the fact that she cannot keep her story straight is evidence that the Appellant's complaint was to serve her personal interests and that the Appellant cannot claim that there is no evidence of malice when she is actually committing an act of malice by deceiving the Court.

31. He urges that at page 78 of the record of appeal, the Appellant admitted on oath that she has a grudge with the 1st Respondent's father one Japheth Ngako over the same piece of land which was the subject therein. That further, the Appellant's witnesses in the criminal trial alleged to have witnessed two people who destroyed the fence and on cross examination, one of her witnesses even alleged to have also seen a fifth person, but the Appellant only chose to make a complaint against the 1st Respondent whom she readily admitted that she had a grudge with his father. That the 2nd and 3rd Respondents did not tender any evidence to dispute the arrest, malicious prosecution and acquittal of the plaintiff in the criminal proceedings. He urges that criminal proceedings are meant to serve the common good of all the citizens and not for misadvised revenge missions between private citizens. He cites *R vs Attorney General Exp Kipngeno Arap Ngeny* (2001) KLR. He further cites *Gachau Githaiga & Another vs Attorney General* (2015) eKLR.

32. He urges that he was charged without evidence and this confirms the existence of malice. He urges that Court to find that he was maliciously prosecuted and further find that he is deserving of award damages equity does suffer wrong without remedy.

33. He cites *Nahashon Mwangi vs Commissioner of Police & Another*, HCCC No. 163 2006 (2015) eKLR where Mabeya J awarded Kshs 800,000/= to the Respondent who unlawfully arrested, confined and maliciously prosecuted.

34. He further urges that the and Respondents were parties in the primary suit and they have filed appeal against the judgement and decree of the court. That this implies that they are dissatisfied with same and as the Appellant herein is not agent of Attorney General, she cannot pray that the entire judgment be set aside. He urges for the appeal to be dismissed with costs to the Respondent

Issues for Determination

35. From the Memorandum of Appeal and submissions by parties, the issues arising for determination are as follows: -

i. Whether the elements for the tort of malicious prosecution were established by the 1st Respondent.

ii. Whether the award of Ksh 800,000/= as general damages was manifestly excessive.

Whether the elements for the tort of malicious prosecution were established by the 1st Respondent.

36. The tort of malicious prosecution is an intentional tort that provides redress to a Plaintiff, for losses incurred following unsuccessful and malicious proceedings which are initiated without any lawful reasonable and/or probable cause by the Defendant.

37. Although it is within any person's rights to approach the Courts and/or other quasi-judicial bodies to seek redress for wrongs committed against them, this right must be exercised within the confines and parameters of the law, for genuine and lawful reasons. If the right is exercised with other ulterior motives, this constitutes abuse of process, which is in itself a wrong and/or violation attracting a claim for damages for malicious prosecution.

38. Traditionally, the tort of malicious prosecution, as known in English Common law was only available to Plaintiffs against whom malicious *criminal* proceedings had been instituted and subsequently determined in their favour. The applicability of the tort is however extending to cover the domain of malicious civil proceedings. See the UK Supreme Court, case of *Willers vs Joyce and Another* (2016) UKSC 43 50. The matter herein was however filed following conclusion of criminal proceedings.

39. The elements of the tort of malicious prosecution have been discussed in various authorities including *Murunga vs The Attorney General* (1976-1980) KLR 1251 where Cotran J listed them 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.

40. Instructively, all the elements apply conjunctively and must all be proven in order to successfully claim for damages for malicious prosecution. See *Attorney General v Peter Kirimi Mbogo & Another*, Meru Civil Appeal 52 & 56 of 2020 (Consolidated) [2021] eKLR.

41. This Court will thus examine whether the abovementioned elements existed in the case: -

Whether the prosecution against the 1st Respondent was instituted by the Appellant or by someone for whose acts she is responsible.

42. It is not in dispute that it is the Appellant who went to make a complaint at Nkubu Police Station concerning the malicious damage to her property and that it is from this complaint that the 1st Respondent came to be charged in Nkubu Criminal Case No. 1525 of 2013.

Whether the prosecution was determined in the 1st Respondent's favour?

43. The 1st Respondent was placed on his defence but was however acquitted. The Court found that ownership of the suit property, which is a necessary ingredient for the offence of malicious damage to property had not been proven. The claim was therefore terminated in the 1st Respondent's favour.

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

44. The real thrust of the Appeal is found in this and the next issue. In a determination of whether there was any probable and/or reasonable cause, the reasonable man's standard applies. In the case of *Hicks v Faulkner* (1878) 8 Q.B.D 167 at 171, Hawkins J held as follows with respect the meaning of reasonable and probable cause: -

“An honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead any ordinarily prudent and cautious man placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.”

45. The test for whether a case was instituted with a reasonable and probable cause was also laid out by the Court of Appeal in *Kagane & Other vs The Attorney General & Another* (1969) EA 643, where Rudd J held as follows: -

“...the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of an objective test. That is to say, to constitute reasonable and probable cause, the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material consisted of facts discovered by the prosecutor or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty. If and so far as that material is based upon information, the information must be reasonably credible, such that an ordinary reasonable prudent and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for the prosecution.”

46. In *Samson John Nderitu vs The Attorney General* (2010) eKLR, Nambuye J (*as she then was*) held as follows: -

“It is trite and this court, has judicial notice of the fact that before an accused person is taken to court, and arraigned in court for criminal prosecution, the prosecuting authority namely the police or whatever unit, whose functions fall under the office of the Defendant, usually carry out investigations, record statements from potential witnesses, analyze the facts to determine if the facts disclose an offence before arraigning such a person in a court of law.”

47. To this Court's mind the test lies on the factors, facts, circumstances and evidence that the Prosecution relied on in charging the accused person (1st Respondent).

48. The 1st Respondent was charged with the offence of Malicious Damage to Property contrary to Section 339 (1) of the Penal Code. The Section provides as follows: -

339. Malicious Injuries to Property

(1) Any person who willfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanour, and is liable, if no other punishment is provided, to imprisonment for five years.

49. The key ingredients for the offence of malicious damage to property, therefore, include: -

- i. Ownership of the property by the complainant;
- ii. Damage or destruction of property; and
- iii. Linkage of the damage to the accused person.

50. The Court has had a chance to peruse the record of proceedings of the criminal court where the 1st Respondent was charged. The Prosecution called a total of 3 witnesses 2 of who were eye witnesses who confirmed to have seen the 1st Respondent destroy the barbed fence wire belonging to the Appellant. The witnesses testified to have known the 1st Respondent well, with PW3 testifying to have known him since childhood. They could, therefore, not have been mistaken as to his identity. Both witnesses described the property on which the barbed wire was located to be owned by the Appellant. The Appellant produced photographs showing the damage complained of. The photographs were taken by the police who visited the scene of crime.

51. From the above, it is clear that there was reason to believe that the 1st Respondent had committed an offence worthy of prosecution. In his defence, the 1st Respondent did not deny causing damage to the property. He merely disputed ownership of the land where the damaged property was, claiming that the land belongs to his grandfather and that there was a pending succession cause. He further urged that there were pending investigations on how the Appellant obtained a title showing her late husband, Silas Elijah Kirimi, as the owner of the land, although he did not lead any evidence to prove this fact.

52. The reason that the Court (Idagwa RM) gave for acquitting the 1st Respondent was that there was no evidence of ownership of the land. In this Court's view, ownership of property claimed to be at the centre of a succession dispute is rather a technical issue that cannot be used to infer want of a reasonable and probable cause to institute the criminal case. The Court considers that the 1st Respondent admitted to the existence of a title in the name of the Appellant's late husband. To police officers investigating the offence, the existence of a title in the name of the Appellant's husband, and the evidence of witnesses who confirm that the land belonged to the Appellant was enough to make them believe in that they could secure a conviction against the 1st Respondent. The Court thus considers that the trial Court erred in finding that there was no reasonable and probable cause to institute the criminal case.

53. This Court contrasts the present case with the case of *Attorney General v Peter Kirimi Mbogo & Another*, Meru Civil Appeal 52 & 56 of 2020 (Consolidated) [2021] eKLR, where I found that there was no reasonable and/or probable cause for instituting a criminal case against an accused, when despite numerous court attendances, none of the Prosecution witnesses were called and/or testified, leading to a discharge of the accused person under Section 87 (a) of the Criminal Procedure Code. In the present case, there were no delays and all the key Prosecution witnesses were promptly availed. The omission to call the investigation officer was also explained and in any event, the Court considers that there was other stronger evidence by eye witnesses who witnessed the 1st Respondent causing the damage, the subject of his charges.

Whether the prosecution was actuated by malice?

54. The element of malice is the epitome of malicious prosecution. Malice connotes the use of justice for some other motive other than bringing the Plaintiff to justice upon a reasonable belief that he is guilty.

55 In *Halsbury's Laws of England, Fourth Edition, Volume 45 (2)* Para 472 at page 314, the following was established: -

'...Although malice may be inferred from want of reasonable and probable cause, want of reasonable and probable cause is not to be inferred from malice...'

See also *Stephen Kaburu & 5 Others v Attorney General & Others*, Civil Appeal No. 51 of 2016 (2018) eKLR.

56. This Court agrees as much because the probability that a prosecution was actuated by malice may be direct as much as it may be circumstantial and may be inferred from the fact that there was no reasonable and probable cause to institute the proceedings. On the other hand, the probability that a party caused malicious damage to property remains the same however much the complainant or police officers who initiated the prosecution disliked the said accused.

57. The trial Court, in allowing the claim for malicious prosecution held that since there was no evidence of ownership, it is highly probable that the *police officers* had been biased and they could have preferred the charges to punish the 1st Respondent.

58. Notably, in its Judgment, the trial Court did not distinguish the discussion on want of probable and reasonable cause and the discussion on malice. This Court has however found that there was indeed a reasonable and probable cause.

59. The Court also considers that the trial Court found malice on the part of the police officer and not on the Appellant. In the circumstances, the trial Court's judgment against the Appellant was faulty. Even on the finding of the malice on the part of the police officers, this Court considers that there was no evidence, whether direct or circumstantial to show that the police officers had any reason to want to punish the 1st Respondent and/or that they acted maliciously.

60. In the present case, the fact that the Court has found that from the evidence and the facts, there was a reasonable and probable cause to institute the charges against the 1st Respondent, the Court considers that the duty to examine whether or not there was malice was

heightened. This Court finds that the circumstances of the case do not reveal the existence of malice. The 1st Respondent does not claim to have been mistreated or mishandled in the process of his arraignment and charging.

61. The ultimate question is whether it can be seen, on a balance of probabilities, that the case was being used for some other skewed reason other than the ordinary pursuit of bringing the offender to justice. This Court finds in the negative. Even if the alleged succession dispute was taken to be a probable cause of malice, this Court considers that the 1st Respondent was not a direct beneficiary of his grandfather's property. There is therefore no direct nexus between the 1st Respondent's prosecution and the succession case.

62. This Court, therefore, does not find that the 1st Respondent proved all the elements of the tort of malicious prosecution.

Whether the award of Ksh 800,000/= as general damages was manifestly excessive.

63. The Court considers that the Appellant was not liable for malicious prosecution and in the premises, the Court finds that the award of damages was erroneous.

64. However, had the Court found the Respondents liable for malicious prosecution, the Court considers that the award of Ksh 800,000/= in the circumstances of the case would have been excessive. The Court considers that an award of Ksh 250,000/= would suffice as general damages.

65. The 1st Respondent has brought to the attention of the Court the fact that the appeal was filed by the Appellant and yet there are other parties who were also found liable i.e the 2nd and 3rd Respondents. The Court has however found that the elements tort of malicious prosecution were not proven and the decision of this Court will apply and affect all parties.

Conclusion

66. Following a complaint made by the Appellant at Nkubu Police Station, the 1st Respondent was charged with the offence of Malicious Damage to property contrary to Section 339 (1) of the Penal Code, in Nkubu Criminal Case No. 1525 of 2013. The Prosecution called a total of 3 witnesses 2 of who were eye witnesses who witnessed the 1st Respondent damage the Appellant's property. The 1st Respondent was placed on his defence but was ultimately acquitted. The criminal court found that ownership of the land where the damage is said to have occurred was not proven.

67. The Court considers that to "*an ordinary reasonable prudent and cautious man,*" in the words of Rudd J, in *Kagane & Others vs The Attorney General & Another* (1969) EA 643, the fact of there being 2 eye witnesses who testified to have seen the 1st Respondent destroying the property and who knew the property on which the damage occurred to belong to the Appellant, created an honest belief of the 1st Respondent's guilt. This Court considers that based on the materials presented, including the Appellant's own testimony as to ownership of the land, the prosecution cannot be said to have been done without reasonable and probable cause. The Court also considers that there was no evidence of malice on the part of the Prosecution or the Appellant. The Court, therefore, finds that the 3rd and 4th elements of the tort of malicious prosecution were not proven.

68. On the issue of damages, the Court finds that the award of Ksh 800,000/= was excessive in the circumstances. Had the Court found that the tort of malicious prosecution was proved, it considers that an award of Ksh 250,000/= would suffice as general damages. The Court will however not make any order as to damages because liability was not proved.

ORDERS

69. In the end, this Court makes the following orders: -

i. The Appellant's Appeal succeeds as the Court finds that the Appellant is not liable for the tort of malicious prosecution with respect to the 1st Respondent's prosecution in Nkubu Criminal Case No. 1525 of 2013.

ii. The trial Court's Judgment against the Appellant is hereby set aside and the 1st Respondent's suit before the trial Court is dismissed.

iii. The Appellant shall have the costs of the appeal.

Order accordingly.

DATED AND DELIVERED THIS 18TH DAY OF NOVEMBER, 2021

EDWARD M. MURIITHI

JUDGE

Appearances

Carl Peters Mbaabu & Co. Advocates for the Appellant

Kiautha Arithi & Co. Advocates for the 1st Respondent